[2018] UKFTT 655 (TC)

TC06803

Appeal number: TC/2016/03419

VAT – zero-rating certificate – whether reasonable excuse for issue of incorrect certificate – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARLOW ROWING CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public in London on 13 June 2018

The appellant was represented by Vincent Wood, club treasurer
Akua Adusei, presenting officer for HMRC

DECISION

Introduction

1. This is an appeal against HMRC's decision that the appellant had no reasonable excuse for issuing a certificate to a supplier which specified that a supply fell under Group 5 of Schedule 8, Value Added Tax Act (VATA) 1994.

Background

2. The appellant is a rowing club. It undertook the construction of a "Water Sports Hub" building to be used by itself and other sports clubs in the local area and also to provide a gym facility for which it would offer membership to non-club members. The appellant issued a zero-rating certificate on the basis that the building was intended to be used for a relevant charitable purpose otherwise than in the course or furtherance of a business.

3. The appellant's grounds of appeal originally included the submission that the certificate had been correctly issued. Following the decision of the Court of Appeal in *Longridge* [2016] EWCA Civ 930, the appellant withdrew that submission.

4. The appellant had also submitted that the penalty had been incorrectly calculated; it was agreed between the parties that this was an evidential issue which they would agree between themselves as necessary once a decision as to whether the penalty should apply at all was reached.

5. Accordingly, the parties agreed that the issue before this Tribunal was only whether the appellant had a reasonable excuse for issuing the certificate.

Relevant law

6. s62 VATA 1994 provides, as relevant

> (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; and

(ii) the amount of VAT actually chargeable;

…

(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.

Appellant's submissions

7. The appellant's grounds of appeal stated that it had a reasonable excuse for issuing the zero-rating certificate for the following reasons:

(1) The appellant has a number of financial and tax professionals as directors and members of the committee that made the relevant decisions throughout the process;

(2) The appellant took further advice from VAT professionals and were satisfied that all relevant detailed HMRC guidance had been reviewed and taken into consideration;

(3) The appellant was aware of the First Tier Tribunal decision in *Longridge*, particularly as the Longridge activity centre is close to the appellant's location. The appellant was aware that that Tribunal decision was not consistent with HMRC's stated policy and so instructed Roger Thomas QC, who had acted as counsel for Longridge, in order to obtain advice from an authoritative source as to whether the fact and circumstances would enable the appellant to obtain the benefit of zero-rating for the part of the building which the appellant considered would be used otherwise than in the course or furtherance of a business;

(4) As counsel's opinion was that there seemed to be good grounds for concluding that, if *Longridge* survived on appeal, the club could issue a zero-rating certificate in relation to that part of the building, the appellant concluded that the opinion meant that it was proper to rely on a decision still progressing through the courts;

(5) The appellant considered counsel's opinion in detail and the relevant committee decided to proceed with issuing the zero-rating certificate on 4 November 2013.

8. The appellant therefore submits that it took all reasonable steps to obtain assurance that it could validly issue the zero-rating certificate. It submitted that it would not have been reasonable to approach HMRC for guidance given that it was already known and acknowledged that the issuing of the certificate was inconsistent with HMRC policy.

9. In the hearing, the appellant further submitted that:

(1) Case law (*N A Dudley* Electrical [2011] UKFTT 260 (TC)) demonstrates that the ordinary meaning of the phrase "reasonable excuse" should apply,

including all the circumstances of the case such as the complexities of the relevant law (*Nigel Barrett* [2015] UKFTT 329 (TC)). The case of *Malin* ([1992] VAT Decision 10085) indicated that if it was not reasonably obvious why the law was as it is, that law should be regarded as complex. The cases of *Weldon-Hollingsworth* ([1995] VAT Decision 13248), *Standing Conference of Voluntary Organisations* ([2002] VAT Decision 17827) and *Saint Benedict's* School ([1992] VAT Decision 7235) all indicated that a taxpayer could have a reasonable excuse for making an error where the relevant law is confusing.

(2) At the time the certificate was issued it was not clear who could claim zero-rating and how it applied. In addition, the overall circumstances should include the fact that the appellant's functions are run by volunteers, so that it should be considered to be more of a cost-sharing arrangement rather than a business as such;

(3) A genuine honest mistake belief can be a reasonable excuse;

(4) In addition to advice from counsel, the appellant had sought advice from Baker Tilly/RSM accountants. The accountants had also been asked to review counsel's opinion;

(5) The accountants had indicated two options were available to the appellant, but both involved the issue of a zero-rating certificate. The committee had selected the option which was considered to be simpler to operate.

(6) When it submitted the return, the appellant believed that there was a strong case for zero-rating, on the basis of the findings and decision in *Longridge* at the First Tier Tribunal. It was not "flying a kite" and was entitled to consider that HMRC's policy is only an interpretation of the law. At the time, the *Longridge* decision indicated that the relevant law was open to other interpretations. The relevant HMRC Notice only has the force of law as to a small point, rather than the entire Notice;

(7) The appellant had sought detailed advice and HMRC guidance acknowledges that accountants can be a good source of information as to tax law;

(8) It had not instructed counsel to obtained advice to confirm its views. When counsel was instructed, the appellant did not know whether the *Longridge* decision would be of any assistance nor whether they would be able to rely on that decision. They had asked initially whether they had any prospect of success and only afterwards had asked for a full opinion;

(9) It would not be in counsel's interests to advise that there was a reasonable prospect of success where there was no such prospect;

(10) Another barrister would also have taken the decision in *Longridge* into account so it was reasonable to ask someone familiar with the law in that area to advise;

(11) They had acted on counsel's opinion, altering the plans to ensure that club and business activities were conducted in separate parts of the building. Although they had not hived off any activities, this was because the gym facilities were considered to be the provision of a sporting facility within the

charitable objectives of the appellant. The gym did not provide classes or similar activities and was set up primarily to enable club members to undertake supplementary training;

(12) The appellant had to make a decision as to whether to issue a zero-rating certificate at a specific point in time, as the legislation does not allow for deferral, and so the appellant had had to form a view on the likely outcome of *Longridge*. It could not wait and see whether *Longridge* succeeded in the higher courts;

10. Mr Wood also gave oral evidence in the hearing as follows:

(1) The club would have accepted an opinion that they did not qualify for zero-rating and had not requested the opinion in order to confirm their own view;

(2) The club had decided to take VAT advice in order to ensure that they could minimise the risk of any penalty, and Richard Thomas QC was the only logical choice as he is an expert in the area of VAT law as it applies to charities and would be familiar with all of the arguments involved in this type of case;

(3) The club had obtained a second opinion from their accountants, after obtaining counsel's opinion, in order to check as the original accountants opinion had not been clearly in favour of zero-rating;

(4) The club had not registered in order to recover the balance of the VAT in relation to business use because it was considered that it did not have the manpower needed to deal with VAT compliance;

(5) He considered that, in correspondence, HMRC had accepted that a taxpayer could rely on decisions of the Upper Tribunal until these were overturned;

(6) He considered that the club had taken the only reasonable course of action available to it. If *Longridge* had succeeded on appeal and the club had not issued a certificate would only have been able to recover, at best, a very small amount of VAT. The club volunteers have responsibilities as charity trustees and took careful advice. If they had not issued the certificate, and *Longridge* had succeeded, they would be likely to have been considered not to be fulfilling their responsibilities as trustees.

11. In summary, the appellant submitted that they had had a reasonable excuse to issue the certificate. They had taken extensive advice from accountants and leading counsel with experience a complex area of law. The appellant had followed the advice received, including taking steps to ensure that various provisos in the opinion were met. Whilst it might have been easier not to issue the certificate, the trustee responsibilities needed to be balanced against that.

HMRC's submissions

12. HMRC submitted that the principle in relation to reasonable excuse was set out in *Appropriate Technology Limited* [1991] BVC 571 as follows:

> "would a reasonable conscientious businessman who knew all the facts of the case as I have set them out, and who was alive to and accepted the need to comply with one's responsibilities in regard to the rendering of VAT returns, consider that the appellant company, in acting as it did in the circumstances in which it found itself, had acted with due care …"

13. HMRC acknowledged the efforts that the appellant took to determine whether the certificate should be issued but noted that the appellant was aware that issuing the certificate was contrary to HMRC policy. HMRC submitted that a "reasonable conscientious businessman" would have sought advice from HMRC where there were conflicting views, particularly as the *Longridge* case on which the decision was partly based could have been appealed, as it in fact was.

14. HMRC submitted that the advice had been taken with the intention of confirming the appellant's view rather than in order to make an objective decision as to whether they were entitled to issue the zero-rating certificate.

15. Considering the similar test in *Clean Car* [1991] BVC 568, HMRC submitted that the appellant's submission that a genuine and reasonable belief cannot amount to a reasonable excuse if the actions undertaken were not reasonable actions for a trader in that position. As the appellant knew that it was taking action which was contrary to HMRC policy, HMRC submitted that a reasonable conscientious businessman or trader would have sought a second opinion or would have asked HMRC's opinion.

16. HMRC submitted that, if the appellant had sought advice from HMRC or otherwise notified HMRC at an early stage, the trustees' position could still have been preserved because a protective assessment could have been put in place and the matter stood behind *Longridge*.

17. HMRC also submitted as follows:

(1) The appellant's initial advice had been that they were not eligible for zero-rating, although it was acknowledged that this advice was obtained before the First Tier Tribunal decision;

(2) The appellant would have anticipated in advance what the advice from counsel would be, as they did not take advice from a person not already involved in a similar case;

(3) At the time that the certificate was issued, in November 2013, the *Longridge* case was under appeal and the appellant could not have known what the decision on appeal would be and so could not know that counsel's caveat, that his advice was dependent on *Longridge* surviving in the higher courts, would be satisfied;

(4) Another caveat in counsel's opinion, that the non-charitable activities in relation to the gym were undertaken by a separate body, was not followed and so the appellant was not relying on counsel's opinion. The gym was open to people without full club membership, outside the rowing community, and so was a business activity rather than a charitable activity;

(5) The appellant's submission that they sought a second opinion from their accountants is not relevant as that second opinion was given on the assumption that a certificate could be validly issued and did not consider whether the certificate could in fact be so issued. The second opinion was requested only on specific points, not to consider counsel's opinion in general;

(6) Further, the accountants' second opinion set out two options for the appellant and recommended the second option, in part because it would ensure that HMRC was aware of the appellant's position at an early stage. The appellant chose to undertake the first option and so HMRC were not aware of the position until a routine check was undertaken.

18. HMRC therefore submitted that the appellant did not have a reasonable excuse as, applying the tests in *Appropriate Technology* and *Clean Car*, the appellant had not acted as a reasonable conscientious businessman or trader intending to comply with their tax obligations would have done in the same circumstances.

Discussion

19. The test of whether something is a "reasonable excuse" for the late filing of a tax return is not set out in statute but, in my view, the test set out in *Clean Car Company* should be applied (and I do not consider that the test in *Appropriate Technology* is materially different):

> "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered"

20. In this case, the appellant is a volunteer-run charity. It took professional advice from accountants and counsel as to whether it could issue a zero-rating certificate in relation to construction of a building which was at least partially to be used for charitable activities. The accountants' advice was first sought before the *Longridge* decision was issued and indicated that the certificate could not be issued.

21. Counsel's advice was sought at a time when the relevant law was in some question, as the First Tier Tribunal had issued a decision in *Longridge* which appeared to support the view that the appellant could issue the certificate, but that decision was under appeal to the Upper Tribunal. Counsel's opinion that the certificate could be issued was, accordingly, stated to be subject to *Longridge* succeeding on appeal. I do not consider that the fact that the appellant took advice from a member of the Bar with recent relevant experience in the particular area of law in this case necessarily means that the appellant could not have a reasonable excuse for issuing the certificate.

22. A second accountants' report was sought and I find that this report, dated 4 October 2013, clearly states that its comments are made on the assumption that a certificate can be issued and does not consider again the question of whether that assumption is correct.

23. That second accountants' report also clearly concludes that there would be an advantage to undertaking a particular structure on the basis that it would highlight the issue to HMRC at a relatively early stage so that certainty could be obtained at the earliest opportunity. I note that the appellant chose not to undertake that structure but, instead, followed the alternative suggestion which noted that it may be some time before certainty is obtained.

24. The appellant was clearly aware that the *Longridge* decision was not final at the time that it made its decision to issue the zero-rating certificate and was clearly aware that its actions in issuing the certificate would not be agreed by HMRC. I note the appellants' concerns as to the responsibilities of trustees of charities and the limited time in which it could issue the relevant certificate, and I note that they sought advice in order to minimise the risk to them of incorrectly issuing the certificate and because this was considered to be a complex and unclear area of law.

25. Taking all the circumstances into account and applying the test in *Clean Car*, I find that a trader in the circumstances of the appellant would have considered in particular the fundamental uncertainty in counsel's opinion, being the need for *Longridge* to succeed on appeal, and the accountants' clear recommendation that HMRC be advised of the position at the earliest opportunity and taken further steps to determine whether HMRC would in fact disagree with their actions by ensuring that HMRC was aware of the position rather than wait to see whether HMRC checked the position. I consider that the trustees' responsibilities could have been met by appealing any disagreement by HMRC and requesting that it be stayed pending the conclusion of the *Longridge* litigation. I note that the appellants were not directly informed by their advisers that this course of action was available, but neither was there any evidence that they had requested such advice.

Decision

26. Accordingly, as the appellant did not take such further steps, I consider that it does not have a reasonable excuse for issuing the zero-rating certificate. The appeal is dismissed, and the penalty upheld subject to agreement as to quantum between the parties.

27. 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: 07 NOVEMBER 2018