[2016] UKFTT 642 (TC)

TC05375

Appeal number: TC/2015/04156

VAT – HMRC statement in letter that appellant "should have registered for VAT" – Whether appealable decision – Yes – Also whether issue of VAT registration certificate and civil penalty also appealable decisions

FIRST-TIER TRIBUNAL
TAX CHAMBER

NT ADA LIMITED
(Formerly NT JERSEY LIMITED) **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, London on 13 September 2016

Keith Gordon, counsel, instructed by N T Advisors, for the Appellant

Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This hearing was listed in accordance with directions issued on 3 March 2016 made, following the appellant's application of 23 February 2016, to determine the Tribunal's jurisdiction in relation to the "decisions" of HM Revenue and Customs ("HMRC"):

> (1) that NT ADA Limited, formerly NT Jersey Limited ("NTJ"), should be registered for VAT;
>
> (2) to issue of a certificate of registration for VAT to NTJ with effect from 1 May 2008 on 29 February 2016; and
>
> (3) to impose a penalty of £234,883 under s 67 of the Value Added Tax Act 1994 ("VATA") on NTJ for the failure to register for VAT at the proper time.

2. Although NTJ appealed to the Tribunal on a protective basis against these decisions on 3 July 2015, 18 March 2016 and 29 April 2016 respectively, an issue arose as to whether its appeal against the s 67 VATA penalty had been notified to the Tribunal in time. There was no objection to the late appeal and, in the circumstances and having regard to the overriding objective contained in the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, I directed that this appeal should be admitted out of time.

3. This is a somewhat unusual application in that it the appellant, NTJ, represented by Mr Keith Gordon that contends that notwithstanding its appeals the above decisions of HMRC are not appealable decisions within the scope of the Tribunal's jurisdiction. Although it is more usual for the Tribunal to consider such matters on an application by HMRC that an appeal should be struck out, in this case it is Mr Michael Jones, who appears for HMRC, that says that the Tribunal does have the jurisdiction to determine all of the appeals.

4. It is common ground that the Tribunal's jurisdiction is contained in s 83(1) VATA which, insofar as is applicable to the present case, provides:

> … an appeal shall lie to the tribunal with respect to any of the following matters–
>
> (a) the registration or cancellation of registration of any person under this Act;
>
> (b) the VAT chargeable on the supply of any goods or services …;
>
> (c) the amount of any input tax which may be credited to a person;
>
> …
>
> (g) the amount of any refunds under section 35;
>
> …
>
> (j) the amount of any refunds under section 40;
>
> …

> (p) an assessment … or the amount of such an assessment
>
> (q) the amount of any penalty, interest or surcharge specified under an assessment under section 76

5. As in the hearing it is convenient to consider each of the decisions in turn.

Should be registered for VAT

6. The decision of HMRC (which was upheld on 29 June 2015 following a review) that NTJ should be registered for VAT was contained in a letter to NTJ, dated 29 June 2012.

7. I was referred to the following passage from that letter:

> "NTJ makes its supplies of tax advisory services from a fixed establishment in the UK. These supplies have been over the VAT registration threshold and NTJ should thus have registered for VAT in the UK. Please provide a schedule of all income received by NTJ from UK client, giving values and the dates of invoicing/payment, from the instigation of these arrangements in order that the correct date of registration can be confirmed. VAT is due from NTJ for all supplies it made from the time that it should have been registered, even if it has not charged its clients VAT.
>
> Failure to tell HMRC that it should be registered for VAT may also lead to a belated notification penalty under section 67 of the VAT Act (as applied at the relevant time). Having regard to Sections 67(8) and 70 of the Act, which deal respectively with "reasonable excuse" and "mitigation", I invite you to make any representations to me that you may feel appropriate.
>
> If NTJ is still actively trading above the current VAT threshold of £77,000 (or intends to trade in the future and would like an ongoing registration) I would ask you to register for VAT from the correct date as soon as possible. You can register for VAT on the HMRC website, where the process is fully explained. If NTJ is currently not trading, please provide the schedule of income as soon as possible and I will raise an assessment for the tax due without administratively registering NTJ. Please let me know if you intend to retrospectively charge VAT on supplies to your clients.
>
> If NTJ has not voluntarily registered for VAT and has not provided a schedule of income as requested within one month of the date of this letter, I will take steps to register and/or assess NTJ on best judgement."

The letter concludes with a reference to NTJ's statutory right to a review by an HMRC officer not previously involved with the case and also its right of appeal to the Tribunal.

8. Mr Gordon, submits that neither s 83(1)(a) nor 83(1)(b) VATA are engaged by this letter due to a lack of finality. Section 83(1)(a) because the decision was not "in respect of" the actual registration but the threat of potential registration and s 83(1)(b) because there has not been any decision by HMRC on the amount of VAT chargeable. Therefore, he says, the letter of 29 October 2012 can have no effect, describing it as not only a "paper tiger" but a "toothless" one at that.

9. With regard to s 83(1)(b) Mr Gordon relies on *Odhams Leisure Group Ltd v Customs and Excise Commissioners* [1992] STC 332 in particular the observation of MuCullough J, at 335d, that:

> "The reference to para (b) of sub-s (1) had been in the 1983 [VAT] Act from the beginning. Section 40(3), to my mind, suggests that Parliament contemplated that a supply, referred to in s 40(1)(b), would be one in which the commissioners had already determined the amount of tax payable; in other words, that it would be a supply which had taken place."

10. Mr Gordon also relied on s 84(3) VATA in support of his argument that a decision only came within s 83(1)(b) if the amount of VAT had been determined by HMRC. This provides that:

> … where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)(b), (n), (p), (q), (ra) of (zb), it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them

11. Mr Jones contends that the 29 October 2012 decision comes within s 83(1)(a) VATA as the words "in respect to" are sufficient to bring the decision that NTJ should register for VAT within the statutory provision. Additionally, he says, and I accept his submission, that the decision is within s 83(1)(b) VATA as it is not necessary for an amount of VAT to have been determined by HMRC, these words are not included in s 83(1)(b) VATA and had Parliament intended them to be included it would have expressly done so as it had in s 83(1)(c), (g), (j) (p) and (q).

12. In *Colaingrove v C&E Commrs* [2000] VATTR 19681, the Chairman of the VAT and Duties Tribunal (Mr Theodore Wallace) said at [10]:

> "I accept that a decision by the Commissioners is a pre-requisite for the right of appeal, see *Marks & Spencer plc v Commissioners of Customs and Excise* (No. 2) [1997] V&DR 344. What constitutes a decision is however inevitably a matter of fact and degree."

13. In *Olympia Technology Ltd v HMRC* [2006] VATTR 19984 (also chaired by Mr Wallace) it was observed, at [11] that:

> "…in order for the Tribunal to have jurisdiction there must be an issue between the parties which has been sufficiently crystallised to constitute a decision falling within one of the paragraphs of section 83. Such decision will normally be in writing and be clearly expressed as a decision subject to appeal whether or not the word decision is used. Where a determination is not expressed as an appealable decision it may nevertheless constitute such a decision in the light of its contents and the surrounding circumstances."

14. Although I was not referred to either *Olympia* or *Colaingrove* the approach taken in those case to identify an appealable decision does not appear to be controversial.

15. Applying such an approach to the present case there is an issue between the parties, ie whether, as stated in the 29 October 2012 letter, NTJ should be registered for VAT as a result of the supplies it is said to have made from a fixed establishment in the UK. That issue, which is stated in writing, is not in the abstract or on a

hypothetical basis (if it were it is clear from *Odhams* that Tribunal would not have jurisdiction). As such, I consider it to be sufficiently crystallised to constitute a decision "in respect to" the registration of NTJ within s 83(1)(a) VATA.

16. It therefore follows that the 29 October 2012 decision is an appealable decision and is not necessary for me further consider the requirements of s 83(1)(b) VATA.

VAT registration certificate

17. The VAT registration certificate, confirming NTJ's registration for VAT from 1 May 2008, was issued by HMRC on 29 February 2016, 40 months after the 29 October 2012 letter. There is some dispute as to whether it was accompanied by a letter that has been included in the bundle of documents. However, it is not necessary for the purposes of this decision for me to reach any conclusion on the provenance of that letter or seek further clarification on this issue from the parties.

18. It is clear, however, that the 1 May 2016 registration certificate (which was issued after NTJ had notified its protective appeal against the 29 October 2012 decision to the Tribunal and requested a preliminary hearing to determine its status) was not sent to the address in Jersey from which NTJ had been corresponding with HMRC but to its alleged fixed establishment in the UK. Although HMRC did subsequently write to NTJ in Jersey, on 8 March 2016, stating that "steps had been taken to register NTJ" and provide it with details of the VAT registration number and registration address.

19. On 4 May 2016, at the request of NTJ, the VAT registration was cancelled from "close of business on 30 April 2008". However, by letter dated 17 May 2016 HMRC reinstated the registration as it was considered that it had been "established" that NTJ was "still required to remain VAT registered."

20. Mr Gordon contends that the issue of the registration certificate by HMRC is invalid on two grounds. First, contrary to s 98 VATA, it was not communicated to NTJ and secondly, contrary to s 83A VATA it did not contain an offer of a review.

21. These sections provide:

> **Section 98 Service of notices**
>
> Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative
>
> **Section 83A Offer of review**
>
> (1) HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.
>
> (2) The offer of the review must be made by notice given to P at the same time as the decision is notified to P.
>
> (3) This section does not apply to the notification of the conclusions of a review.

22. Therefore, while Mr Gordon accepts that the issue of a registration certificate would ordinarily fall with s 83(1)(a) VATA he says it cannot in the present case because it was not sent to the correct address. Alternatively, he contends that even if the registration certificate was valid when it was issued, it has been cancelled and that the letter from HMRC of 17 May 2016 is ineffective as it is not possible to undo what had been done at an earlier stage.

23. However, as Mr Jones points out, notification is not a pre-requisite to a valid VAT registration. Accordingly, the registration would have become effective irrespective of whether it was notified. Also, as the requirement under s 83A VATA only applies where a decision has been "notified", the absence of an offer of a review cannot effect the validity of the registration. It is therefore an appealable decision within s 83(1)(a) VATA as is the issue of its cancellation and the effect of HMRC's letter 17 May 2016 being matters "in respect to" the "registration or cancellation of any registration of any person".

Section 67 VATA Penalty

24. The s 67 VATA Penalty of £234,833 was imposed, by HMRC, on 4 April 2016, on the grounds that NTJ had failed to notify its liability to register for VAT "at the proper time." The letter containing notice of the penalty, like the VAT registration certificate, was not sent to NTJ's address in Jersey but to where HMRC considered it had a fixed establishment in the UK. It was subsequently sent to NTJ which, as noted above, on 29 April 2016 notified the Tribunal of its appeal.

25. Under a sub-heading 'What to do if you disagree with this notice" the letter stated:

> "If you disagree with this decision you can ask for a review by an independent HMRC Officer by writing to the address above within 30 days of the date of this letter. Or you can appeal to the Tribunal Service within 30 days of this letter. If you opt for a review, you can still appeal to the tribunal after the review has finished."

26. As with the registration certificate Mr Gordon argues that the penalty notice is ineffective as it was notified to the wrong address contrary to s 98 VATA and did not offer a review contrary to s 83A VATA (see above). He says that the use of "ask" in the letter is, in the language of contract law, more akin to an invitation to treat than an offer as it does not provide any assurance that a request for a review would be granted. However, Mr Jones contends that the letter is plainly an offer and that it is "splitting hairs" to say otherwise.

27. Unlike the position in relation to registration there is a requirement to notify a person liable for a penalty, s 76(4) VATA. However, I was referred, by Mr Jones, to the decision of Macpherson J in *Grunwick Processing Laboratories v Customs and Excise Commissioners* [1986] STC 441 where he said, at 3, in relation to an assessment for which notification was required:

> "… it is said that the assessment was not notified to the taxpayer company as the statute requires it to be (see s 46 and Sch 7, para 4 of the Value Added Tax Act 1983), and that the assessment is thus flawed. The chairman found that there was no proper notification, but he also held that the result was that the assessment was simply unenforceable unless and until it was notified properly. The point has

> very little, if any, merit since the taxpayer company plainly got the assessment through their own solicitors, but it is a point which exists and had to be met, and has to be met by me.
>
> I conclude that on the facts the chairman was correct and he was correct in his conclusions. The matter could be and indeed, in my judgment, has been rectified by notification now. There has been formal notification in accordance with the 1983 Act so that any irregularity is cured, and the taxpayer company can no longer have the protection, in my judgment, of that argument."

28. Clearly NTJ was aware of the penalty when it sent its Notice of Appeal to the Tribunal on 29 April 2016 and in the light of *Grunwick*, even if not rectified by notification now, the penalty would still have been being valid, although not enforceable, and as such would be an appealable decision within s 83(1)(q) VATA were it not for the failure by HMRC to comply with s 83A VATA.

29. I accept Mr Gordon's submission in relation to s 83A VATA and, given the mandatory requirement in the legislation, it is not sufficient for HMRC to state, as it did in the letter of 4 April 2016, that an appellant "can ask for a review" without any assurance that it will be granted. Rather it should have been stated, as it was in the 29 October 2012 letter, that an appellant has "a statutory right to a review". In my judgment the failure to make it clear to NTJ that it was entitled to a review, and not could just ask for one, invalidates the decision which cannot therefore be an appealable matter within s 83(1) VATA. As such, the Tribunal does not have the jurisdiction to determine it.

30. Under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 the Tribunal must strike out "the whole or part of the proceedings" if it does not have jurisdiction. Having found that the Tribunal does not have jurisdiction in relation to the penalty it follows that I must strike out the appeal against the s 67 VATA penalty.

31. I should add that as it is accepted that the imposition the s 67 VATA penalty and issue of the VAT registration certificate represents decisions in their own right, and not part of the process of the 29 October 2012 decision, I do not consider these decisions to have been an abuse of process.

Decision

32. For the above reasons I conclude that the Tribunal does have the jurisdiction to determine the appeals against the 29 October 2012 decision and the VAT registration certificate but not the s 67 VATA penalty. Other than the appeal against the penalty, which is struck out, the other appeals should proceed in accordance with the directions agreed by the parties and separately issued by the Tribunal.

Appeal Rights

33. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 19 SEPTEMBER 2016