[2019] UKFTT 219 (TC)

TC07066

Appeal number: TC/2018/04089

VAT – Sch 36 Notice – whether Items required by the Notice were statutory records –whether TMA s 114 applies – whether required for the purposes of checking the taxpayer's tax position, or only to provide information to an overseas tax authority – appeal dismissed in relation to three Items and allowed in relation to one Item

FIRST-TIER TRIBUNAL
TAX CHAMBER

CPR COMMERCIALS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR JOHN ADRAIN

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 12 March 2019

Mr David Bedenham of Counsel, instructed by Rainer Hughes, for the Appellant

Ms Sophie Rhind, of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

1. CPR Commercials Limited ("CPR") appealed against:

   (1) a Notice issued on 17 November 2017 by HM Revenue & Customs ("HMRC") under Finance Act 2008, Sch 36 ("Sch 36") para 1, requiring the provision of certain information and documents ("Items");

   (2) a penalty of £300 issued on 31 January 2018 under Sch 36, para 39; and

   (3) a daily penalty of £30 a day for the period from 1 February to 13 March 2018, so a total of £1,230, issued on 14 March 2018 under Sch 36, para 40.

2. Sch 36, para 29(2) provides that is not possible to appeal against "a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records".

3. There were four Items on the Notice. The Tribunal decided that Items 1,2 and 4 required the provision of statutory records. As a result, CPR had no right to appeal against the requirement to provide those Items , and the Tribunal had no jurisdiction. However, we found that Item 3 did not require the provision of statutory records, and was also not reasonably required for the purposes of checking CPR's tax position. We therefore allowed CPR's appeal in relation to that Item.

4. It was accepted during the hearing that CPR had not complied with the Notice, and so had therefore not provided the Items which were statutory records. We therefore confirmed the penalties.

The evidence

5. Both parties supplied a Bundle of documents; the contents of each Bundle was substantially the same. In addition, Mr Wright, a director of CPR, provided a witness statement, gave oral evidence and was cross-examined by Ms Rhind. We found him to be an honest and credible witness.

6. On the basis of the evidence in the Bundles and Mr Wright's oral evidence, we make the findings of fact set out below.

The facts

7. On 16 August 2017, Officer Hoy visited CPR in connection with intra-community supplies. In his subsequent letter of 24 August 2017 he said that "the reason for my visit was a request made for information by the Eire Tax Authority under Art 7, EU Reg 901/2010". He went on to say that CPR had completed EC sales lists detailing supplies to Martyn James Ronan between November 2015 to July 2016, totalling £168,300, and he asked CPR to provide, in relation to those sales:

   (1) copies of trade accounts and sales invoices;

   (2) proof of delivery of the goods and where they were delivered to;

(3) confirmation of who arranged for collection, delivery and payment of the goods;

(4) evidence of payments received for the goods, and confirmation of the type and origin of those payments; and

(5) the name of CPR's contact at Martyn James Ronan.

8. CPR did not respond to that letter. On 15 September 2017, Officer Hoy wrote again, saying that "a request has been made for information by the Bulgarian Tax Authority under Art 7, EU Reg 901/2010". He said that CPR had completed EU sales lists showing sales to Trans Exspres 2016 –EOOD between October and December 2016, totalling £120,500. In relation to those sales, he asked for the same information as set out at (1) to (4) of the preceding paragraph, and for the name of CPR's contact at Trans Exspres.

9. On 5 October 2017, CPR sent HMRC a bundle of invoices, together with some payment slips and six documents relating to ferry shipments. It did not provide a schedule linking any of this material to the information on the EC sales lists, or any other explanatory information.

10. On 17 November 2017, Officer Hoy issued the Sch 36 Notice. The opening section states that he believed the Items in the schedule to the Notice to be reasonably required, and added that:

> "this means that it is reasonable for me to ask for these so that I can check the company's VAT position. I need them so that I can check the figures declared on the VAT returns."

11. The schedule to the Notice set out the following four Items:

(1) trade accounts for Martyn James Ronan and Trans Exspres 2016 –EOOD;

(2) bank statements which show payments received for goods supplied to Martyn James Ronan and Trans Exspres 2016 –EOOD;

(3) confirmation of who arranged for collection, delivery and payment of the goods supplied to Martyn James Ronan and Trans Exspres 2016 –EOOD; and

(4) proof of delivery of those goods (customer order, inter-company correspondence, travel tickets, delivery notes signed by customer) and the place to which they were delivered.

12. On 21 November 2017, Officer Hoy wrote to Rainer Hughes, CPR's agent, attaching a copy of the Notice, and saying that the information sent on 5 October 2017 was "not sufficient as evidence of removal to another member state". He asked CPR to supply, for each sales invoice provided evidence of payment and delivery, as per the Sch 36 information request. He also said that he was not able to match the information provided on 5 October 2017 to particular sales, and asked CPR to "make clear what evidence relates to what sale". He added that some of the documents were illegible, and so asked for the original documents such as travel tickets.

13. No reply was received to that letter, or to the Notice. On 31 January 2018, Officer Hoy issued CPR with a fixed penalty of £300 for failure to provide the information in the schedule to the Notice. The Penalty Notice warned that daily penalties would be levied if CPR continued to fail to comply.

14. On 6 February 2018, Rainer Hughes wrote to Officer Hoy, attaching a further copy of the documents previously sent.

15. On 14 March 2018, Officer Hoy issued CPR with a second Penalty Notice, charging daily penalties of £30 a day for the period from 1 February 2018 to 13 March 2018, a total of £1,230.

16. On 20 March 2018, Rainer Hughes asked on behalf of CPR for a statutory review of the Notice and the two penalties. The Review Officer upheld all Officer Hoy's three decisions, and CPR notified its appeal to the Tribunal.

Whether CPR had complied with the Notice

17. One of CPR's grounds of appeal was that it had complied with the Notice. However, Mr Wright accepted under cross-examination that, as set out above, it had only supplied HMRC with the bundle of invoices, some payment slips and six documents relating to ferry shipments, and that none of the Items in the Notice had therefore been provided.

Statutory records

18. Sch 36, para 29(2) provides that it is not possible to appeal against a Sch 36 Notice if the Items required by HMRC are statutory records. The meaning of that term is defined at Sch 36, para 62(1), which reads:

> "For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of:
>
> (a) the Taxes Acts, or
>
> (b) any other enactment relating to a tax,
>
> subject to the following provisions of this paragraph[1]."

19. Reg 31 of the Value Added Tax Regulations 1995 is headed "Records", and para 1 reads:

> "Every taxable person shall, for the purpose of accounting for VAT, keep the following records—
>
> (a) his business and accounting records,
>
> (b) his VAT account,
>
> (c) copies of all VAT invoices issued by him,
>
> (d) all VAT invoices received by him
>
> (da) all certificates

[1] On the facts of this case, none of the following provisions of the paragraph were relevant

(i) prepared by him relating to acquisitions by him of goods from other member States, or

(ii) given to him relating to supplies by him of goods or services,

provided that, owing to provisions in force which concern fiscal or other warehousing regimes, those acquisitions or supplies are either zero-rated or treated for the purposes of the Act as taking place outside the United Kingdom,

(e) documentation received by him relating to acquisitions by him of any goods from other member States,

(f) copy documentation issued by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(g) documentation received by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(h) documentation relating to importations and exportations by him, and

(i) all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents that are issued by him…"

20. Ms Rhind said that the Items in the Notice all fell within Reg 31 and so were statutory records. Mr Bedenham submitted that, to bring an Item within the "statutory records" provision to the Sch 36 Regs, HMRC had to specify the statutory requirement on which they were relying, and had not done so here.

21. We do not accept Mr Bedenham's submission. There is nothing within Sch 36, or elsewhere, which requires HMRC to specify the statutory requirement. If a taxpayer has a legal obligation to keep certain records, HMRC has a right to see those records, and there is no right of appeal against a notice requiring their provision.

22. In relation to Items 1, 2 and 4 of the Notice, we agree with Ms Rhind that they are statutory records because they come within Reg 31. Item 1 asks for "trade accounts". Although Mr Bedenham said this term was unclear, we find that the reasonable person would understand that "trade accounts" were the internal records kept by a firm in relation to its transactions and so form part of his "business and accounting records".

23. Item 2 asks for bank statements which show payments received for goods supplied to the two specified customers. Although Mr Bedenham submitted that bank statements are not statutory records, he cited no authority for that submission, and we find that they are clearly part of the "business and accounting records". The Tribunal has consistently come to the same conclusion, see for example *Akrill v HMRC* [2016] UKFTT 0550 (TC) (Judge McGregor); *Shimlas v HMRC* [2016] UKFTT 0670 (TC) (Judge Poon and Mr Shepherd) and *New Way Cleaning v HMRC* [2017] UKFTT 293 (TC) (Judge Brannan).

24. Item 4 asked for "proof of delivery of the goods (customer order, inter-company correspondence, travel tickets, delivery notes signed by customer) and where they were delivered to for goods supplied" to the two customers. Reg 31(1)(f)-(h) states that a person is required to keep "copy documentation issued by him relating to the transfer, dispatch or transportation of goods by him to other member States"; "documentation received by him relating to the transfer, dispatch or transportation of goods by him to other member States" and "documentation relating to importations and exportations by him". There is no doubt that Item 4 comes within those provisions and are thus statutory records.

25. In relation to Item 3, we could identify no statutory provision which required CPR to provide (our emphasis) "confirmation of *who arranged for collection, delivery and payment* of the goods supplied".

26. Thus, the only Item remaining in issue is Item 3.

Whether the Notice was valid

27. The parties' submissions under this heading were made on the basis that some or all of the Items were not statutory records. Because of our finding that only Item 3 is not a statutory record, this part of our decision applies only to that Item.

28. Mr Bedenham submitted that the Notice was invalid because it did not specify the time period for which any of the Items were required. Ms Rhind's response was that the time period was clear from Officer Hoy's earlier correspondence, and that CPR were not in any doubt as to which periods were in issue. Mr Wright confirmed that this was correct: he knew what was being requested and for what periods.

29. The Tribunal suggested that Taxes Management Act 1970 ("TMA"), s 114 might be relevant; although Mr Bedenham disagreed, Ms Rhind concurred.

30. TMA s 113 is headed "Form of returns and other documents" and begins:

> (1) Any returns under the Taxes Acts shall be in such form as the Board prescribe...
> …
> (3) Every assessment, determination of a penalty, duplicate, warrant, notice of assessment, of determination or of demand, or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty shall be in accordance with the forms prescribed from time to time in that behalf by the Board, and a document in the form prescribed and supplied or approved by them shall be valid and effectual."

31. TMA s 114 is headed "Want of form or errors not to invalidate assessments, etc" and reads:

> "(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or

> according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.
>
> (2) An assessment or determination shall not be impeached or affected:
>
> (a) by reason of a mistake therein as to
>
> (i) the name or surname of a person liable, or
>
> (ii) the description of any profits or property, or
>
> (iii) the amount of the tax charged, or
>
> (b) by reason of any variance between the notice and the assessment or determination."

32. In *McGuinness v HMRC* [2013] UKFTT 088 (TC) (*McGuinness*), an earlier decision of a Tribunal including Judge Redston, one of the issues was whether TMA s 114(1) could be relied on to remedy a mistake in the taxpayer's name on a notice to file a tax return. The answer depended on whether that notice was an "other proceeding" within the meaning of that section. The Tribunal considered the dictionary definition of the meaning of "proceeding"; the *eiusdem generis* principle, and the rule of statutory construction that an Act is to be read as a whole, and concluded at [53] that when the draftsman referred to "assessment or determination, warrant or other proceeding", the reference to "other proceeding" was a reference back to TMA s 113(3), and was shorthand for the items in that subsection which were not an assessment, determination or warrant, as emphasised below:

> "assessment, determination of a penalty, duplicate[2], warrant, notice of assessment, of determination or of demand, or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty…"

33. In *R (oao Archer) v HMRC* [2018] STC 38 ("*Archer*") Lewison LJ, giving the only judgment with which Asplin and Longmore LJJ both agreed, said at [34] that the analysis in *McGuinness* was "generally accepted" to be the correct view. We return to *Archer* below.

34. Two other cases are relevant, *Pipe v HMRC* [2008] STC 1911 ("*Pipe*") and *HMRC v Donaldson* [2016] STC 2511 ("*Donaldson*").

35. In *Pipe* the taxpayer had been notified by letter that, if she did not submit her tax return within 14 days of the date of receipt of that letter, HMRC would issue penalties of £60 a day from 8 September 2004. Mrs Pipe did not comply, and on 29 September 2004 HMRC issued the penalty notice, wrongly referring to the period of the penalty as being 15 to 28 April 2004. Henderson J said that the document containing the mistake only notified the penalties, and the taxpayer's appeal was

[2] TMA s 112(1) refers to "any assessment to tax, or any duplicate of assessment to tax" and the word "duplicate" here refers back to that subsection.

against the assessment which preceded the notification, but that TMA s 114 would in any event have cured the defect. He referred to s 114(2)(b), which refers to the document not being affected "by reason of any variance between the notice and the assessment or determination", and continued at [51]:

> "The force of the words 'any variance' is that no variance of any description between the notice and the determination is to invalidate the determination. I accept that there may come a stage where the error or discrepancy in question is so fundamental in character that it could not properly be described as a 'variance' at all; but in my judgment a mistake about dates of the type made in the present case gives rise to a 'variance' within the ordinary and natural meaning of that word."

36. The issue in *Donaldson* was whether the daily penalty notices issued to Mr Donaldson were valid. Under Finance Act 2009, Sch 55, para 4(1)(c), one of the requirements for a valid notice was that HMRC must "state in the notice the period in respect of which the penalty is assessed". Dyson MR, giving the only judgment with which Kitchen and Hamblen LJJ both agreed, found at [28] that although HMRC had failed to meet that requirement, the failure was remedied by s 114(1). He said that the section was "expressed in wide terms", although he agreed with Henderson J in *Pipe* that "a mistake may be too fundamental or gross to fall within the scope of the subsection". He continued at [29]:

> "Although the period was not stated, it could be worked out without difficulty…Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice."

37. In *Archer,* HMRC had failed to state, in a closure notice, the amount of tax due from the taxpayer. Lewison LJ first set out the above passage from *Donaldson,* and then said at [36]:

> "Although this passage is worded in terms that might suggest that the question was whether Mr Donaldson himself was misled, the test under s 114 must be an objective one: see *Pipe v HMRC* at [51]. However, in applying an objective test the reader of the closure notice must, I think, be taken to be equipped with the knowledge that Mr Archer and KPMG had, including knowledge of what had led to the enquiry and what HMRC's conclusions were…"

38. He went on to say at [39] that:

> "applying the test in *Donaldson*, Mr Archer's liability could have been easily worked out, and he can have been in no doubt what he owed HMRC. He had in addition been informed by the APNs what HMRC asserted was his liability. He could not have been confused or misled. KPMG themselves had said in support of their application to the FTT that there was no amount of tax for 2001/2 which remained uncertain. HMRC's

> omission to amend his return to accord with their conclusions was, in my judgment, a matter of form rather than substance on the particular facts of this case. I would hold, therefore, that the closure notices were validated by s 114."

39. In relation to the facts of CPR's appeal, we first considered whether a Sch 36 Notice was an "other proceeding" – namely an "other document required to be used in assessing, charging, collecting and levying tax". Our understanding of this provision is that a document which is part of HMRC's normal tax collection procedures comes within the definition, and we therefore find that it is broad enough to encompass a Sch 36 Notice.

40. Applying the case law set out above to the facts of this case, we find that:

(1) the failure to specify the dates in the Sch 36 Notice was not a "fundamental or gross" error;

(2) applying an objective test, the reader of that Notice would be equipped with the knowledge of what was in the earlier correspondence, and would not have been confused or misled; and

(3) therefore the Sch 36 Notice was not invalidated by the failure to specify the dates on the face of the Notice.

Whether reasonably required

41. Sch 36 (1) provides as follows:

> "An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position."

42. Mr Bedenham submitted that Officer Hoy's purpose was not to check CPR's tax position, but instead to provide information to foreign revenue authorities; this was clear from the letters of 24 August 2017 and 15 September 2017. Ms Rhind said that this was not his only purpose: the Sch 36 Notice itself said that the Items were required to "check the company's VAT position" and that Officer Hoy needed them to "check the figures declared on the VAT returns".

43. We agreed with Ms Rhind that by the time Officer Hoy issued the Sch 36 Notice, one of his purposes was to check CPR's VAT return. We also accept that Items 1, 2 and 4 were relevant to checking whether CPR was entitled to zero-rating on the basis that it had exported the goods – but we have already found that those Items are statutory records.

44. There was no similar link between Item 3 and the zero-rating of the goods, or any other VAT requirement of which we are aware. We therefore agree with Mr Bedenham that "confirmation of who arranged for collection, delivery and payment of

the goods supplied" was not "reasonably required by the officer for the purpose of checking the taxpayer's tax position", and allow CPR's appeal in relation to that Item.

The penalties

45. HMRC can impose a fixed penalty under Sch 36, para 39, if a person "fails to comply with an information notice", and a daily penalty can be imposed under Sch 36, para 40 if the failure continues.

46. CPR had not complied with the Items 1, 2 or 4 in the Notice, and we therefore uphold the penalties.

Decision

47. The appeal is dismissed in relation to Items 1, 2 and 4 because these requests were for statutory records. The appeal is allowed in relation to Item 3, because it was not reasonably required for the purposes of checking CPR's tax position.

48. This document contains full findings of fact and reasons for the decision.

Appeal rights

49. There is no right of appeal against the Tribunal's decision about the Notice, see Sch 36, para 32(5).

50. Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 gives CPR has a right to apply for permission to appeal against the Tribunal's decision to uphold the penalties. Any such 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 REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 3 APRIL 2019