[2018] UKFTT 639 (TC)

TC06787

Appeal number: TC/2015/03746

VAT – ***penalties - whether there was a supply - whether there were inaccuracies in return - whether deliberate***

FIRST-TIER TRIBUNAL
TAX CHAMBER

PROMO INTERNATIONAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER
MRS HELEN MYERSCOUGH

Sitting in public at Colchester on 29-30 November 2016

Mr M Firth, instructed by Tees Law for the Appellant

Mr G Thomas, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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SUPPLEMENTARY DECISION

Background

1. This supplementary decision is supplementary to a decision issued on 10 February 2017 (the "main decision") in relation to the above case. The case concerned penalties for inaccuracies in the Appellant's VAT returns for the periods 06/12, 09/12 and 06/14. The inaccuracies in the 06/14 return related to two discrete matters, one of which was the "Talbot issue" as referred to in the main decision. The main decision determined the case, except in relation to the Talbot issue. This supplementary decision relates solely to the resolution of the Talbot issue although our findings of fact and discussion of the law and the submissions of the parties contained in the main decision apply so far as relevant.

2. The Talbot issue related to three invoices to a company called Talbots (Birmingham) Ltd. ("Talbots"), dated 26 June 2014, which had been omitted from the Appellant's VAT return for the period ended 06/14. The output tax which is alleged to have been unpaid amounted to £50,640.69. This was the "potential lost revenue" on the basis of which HMRC charged penalties under Schedule 24 Finance Act 2007. HMRC assessed a penalty of £17,240 on the basis that the error had been deliberate and the disclosure of the error was prompted. HMRC can charge penalties for prompted, deliberate errors within the range of 35% to 70% of the potential lost revenue depending on the quality of the disclosure and assistance given. HMRC reduced the penalty to the minimum ie 35% of the potential lost revenue which produced the £17,240 figure.

Procedural background

3. HMRC's case was based on the premise that there had been a "supply" to Talbots which would have triggered the liability to pay output tax. Mr Firth, for the Appellant submitted that there had been no supply as ownership in the goods never passed to Talbots. Mr Townsend, a director of the Appellant, gave witness evidence that although invoices had been produced by the accounts system they had never been issued and the goods had never been delivered to Talbots. If this was the case, there would have been no supply of the goods. If there was no supply, no VAT was due and there could be no penalties for non-payment of VAT.

4. The parties agreed that, in the light of the evidence at the hearing, it was likely that they could reach agreement on the Talbot issue and the Judge issued Directions on 2 December 2016 giving the parties time to discuss a settlement. HMRC requested an extension of time and this was granted.

5. On 3 April 2017 HMRC wrote to the Tribunal to inform them that it had not been possible to reach a settlement on the Talbot issue. The email was copied to the Appellant's solicitors.The email attached a letter which referred to an attachment (which was omitted from the original letter but subsequently provided) which

explained why it was not possible to reach agreement with the Appellant. We refer to this further below but, essentially, HMRC had obtained records from Talbots which confirmed their original view that goods had been supplied to Talbots and the VAT was due.

6. Mr Firth responded on behalf of the Appellant on 18 April 2017 and in his reply submitted that the 3 April documents represented an impermissible attempt for HMRC to supplement their case and should be disregarded other than to note that HMRC have decided not to concede the point.

7. The Tribunal considered that HMRC had not raised any new points. Their stance all along was that there had been a supply so that VAT was due which had not been paid. The 3 April 2017 letter submitted in response to the Directions of 2 December 2016 explained that no settlement could be reached and sought to explain why. The explanation included additional evidence in support of HMRC's position.

8. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") confer wide case management powers and powers in relation to evidence and submissions on the Tribunal. In particular, Rule 5(3)(d) enables the Tribunal to "permit or require a party to provide documents, information or submissions to the Tribunal…" and Rule 15(1)(a) enables the Tribunal to give Directions as to "issues on which it requires evidence or submissions". The Tribunal considered it to be in accordance with the overriding objective in Rule 2, to deal with cases fairly and justly, to take account of HMRC's letter of 3 April 2017 but to allow the parties to make further submissions. The Tribunal issued further Directions in June 2017 allowing the parties to make further submissions and provide further evidence and information in relation to the Talbot issue. No further submissions, evidence or information were made or provided and in accordance with the further Directions, we now set out our decision on the Talbot issue.

The law

9. Section 5 of the Value Added Tax Act 1994 (VATA) defines a supply, rather unhelpfully, as follows:

> **"5 Meaning of supply: alteration by Treasury order**
> (1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.
> (2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—
> (a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
> (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services."

10. Section 5 is supplemented by Schedule 4 VATA which provides:

> **"Section 5**

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(1) Any transfer of the whole property in goods is a supply of goods; but, subject to sub-paragraph (2) below, the transfer—

(a) of any undivided share of the property, or

(b) of the possession of goods,

is a supply of services.

(2) If the possession of goods is transferred—

(a) under an agreement for the sale of the goods, or

(b) under agreements which expressly contemplate that the property also will pass at some time in the future (determined by, or ascertainable from, the agreements but in any case not later than when the goods are fully paid for),

it is then in either case a supply of the goods."

11. The meaning of supply was considered by the Court of Justice of the EU in the case of *'Fast Bunkering klaipeda' UAB v Valstybine v Valstybine mokesciu inspekcija prie Lietuvos Respublikos finansu ministerijos* C-526/13 where the Court said:

> "51. In order for a transaction to be classified as a supply of goods to a person for the purposes of Article 14(1) of Directive 2006/112, it is necessary that that transaction has the effect of authorising that person actually to dispose of them, as if he was the owner of the goods. According to settled case-law, the concept of 'supply of goods' referred to in Article 14(1) of Directive 2006/112 does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law, but covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were its owner (judgment in *Evita-K*, C-78/12, EU:C:2013:486, paragraph 33 and the case-law cited)."

12. Section 6 VATA provides that a supply of goods is treated as taking place on the earliest of the time when the goods are removed by or made available to the customer, the date an invoice is issued and the date of payment. Section 6 relates only to the time of supply and cannot create a supply where none has been made. This means that the issue of an invoice does not of itself create a supply for the purposes of the VAT legislation.

The facts in relation to the Talbot issue

13. Paragraphs 48 to 50 of the main decision dealt with the Talbot issue and the agreement to try and reach a settlement.

14. Mr Townsend's evidence was that the goods had never left the warehouse. Having become aware of Talbots' precarious financial position, he instructed the warehouse by telephone not to allow Talbots to take the goods which had been ordered and which were waiting on pallets for Talbots to collect them. Mr Townsend further stated that although the invoices had been produced by the accounts system, they were never sent to Talbots and remained in the office, so they were never issued.

15. We had previously been taken to evidence contained in the bundles and we had heard evidence from Mrs Sellers, the HMRC officer who had conducted the visit to the Appellant on 6 August 2014.

16. In her witness statement, Mrs Sellers stated that she spoke to Samantha, a member of staff, concerning a manual adjustment decreasing the VAT due on sales. Samantha told Mrs Sellers that the adjustment related to unpaid invoices to Talbots. She said that the adjustment would have been made by Ms Cudlip, the company's accountant who had recently gone on maternity leave.

17. Mrs Sellers stated that Samantha contacted Ms Cudlip whilst she, Mrs Sellers, was there and informed her that Ms Cudlip had confirmed the invoices were raised to Talbots for stock held in their warehouses. Ms Cudlip expected the invoices to be disputed and not paid so made an adjustment to remove them from the VAT return. Samantha confirmed to Mrs Sellers that no credit notes had been issued in relation to the invoices. She also said that Samantha told her that the invoices had been paid before the visit, but for a lesser amount.

18. Following her visit, Mrs Sellers prepared a detailed report of the visit. That recorded Samantha's statements as set out above and continued "Sam believes they have since been paid although the amounts may have varied. Advised that o/tax [presumably output tax] will be due in the 06/14 return and credit notes/additional invoices should be issued to Talbot for any adjustments/differences if necessary. Also discussed rules for bad debt relief procedures." At the hearing, Mrs Sellers said that she assumed the goods had been delivered as why would Talbots have paid for the goods if they had not been delivered. When pressed, Mrs Sellers acknowledged that she did not know whether there had been a supply and accepted that if the goods had not been delivered there would have been no supply and so no VAT liability and penalties could not be charged.

19. The Talbots invoices were also referred to in correspondence. HMRC's letter of 14 August 2014 set out that output tax had been omitted from the VAT return in relation to three invoices to Talbots, all dated 26 June 2014:

- Invoice MI1124, VAT £20,168.10
- Invoice MI1125, VAT £20,331.65
- Invoice MI1126, VAT £10,140.94

20. This gives total output VAT omitted of £50,640.69.

21. Mr Townsend's letter of 9th September 2014 referred to his serious concerns about whether the debt owed by Talbots would be honoured. This suggests that there *was* a debt ie that the supply had been made and Talbots owed the money.

22. In a later letter, of 31 October 2014, Mr Townsend stated:

> "For clarification, this is the position with regard to the Talbots invoices. The 3 invoices were dated 26 June. However, due to worrying financial news on Talbots, it was decided that the goods would not be delivered to the client until we were confident that they would be able to pay for them in full. So the goods & title had not changed hands at 30 June 2014. At this point credit notes should have been raised…".

23. Talbots did, in fact, become insolvent and went into administration. The Appellant sought to recover storage costs on the stock which was still held by RIF Logistics from the administrator.

24. Inconsistencies in the documentary and oral evidence made it unclear whether or not the goods had been supplied to Talbots. It was therefore agreed that the parties should be given time to explore the issue and try and reach a settlement on the point. The subsequent Directions and correspondence is referred to above.

25. HMRC's letter of 3 April 2017 enclosed copies of various invoices and credit notes including the three invoices in dispute. These documents had been obtained from Talbots. Our bundles also contained copies of invoices MI1124 and1125.

26. The disputed invoices were stamped or printed with the words "DELIVERED TO RIF LOGISTICS". RIF Logistics dealt with the storage and distribution of the goods. Other invoices were marked "DELIVERED FOB" and others had no stamp about delivery. The Appellants have not explained whether these stamps had any significance although they had the opportunity to do so.

27. The invoices were addressed to a lady at Talbots called "Michelle Kirby". The invoices obtained from Talbots, but not the invoices in the bundle, were marked with a stamp which set out a list of actions, including "Agreed to Order" and "Agreed to Delivery Note" which were initialled and dated. The initials against almost every action were "MK" which we infer was Michelle Kirby. Clearly, the invoices had been received by Talbots, contrary to Mr Townsend's evidence at the hearing and the inference is that the goods had been delivered too.

28. More compelling is the fact that for each of the invoices there were corresponding credit notes in relation to part of the consignment resulting from defects or other disputes. Invoice MI1124 was annotated in manuscript:

> "29,500 damaged stock CP12 (hinges broken)
>
> 29,500 @ £0.284=£8378"

29. A credit note was issued against this invoice on 25 July 2014 for £8378.

30. Invoice MI1125 was annotated

> "price query on Lk bags, W boxes CN received"

31. A credit note was issued against that invoice on 20 August 2014 for £12,404.44.

32. Invoice MI1126 was annotated:

> "*credit note required for mouldy pads*" and certain items in the list of goods attached were marked "mouldy pads".

33. A credit note was issued on 20 August 2014 against this invoice for £185 "Re…Pads (mouldy)".

34. The only inference we can make from these invoices and credit notes is that the goods were in fact delivered to Talbots. Talbots had clearly been able to examine the goods and identified queries in relation to some of goods. The credit notes related only to the goods queried and were for relatively small amounts compared with the amounts of the invoices. They were not a reversal of the whole invoice which would have been the case if the goods had not been delivered and the intention was to cancel the order.

35. This is consistent with Mrs Seller's evidence, and her report of the visit on which it was based, that Samantha told her that the invoices had since been paid although for lesser amounts.

36. Taking into account all the evidence including that presented at the hearing in documentary and oral form and the subsequent evidence provided by HMRC and the fact that the Appellant has produced no further submissions or evidence to rebut or explain HMRC's evidence, we find that invoices MI1124, 1125 and 1126 were issued to Talbots and that the goods which were the subject of those invoices were supplied to Talbots in the VAT period ended 06/14. Accordingly, additional output tax of £50,640.69 was due for that period. Any adjustments for the credit notes should have been made in a subsequent period.

37. As we have found that the Appellant did supply the goods and output tax was underdeclared, the remaining question is whether the inaccuracy in the VAT return was "deliberate".

Was the inaccuracy "deliberate"?

38. We set out the considerations in determining whether an inaccuracy is careless or deliberate in paragraphs 112 to 127 of the main decision and we do not repeat them here except to say that the burden of proof in on HMRC to show, on the balance of probabilities, that the Appellant had acted carelessly or deliberately and to set out the test for deliberate behaviour in *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 (TC):

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document".

39. We found that the VAT return for the 06/14 period was submitted by Ms Cudlip.

40. The Appellant's case is that there was no inaccuracy as there was no supply. We have found, for the reasons set out above, that there was a supply in relation to the disputed invoices.

41. Mrs Sellers' evidence, which we accept, was that she examined the detailed VAT report for the period and noted that manual adjustments had been made to the return, reducing the net tax liability. One of those adjustments related to a decrease in the VAT due on sales by reference to the disputed invoices. Mrs Seller was told that Ms Cudlip expected the invoices which had been issued to be

disputed and not paid and so made an adjustment to remove them from the VAT return.

42. Ms Cudlip was an experienced accountant. Even allowing for the pressure she was under and the health problems resulting from her difficult pregnancy, she must have know that she could not omit output VAT on invoices which had been issued from the VAT return because she thought they would not be paid. It is a fundamental principle of VAT that the tax must be accounted for when the supply is made, whether or not the recipient of the supply pays for it. If the recipient does not pay, an adjustment can be made in a later period or the taxpayer can claim bad debt relief.

43. We have found that there was a supply and the invoices were issued to Talbots. The evidence indicates that Ms Cudlip, who represents the company for this purpose, made a conscious decision to omit the invoices from the return and in fact made a manual adjustment to exclude them.

44. The penalty assessments state that the inaccuracy was regarded as deliberate because:

> "You advised the sales invoices to Talbots were not included in the VAT return because you had concerns as to whether they would be paid. This error resulted in your net tax liability being significantly reduced. As you knowingly decided to omit the returns *(sic)* and not follow proper bad debt relief procedures I deem the behaviour leading to the errors to be deliberate."

45. This indeed appears, on the basis of the evidence, to be the case. Ms Cudlip took steps to exclude the invoices from the VAT return, which increased the repayment claim, and she must have intended that HMRC accept the return on that basis.

46. We find that on the balance of probabilities, the inaccuracy in the 06/14 VAT return relating to the Talbot invoices was a result of deliberate behaviour.

Decision on the Talbot issue

47. For the reasons set out above, we have decided that the Appellant made a supply to Talbots and that the invoices were issued to Talbots so that output VAT on the three disputed invoices was due.

48. That output VAT was deliberately omitted from the VAT return resulting in an excessive tax reclaim.

49. The penalties for deliberate inaccuracy under Schedule 24 Finance Act 2007 are therefore due.

50. HMRC have allowed the maximum reduction in the penalty to reflect the Appellant's co-operation in the enquiry and we do not wish to alter that.

51. Accordingly, in relation to the Talbot issue, we dismiss the appeal and affirm HMRC's decision.

52. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 29 October 2018