[2019] UKFTT 0712 (TC)

TC07484

VAT penalty under section 62 of the VATA for providing an incorrect certificate as to zero-rating. Whether 'reasonable excuse'. Perrin v HMRC applied. Whether HMRC's letter expressing a 'non definitive' view (which was wrong) sufficient to provide reasonable excuse. Held because view 'non definitive' and subsequent declaration in certificate expressly set out the correct position, no reasonable excuse. HMRC criticised for potentially leaving taxpayers in 'no man's land' by expressing a view whilst at the same time saying that this was not a definitive response.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2015/07158

BETWEEN

WESTOW CRICKET CLUB **Appellant**

-and-

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

TRIBUNAL: JUDGE MALEK
ANN CHRISTIAN

Sitting in public at 4th Floor, City Exchange, 11 Albion Street, Leeds LS1 5ES on 10 September 2019 and reconvened on 22 November 2019

Mr. Brothers for the Appellant

Mr. Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns itself with the decision by HMRC to issue, on 31 March 2015, the Appellant with a penalty under s. 62(1) and (2) of the Value Added Tax Act 1994 (the "VATA") in the sum of £20, 937.

2. The penalty arose from the decision by the Appellant to issue a zero-rating certificate to Atkinson Builders Ltd on 9 March 2013 in relation to supplies to it during the course of the construction of a new pavilion.

3. The only issue before us was whether or not the Appellant could prove to the requisite standard that it had a reasonable excuse for issuing the zero-rating certificate, it having been conceded that the Appellant ought not to have issued the zero-rating certificate.

THE LAW

4. Section 62 of the VATA provides:

> "62 Incorrect certificates as to zero-rating etc.
>
> (1)Subject to subsections (3) and (4) below, where—
>
> (a)a person to whom one or more supplies are, or are to be, made—
>
> (i)gives to the supplier a certificate that the supply or supplies fall, or will fall, wholly or partly within any of the Groups of Schedule 7A, Group 5 or 6 of Schedule 8 or Group 1 of Schedule 9, or
>
> (ii)gives to the supplier a certificate for the purposes of section 18B(2)(d) or 18C(1)(c),and
>
> (b)the certificate is incorrect, the person giving the certificate shall be liable to a penalty….
>
> (2)The amount of the penalty shall be equal to—
>
> (a)in a case where the penalty is imposed by virtue of subsection (1) above, the difference between—
>
> (i)the amount of the VAT which would have been chargeable on the supply or supplies if the certificate had been correct; ….
>
> (3)The giving or preparing of a certificate shall not give rise to a penalty under this section if the person who gave or prepared it satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for his having given or prepared it."

5. VAT Notice 708, as was in force at the relevant time, stated in relation to "relevant charitable purpose":

> "14.7 What 'relevant charitable purpose' means
>
> 14.7.1 The definition
>
> 'Relevant charitable purpose' means use by a charity in either or both of the following ways:
>
> - otherwise than in the course or furtherance of business – see sub-paragraph 14.7.3

- as a village hall or similarly in providing social or recreational facilities for a local community – see sub-paragraph 14.7.4

14.7.2 Where is this definition used?

The definition appears in the following situations:

- section 3 – zero-rating the construction of new buildings;

…

14.7.4 Village halls and similar buildings

A building falls within this category when the following characteristics are present:

- there is a high degree of local community involvement in the building's operation and activities, and
- there is a wide variety of activities carried on in the building, the majority of which are for social and / or recreational purposes (including sporting)

NB: Users of the building need not be confined to the local community but can come from further afield.

Any part of the building which cannot be used for a variety of social or recreational activities cannot be seen as being as a village hall.

Buildings that not typically seen as being similar to a village halls are:

- community swimming pools
- community theatres
- membership clubs (although community associations charging a notional membership can be excluded)
- community amateur sports clubs

Buildings that are seen as being similar to village halls when the characteristics noted above are present:

- scout or guide huts…
- sports pavilions
- church halls
- community centres
- community sports centres"

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6. In *Perrin v The Commissioners for Her Majesty's Revenue & Customs [2018] UKUT 0156 (TCC)* the Upper Tribunal considered the issue of "reasonable excuse" in the context of penalties for the late filing of self-assessment tax returns and gave the following guidance:

> "70. Assuming that hurdle to have been overcome by HMRC, the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion

which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.

71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car* Co and *Coales*).

72. Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. "I thought I had filed the required return", or "I did not believe it was necessary to file a return in these circumstances"), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is being asserted was in fact held; as Lord Hoffman said in In *re B (Children) [2008] UKHL 35, [2009] 1AC 11* at [15]:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

74. Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse…

75. It follows from the above that we consider the FTT was correct to say (at [88] of the 2014 Decision) that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account."

76. The FTT therefore identified the correct legal test for deciding whether the facts that it had found amounted to a reasonable excuse…

…81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way: (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts). (2)

> Second, decide which of those facts are proven. (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?" (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

7. Article 1 of Protocol 1 to the European Convention On Human Rights ("A1P1") provides:

> "(1) Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

THE FACTS

8. Evidence on behalf of the Appellant was given by Mr. Robin Kellock. This took the form of a written statement [214] and oral evidence given under oath. Mr. Kellock was cross examined by the Respondent and we had an opportunity to put questions to him. He presented as an honest and intelligent witness. We make the following findings of fact on the balance of probabilities.

9. The Appellant is a Community Amateur Sports Club ("CASC") registered under section 58 of the Corporation Tax Act 2010 from October 2012. It is not, for the avoidance of doubt, a registered charity.

10. The Appellant is a cricket club run by unpaid volunteers with a love for village cricket. Mr. Kellock has been its treasurer since around 2000 and is a Mortgage Advisor. He, together with Julia Price who was the club secretary, dealt with all matters relating to its administration including filling out relevant forms.

11. The club raised funds to build a pavilion and sports hall adjacent to the cricket ground. Prior to any building work starting, on 22 March 2012, Julia Price wrote on behalf of the Appellant to the Respondent giving details about the Appellant and the building project and seeking guidance on the zero rating of supplies to the Appellant in the course of the construction of the pavilion and sports hall [86].

12. The Commissioners responded on 30 March 2012 and said, *inter alia*:

> "HM Revenue & Customs policy prevents this Department from providing a definitive response where we believe that the point is covered by our Public Notices or other published guidance, which, in this case, I believe it is.

> In view of the above, please refer to section 16 of Public Notice 708 Buildings and construction. This explains when you can issue a certificate. Section 17 includes the certificates.
>
> Furthermore I would refer you to sub-paragraph 14.7.4 which covers what is classed as a village hall or similar building. Providing the new pavilion meets the conditions set out, and it appears to do so, the construction work will be zero-rated for VAT purposes.
>
> If you have any further queries regarding this matter, please contact us quoting our reference number."

13. Mr. Kellock accepted during cross examination, and we find, that on receipt of the aforementioned letter he read paragraph 14.7 of VAT Notice 708.

14. The Appellant (through Ms. Price) completed a certificate for zero rated and reduced rated building work on 9 March 2013 and ticked box 4 to confirm:

> "I have read the relevant parts of Notice 708 Buildings and construction and certify that this organisation (in conjunction with any other organisation where applicable) will use the building, or the part of the building, for which zero-rating is being sought …..solely for
>
> a relevant charitable purpose, namely by a charity in either or both of the following ways:
>
> ….
>
> (b) As a village hall or similarly in providing social or recreational facilities for a local community."

15. Although it was Ms Price who completed the certificate referred to above, only Mr Kellock gave evidence before us, as set out above. We find that Mr. Kellock honestly believed that the club was entitled to issue a zero rated certificate and that this was a belief shared by the other members of the club (and therefore the Appellant).

16. Following a check, HMRC wrote to the Appellant on 31 March 2015 with their decision that a zero-rated VAT certificate was issued incorrectly, and that a penalty of £20,937 under section 62(1) VATA 1994 was due as a result.

DISCUSSION

17. These proceedings have had a somewhat torturous path with which we do not need to burden this decision with save to say that on 7 September 2018 the Appellant was ordered by Tribunal Judge Richards to spell out, with particularity, the "reasonable excuse" relied upon. This resulted in the Appellant producing a "clarification document" [183] which set out that (a) the Appellant was a "lay person" in matters of indirect taxation, (b) that it sought assistance and advice from the Respondent in relation to the zero rating certificate, (c) that the Respondent advised it that the construction work was zero-rated, (d) that the Appellant acted reasonably in following that advice in issuing a zero rated certificate and that (e) this provides the Appellant with a "reasonable excuse".

Reasonable excuse

18. During the course of submissions it was accepted on behalf of the Appellant that it could not argue that the letter dated 30 March 2012 was sufficient to create a "legitimate expectation". This, in our view, produces the following conundrum for the Appellant: Can it succeed on an argument based upon reasonable excuse where it accepts that no legitimate expectation was created? The range of circumstances which may afford an appellant a "reasonable excuse" are,

of course, much wider that those that might create a legitimate expectation and, ordinarily, the answer would be "yes". However, in the present circumstances the Appellant's only "excuse" is that it relied upon "advice" from the Respondent. If it could not rely upon that advice in the "legitimate expectation" sense can it, nonetheless, rely upon it to give itself a "reasonable excuse"? We find this argument a conceptually difficult one to maintain; however, we accept that there might conceivably be a situation where the excuse relied upon consists of "advice" given upon which a legitimate expectation could not be founded, but which might, nonetheless, provide a "reasonable excuse". We, therefore, go on to consider whether or not the Appellant had a "reasonable excuse".

19. As we have already found, we accept that the Appellant club is staffed by volunteers who may have lacked experience of VAT matters. It must also be uncontroversial that those in the Appellant's situation can reasonably be expected to enquire about the tax treatment of a particular transaction and expect to get help and guidance from HMRC. We have also accepted Mr. Kellock's evidence that as a result of the letter from HMRC dated 30 March 2012, and his reading of the relevant parts of Notice 708, he honestly believed that the Appellant was entitled to issue the zero rated certificate and that is why he asked Ms. Price to complete it.

20. However, we must regrettably conclude that, viewed objectively, these facts do not amount to an objectively reasonable excuse for the default. Our conclusion is based upon two strands of reasoning.

First Strand

21. Firstly, an objective reading of the letter dated 30 March 2012 shows that the author did not intend his letter to provide a definitive response to the query, let alone advice, because policy prevented him from doing so. It asked the reader to refer to paragraph 16 of VAT Notice 708 which provides:

> "16.1 When does a contractor or developer need to hold a certificate?
>
> You need to hold, within your business records, a valid certificate when you make any zero-rated:
>
> …supply in connection with a building that will be used solely for a 'relevant charitable purpose' - see paragraph 14.7"

22. Only after that does the author of the letter, Mr. Cooper, go on to refer to paragraph 14.7.4. Mr. Cooper continues by saying that "*provided the pavilion meets the conditions set out…the construction work will be zero rated…*". Had Mr. Cooper left it at that we think the Appellant would have had little to complain about. However, Mr. Cooper went further. He gives an opinion saying that "*it appears to do so*" (i.e. the pavilion appears to meet the criteria for zero rating). We note that the opinion is not definite. Mr. Cooper's view is that the information that he has been given gives the ***appearance*** that the work to the pavilion should be zero rated – that is to say that there is room for doubt and a different view could be taken. Accordingly, the Appellant should not have taken Mr. Cooper's letter as the definitive answer to their query.

23. Notwithstanding this, Mr. Cooper appears to have laboured under the misapprehension that the Appellant was a charity, or was ignorant of the requirement for it to be so in order to provide a zero-rated certificate. This was an error on Mr. Cooper's part and we cannot see how the blame can be shifted onto the Appellant by saying that they should have specified that they were not a charity. As Mr. Kellock put it in his evidence the Appellant is "not many things" and should not have to set all of these out.

24. We think, on balance, if HMRC are to rely upon their policy of not providing a definitive response to queries where the point is covered by a public notice then it should simply point to

the relevant notice and do no more. We realise that this might be seen as unhelpful in some quarters, but for HMRC to offer a view whilst at the same time maintaining that the point is adequately covered by a public notice is more unhelpful still. It can, potentially, leave the taxpayer in "no man's land". It might also be helpful if HMRC specified that the information that it provided was of generic applicability and that it did not provide advice to taxpayers.

Second strand

25. Secondly, we have concluded that even if the letter of 30 March 2012 had muddied the water sufficient to give the Appellant a "reasonable excuse" that no longer applied once the Appellant completed the certificate for zero rated and reduced rated building work on 9 March 2013. This is because the certificate is explicit and asks for confirmation that the building will be used "*solely for…a relevant charitable purpose, namely by a charity*". The requirement is expressly set out and there is no other objectively reasonable interpretation that might be applied. In our judgment, if the Appellant thought that this was at odds with the letter of 30th March 2012 then the reasonable thing to do would have been to seek assistance in resolving the query and not to press ahead by inserting a CASC number on the form instead of the requested charity number.

A1P1

26. Following the conclusion of the hearing on 10 September 2019 and during the course of deliberations thereafter the Tribunal concluded that it had not heard submissions on A1P1 and that it would be in furtherance of the overriding objective for it to hear those arguments. Accordingly, it raised, of its own motion, the question as to whether or not the penalties referred to in this decision fell foul of A1P1 and reconvened a hearing on 22 November 2019 in order to allow the parties to make submissions.

27. We also ordered that the parties file skeleton arguments, limited to the A1P1 issue, well in advance of the reconvened hearing. Unfortunately, the Appellant's skeleton argument was filed and served late. In addition Mr. Michael Firth of counsel, who had drafted the Appellant's skeleton, could not attend because of other commitments and Mr. Brothers appeared in his stead. Whilst the late filing of skeleton arguments was not a satisfactory way of proceeding before this Tribunal, we were content, in the circumstances where we had reconvened the hearing of our own motion and parties were entitled to make oral submission without having filed skeleton arguments and for the oral reasons given, to consider Mr. Firth's skeleton argument even though it had been filed and served late.

28. The Appellant argues that the penalty imposed is disproportionate because:

(1) the regime pursues an illegitimate aim,

(2) the regime, in general, is disproportionate, and

(3) the result in the present case is disproportionate.

29. The first argument is developed on behalf of the Appellant by Mr. Firth saying that VAT is, subject to some irrelevant exceptions, only payable by the person carrying out a taxable supply of goods or services (Article 193, Directive 2006/112). That, it is argued, means that the Respondents are not entitled to recover tax payable by the contractor engaged by the Appellant directly from the Appellant. This argument is developed by categorising the penalty as a tax and in fact the same tax that should have been paid by the supplier. Further, Mr. Firth points out that there is nothing in law that prevents the Respondent from recovering the actual tax due from the supplier- even though there is an extra-statutory concession (ESC 3.11) whereby the Respondents have said that they will not seek to recover the tax due in these circumstances from the supplier providing that the supplier "*despite having taken reasonable steps to check the validity of the declaration, nonetheless fails to identify the inaccuracy and*

in good faith makes the supplies concerned". It is said that the extra-statutory concession does not have the force of law and is further evidence of an unlawful policy.

30. Attractive as this argument is at first blush, it is not one that we are persuaded by. The overall aim of the VAT directive is to maintain fiscal neutrality in the sense of "*ensuring a neutral tax burden which protects the taxable person, since the common system of VAT is intended to tax only the final consumer*" (see *HMRC v Trinity Mirror PLC [2015] UKUT 421 (TCC)* at par 59). In the present case the Appellant is the final consumer. Had it not provided a certificate to its supplier indicating that the supplies to it should be zero rated it would have had to account, via its supplier (who simply collects the VAT on behalf of the Respondent), to the Respondent for the VAT. In the circumstances that the Appellant has provided an incorrect certificate such that the supplies to it should not have been zero, but standard rated, we can see nothing in the argument that the penalty is, effectively, imposing the tax on the wrong party. In our view the right party (being the final consumer) bears the tax and it is noteworthy that the Appellant is not being asked to pay any more than the sum that it would have paid in VAT had it correctly informed its supplier that it could not benefit from zero rated supplies. The aim of the penalty is, therefore, an entirely legitimate one.

31. As set out above the Appellant argues that the regime in general is disproportionate. This is said to be so on the following grounds:

(1) the regime does not distinguish between persons based upon their culpability,

(2) the amount of penalty is not related to any tax liability,

(3) the amount of penalty is 100% of the tax said to be due by another person,

(4) there is no mechanism for taking into account the circumstances or hardship that may be caused,

(5) there is no warning system, and

(6) there is no maximum penalty.

32. In addition it is argued that if the aim is to incentivise the accurate production of documents then a flat 100% penalty would be disproportionate and parliament has already legislated (via sch 24 of the Finance Act 2007) to provide a complete structure to deal with inaccurate documents covering all taxes. We would tend to agree. However, the aim of s.62 of the VATA is not to incentivise the accurate production of document as we have set out above. Further sch 24 would simply not apply in the current situation as it concerns itself with inaccurate documents produced to the Respondent (and not to another taxpayer). It is, therefore, not possible to draw a fair comparison between the two regimes.

33. Looking at the arguments set out in paragraph 31 above through the prism of fiscal neutrality (as set out at paragraph 30) exposes their inherent weaknesses. The regime does not punish, but aims to put the end consumer in the position that it would have been in had it provided the right information in the first place. There are no warning system, no maximum penalty and no mechanism for taking into account individual circumstances or hardship. But that is not surprising because, as we say above, the regime is not penal in nature.

34. When one also takes into account the wide discretion that is conferred on Government and Parliament in devising a suitable scheme for penalties whereby *"…a high degree of deference is due by courts and tribunals when determining legality."* and *"…The state has a wide margin of appreciation, so wide as to allow the imposition of taxes, contributions and penalties unless the legislature's assessment is devoid of reasonable foundation…*" (see *HMRC v Trinity Mirror PLC [2015] UKUT 421 (TCC)* at par 15) it becomes clear that we are unable to conclude that the regime is, generally, disproportionate.

35. Lastly we must consider whether the results in the present case are disproportionate. The key relevant factors are:

(1) the Appellant consists of a group of lay volunteers who had organised themselves to raise money from grants and fund-raising events to build a pavilion for the benefit of the community,

(2) the project in relation to which the present penalties arose was a "once-in-life-time" project and the Appellant has limited other funds,

(3) there is no allegation or finding that the inaccuracy (contained in the certificate) was deliberate or concealed, and

(4) that the Respondents had indicated that the project appeared to qualify for zero rating.

36. We have to conclude, with some regret, that the results in the present case are not disproportionate. We recognise that the Appellant is a voluntary organisation staffed by publically spirited individuals who receive no remuneration for their substantial and valuable work. We also fully accept that the Appellant has limited means and relies upon public funding and donations. However, the penalty imposed is nothing more than the VAT that would have been paid by any other CASC seeking to build a pavilion incurring a vatable supply of a similar sum. Likewise any other small CASC seeking to undertake a large capital project might find that the size of the project (and therefore the VAT payable) was substantial (and may in fact exceed any residual funds). The only difference here is that the Respondents, wrongly as it turned out, indicated that the project appeared to qualify for zero rating. We have set out our views on this earlier on in this decision. However, this partial error, in itself, is insufficient in our view, to make the penalty disproportionate in the present circumstances.

CONCLUSION

37. For the reasons set out above we must dismiss this appeal must be dismissed.

38. We have also indicated our unease with the Respondents apparent policy of saying on the one hand that they could not provide definitive answers to queries, but then at the same time expressing a view. We trust that the Respondent will take note of our concerns and if this is a matter of policy revisit that policy in light of the comments that we have made in this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

ASIF MALEK
TRIBUNAL JUDGE

RELEASE DATE: 02 DECEMBER 2019