TC01894

Appeal number: TC/2011/9586

Excise duty – Penalty for failure to supply requested information – section 9 FA 1994 – whether requested information reasonably required – section 118B CEMA 1979 – whether provision of requested information prohibited by the Data Protection Act 1998 – whether penalty disproportionate

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr DOUGLAS HENN-MACRAE **Appellant**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
Mr JOHN AGBOOLA

Sitting in public at Ashford, Kent on 24 February 2012

The Appellant in person

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

DECISION

The Facts

1. Mr Henn-Macrae has traded as an independent wine merchant since 1984. In December 2009 Mrs Templeman of HMRC's Local Compliance Alcohol Team visited his premises on a compliance visit. Mrs Templeman provided a witness statement for the hearing, and attended the hearing and answered questions from Mr Henn-Macrae and the Tribunal. She explained that HMRC have an interest in businesses dealing in alcohol, to ensure excise duties have been properly accounted for. Also, Mr Henn-Macrae had used REDS agents (Registered Excise Dealers and Shippers – now called Registered Consignees) and the obligations on REDS agents to account for duties was a further reason for HMRC wishing to establish a full audit trail of alcohol transactions. At the visit Mrs Templeman had asked Mr Henn-Macrae for his customer list; he declined to provide the list and asked what authority HMRC had to request such information; Mrs Templeman cited Customs and Excise Management Act 1979 ("CEMA"); Mr Henn-Macrae asked how that fell within the Data Protection Act 1998 ("DPA"); Mrs Templeman said she did not know.

2. In February 2010 Mrs Templeman wrote to Mr Henn-Macrae raising some points that arose from her visit, and asking for certain information concerning customers and suppliers of the business, and how excise duty had been accounted for. She cited ss 118A and 118B CEMA and stated that penalties could be imposed for not submitting the required information. There was then a series of emails between Mrs Templeman and Mr Henn-Macrae where Mr Henn-Macrae sought to clarify what information was required – for example, whether private as well as trade customers were required, whether only regular customers, and over what period.

3. On 3 March 2010 Mr Henn-Macrae emailed Mrs Templeman:

> "I am advised by the Information Commissioner's Office that HMRC needs to give its reasons for requiring me to provide personal information relating to my customers, since there appears to be no suggestion that any crime has been committed, and to clarify under what Section(s) of the Data Protection Act 1998 I may legally comply with your request."

4. Mrs Templeman stated that she would need to consult on the answer to that point. Mr Henn-Macrae stated that in the interim he would provide copies of customer invoices but with identities redacted – copies were available to the Tribunal. On 17 February 2011 Mrs Templeman sent her reply on the DPA point, which is set out in full below. The letter refers to the DPA 1988, whereas the legislation is in fact the DPA 1998.

> "I write in connection with your e-mail of 03 March 2010 regarding your concerns about the provision of information to HM Revenue & Customs.
>
> Hopefully this will allay your concerns about the use and protection of data obtained by HM Revenue & Customs. HM Revenue & Customs is bound by the constraints of the

Data Protection Act 1988 (DPA) and the Commissioners of Revenue and Customs Act 2005 (CRCA), specifically section 18(1) and has a duty of care with regard to any information and data provided.

The order for the production of the records is made under enactment of UK law. The information that you are concerned about, i.e. details pertaining to your customers may be released to HMRC under the exemption provided in S.35(1) DPA 88.

As a revenue trader as defined in The Customs & Excise Management Act 1979 (CEMA '79), Section 1, you are required to keep records in respect of your revenue trade. Section 118A of the same Act specifies the requirement to keep records. Revenue Traders have a duty to furnish such records as the Commissioners may reasonably require under S.118B CEMA 79. These records are inspected by HM Revenue& Customs to ensure the accuracy of duty declarations made by or on behalf of Revenue Traders.

The types of records that a Revenue Trader may be expected to maintain and preserve are detailed in Schedule 1 to the Revenue Traders (Accounts and Records) Regulations 1992. Schedules 2 - 4 also provide for other records and circumstances.

You failed to provide the records necessary to confirm a full audit trail and the accuracy of duty declarations made at a pre-arranged appointment and you are still required to produce the following information under S.118B CEMA 1979.

(a) a list of all your customers whom you dealt with in the course of your business of purchasing and supplying alcohol in the period 01 January 2008 to 31 December 2008, and

(b) copies of your invoices from the Registered Consignee(s) (previously REDS agent).

Please sign and date the acknowledgement slip on the copy of this letter and return it to me at the address shown on the letterhead no later than 03 March 2011."

5. On 13 April 2011 Mrs Templeman wrote again stating:

"I wrote to you on 17 February 2011 in connection with your e-mail of 03 March 2010 regarding your concerns about the provision of information to HM Revenue & Customs. I requested that you provide the records necessary to confirm a full audit trail and the accuracy of duty declarations. I enclose a copy of my letter for your attention.

You are still required to produce the following information under S.118B The Customs and Excise Management Act 1979 (CEMA 1979).

a) a list of all your customers whom you dealt with in the course of your business of purchasing and supplying' alcohol in the period 01 January 2008 to 31 December 2008; and
b) details of the charges by the Registered Consignee (previously REDS agent) and what these charges include.

If we do not receive this information by the specified date, as a Revenue Trader you will be liable to a civil penalty.

> The Finance Act 1994, section 9 states that an initial penalty of £250 may be charged with daily penalties of £20 per day after the specified period for these requirements has expired.
>
> I also refer you to Notice 206 'Revenue Traders Records' Update 1 (March 2002). All Notices are available from the HM Revenue & Customs website.
>
> Please sign and return the acknowledgement slip on the enclosed copy of my letter dated February 2011 and forward it to me with the requested information to the address shown on the letterhead no later than 27 April 2011."

6. No information was provided, so Mrs Templeman paid a further visit to the premises on 27 June 2011 with a colleague. There was no one present and so a letter was put through the letter box reminding Mr Henn-Macrae that information was outstanding and giving an extended deadline of 4 July 2011.

7. On 1 August 2011 Mrs Templeman wrote notifying Mr Henn-Macrae that she was levying under s 9 FA 1994 a fixed penalty of £250 plus daily penalties of £20 per day. An assessment showing £770 penalties (being the £250 plus £520, being £20 per day from 5 July to end July) was issued. The letter stated:

> "I have written to you on several occasions asking you to provide the records necessary to confirm a full audit trail and the accuracy of duty declarations. I wrote to you on 17 February 2011 regarding your concerns about providing this information to HM Revenue & Customs.
>
> We called at the above address on 27 June 2011 and as there was no answer we posted a letter through the letterbox advising you that if the said information has not been received by 04 July 20.11 that you will be liable to an initial penalty of £250 and daily penalties of £20 per day after the specified period for these requirements has expired until such time as we receive the requested information. To date I still have not received your customers details which are required to complete the audit trails.
>
> You are still required to produce the following information under S.118B CEMA 1979.
>
> a) a list of all your customers whom you dealt with in the course of your business of purchasing and supplying alcohol in the period 01 January 2008 to 31 December 2008, and
> b) details of what the charges by the Registered Consignee (previously REDS agent) to you include.
>
> The Finance Act 1994 s. 9 states that an initial penalty of £250 may be charged with daily penalties of £20 per day after the specified period for these requirements has expired.
>
> Enclosed is form EX6O.1 setting out details of the civil penalty. Payment of the net amount due on form EX6O.1 should be made in accordance with the instructions on the enclosed remittance advice."

8. On 23 August 2011 Mr Henn-Macrae emailed Mrs Templeman stating that there had been only one customer with whom he had dealt with more than once in 2008. He did not reply to the question concerning REDS agents.

9. Also on 23 August 2011 Mr Henn-Macrae requested an internal review of HMRC's decision and he was notified on 4 October 2011 that the decision had been varied so as to remove the daily penalties, but upholding the decision to levy the £250 fixed penalty.

10. Mr Henn-Macrae appealed against the £250 fixed penalty to this Tribunal. The appeal was out of time but HMRC confirmed to the Tribunal that they took no issue with that, and the Tribunal admitted the late appeal.

The Statutory Provisions

11. Section 1 CEMA defines a "revenue trader". It is common ground that Mr Henn-Macrae is a revenue trader for the purposes of s 1.

12. Section 118A CEMA imposes on revenue traders a duty to keep certain records, and these are stipulated in the Revenue Traders (Accounts and Records) Regulations 1992 (SI 1992/3150) ("the Regulations") to include invoices, records relating to an importation, and any other record maintained for a trading or business purpose (sch 1).

13. Section 118B CEMA provides, so far as relevant:

> **"118B Duty of revenue traders and others to furnish information and produce documents**
>
> (1) Every revenue trader shall—
>
> (a) furnish to the Commissioners, within such time and in such form as they may reasonably require, such information relating to—
>
> (i) any goods or services supplied by or to him in the course or furtherance of a business, or
>
> (ii) any goods in the importation or exportation of which he is concerned in the course or furtherance of a business, or
>
> (iii) any transaction or activity effected or taking place in the course or furtherance of a business,
>
> as they may reasonably specify; and
>
> (b) upon demand made by an officer, produce or cause to be produced for inspection by that officer—
>
> (i) at the principal place of business of the revenue trader or at such other place as the officer may reasonably require, and
>
> (ii) at such time as the officer may reasonably require,
>
> any documents relating to the goods or services or to the supply, importation or exportation or to the transaction or activity.

(2) Where, by virtue of subsection (1) above, an officer has power to require the production of any documents from a revenue trader—

(a) he shall have the like power to require production of the documents concerned from any other person who appears to the officer to be in possession of them; but

(b) if that other person claims a lien on any document produced by him, the production shall be without prejudice to the lien.

(3) For the purposes of this section, the documents relating to the supply of goods or services, or the importation or exportation of goods, in the course or furtherance of any business, or to any transaction or activity effected or taking place in the course or furtherance of any business, shall be taken to include—

(a) any profit and loss account and balance sheet, and

(b) any records required to be kept by virtue of section 118A above,

relating to that business.

(4) An officer may take copies of, or make extracts from, any document produced under subsection (1) or (2) above.

(5) If it appears to an officer to be necessary to do so, he may, at a reasonable time and for a reasonable period, remove any document produced under subsection (1) or (2) above and shall, on request, provide a receipt for any document so removed.

…"

14. s 118G CEMA provides, so far as relevant:

"**118G Offences** …

(1) If any person fails to comply with any requirement imposed under section 118A(1) or section 118B above, his failure to comply shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties) and, in the case of any failure to keep records, shall also attract daily penalties."

15. Section 9 FA 1994 provides, so far as relevant:

"9 Penalties for contraventions of statutory requirements

(1) This section applies, subject to section 10 below, to any conduct in relation to which any enactment (including an enactment contained in this Act or in any Act passed after this Act) provides for the conduct to attract a penalty under this section.

(2) Any person to whose conduct this section applies shall be liable—

…

(b) … to a penalty of £250."

16. Section 10 FA 1994 provides a "reasonable excuse" defence:

> "… in relation to any conduct to which section 9 above applies, such conduct shall not give rise to any liability to a penalty under that section if the person whose conduct it is satisfies the Commissioners or, on appeal, an appeal tribunal that there is a reasonable excuse for the conduct."

Mr Henn-Macrae's Submissions

17. Mr Henn-Macrae submitted that the information demanded by HMRC in his case did not meet the requirement in s 118B that HMRC "may reasonably specify" it. First, HMRC's specific requests had been conflicting and contradictory, despite his attempts to obtain clarification. Second, the use of the word "may" gave a discretion and HMRC had not properly considered whether to use that discretion in his case. Third, the justification given by HMRC of the need to establish an audit trail in relation to alcohol trading was belied by the fact that they had not taken action on certain errors apparent on the records he had provided to them.

18. Mr Henn-Macrae submitted that he had had a legitimate concern that he might be in breach of the DPA if he complied with HMRC's requests, which he considered unnecessary and intrusive. He acknowledged that Mrs Templeman had provided an explanation but he only had her word as to its correctness. There had been a delay of twelve months between his raising his concerns and HMRC's response.

19. Mr Henn-Macrae submitted that the £250 penalty was unreasonable and disproportionate. In the year in dispute (2008) the total excise duty on all his sales was only £249 but he was facing a penalty of an equivalent amount. This was a sledgehammer to crack a nut.

20. Mr Henn-Macrae accepted he did not contend that he had a reasonable excuse defence under s 10.

HMRC's submissions

21. For HMRC Mr Jones submitted that HMRC's request for information was entirely reasonable. The information being requested was no more than the records that a revenue trader had a duty to prepare and preserve under s 118A and the Regulations. HMRC required information to ensure that excise duties on alcohol were being paid in the correct amount at the right time. REDS agents pay duties on behalf of their principals and so cross checks needed to be made by HMRC; also it was important for HMRC to examine charges paid to REDS agents to ensure they are consistent with those of normal agents. Mr Henn-Macrae had made much of challenging whether information was requested in respect of business or private customers, or regular or occasional customers, but that was disingenuous because it eventually transpired that in 2008 he had only one customer who dealt with him more than once. Even if Mr Henn-Macrae's questions left him unsure exactly what information was required, that ceased when the request was crystallised in the letter dated 13 April 2011. There were two questions, a deadline for reply, and a warning

of penalties for noncompliance. Mr Henn-Macrae was then given a second chance after the personal visit to the premises on 27 June 2011 but he still failed to comply. HMRC acknowledged that the wording of the second question was slightly different between the 13 April and 27 June letters but those requests were consistent and Mr Henn-Macrae had simply provided no information at all on that item.

22. HMRC's answer to Mr Henn-Macrae's concerns about the DPA was set out in detail in the letter dated 17 February 2011. Section 35 DPA gave a complete answer in that it provides:

> **"35 Disclosures required by law or made in connection with legal proceedings etc**
>
> (1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court."

23. The penalty was neither unfair nor disproportionate. Mr Henn-Macrae had received repeated requests for information and repeated warnings of the consequences of noncompliance. The penalty was proportionate from a human rights point of view, applying the principles set out by the Tribunal in *Dina Foods v HMRC* [2011] UKFTT 709 (TC) (at ¶¶ 41to 42):

> "41. The issue of proportionality in this context is one of human rights, and whether, in accordance with the European Convention on Human Rights, Dina Foods Ltd could demonstrate that the imposition of the penalty is an unjustified interference with a possession. According to the settled law, in matters of taxation the State enjoys a wide margin of appreciation, and the European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. Nevertheless, it has been recognised that not merely must the impairment of the individual's rights be no more than is necessary for the attainment of the public policy objective sought, but it must also not impose an excessive burden on the individual concerned. The test is whether the scheme is not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social objective, it simply cannot be permitted.
>
> 42. Applying this test, whilst any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. It is in our view clear that the scheme of the legislation as a whole, which seeks to provide both an incentive for taxpayers to comply with their payment obligations, and the consequence of penalties should they fail to do so, cannot be described as wholly devoid of reasonable foundation. We have described earlier the graduated level of penalties depending on the number of defaults in a tax year, the fact that the first late payment is not counted as a default, the availability of a reasonable excuse defence and the ability to reduce a penalty in special circumstances. The taxpayer also has the right of an appeal to the Tribunal. Although the size of penalty that has rapidly accrued in the current case may seem harsh, the scheme of the legislation is in our view within the margin of appreciation afforded to

> the State in this respect. Accordingly we find that no Convention right has been infringed and the appeal cannot succeed on that basis."

24. The daily penalties had been cancelled because the period of calculation had been incorrectly stated on the assessment; that left only the fixed penalty. The penalty under s 9 was of a fixed amount that was not unreasonable and was proportionate to its aim of encouraging provision of information; there was a defence of reasonable excuse; an internal review of the decision was available, which in this case had resulted in cancellation of the daily penalties; and there was recourse to the Tribunal by way of appeal. Mr Henn-Macrae could easily have complied with the reasonable request if he had so chosen.

Consideration and Conclusions

The request for information

25. We consider the information requested by HMRC was entirely reasonable. Mrs Templeman confirmed that HMRC had no concerns that Mr Henn-Macrae had been involved in evasion of excise duties. HMRC's enquiries were routine for a trader in alcohol. Most of the information requested was records required by the Regulations to be kept by any revenue trader. The work necessary to answer the questions was not onerous or unusual. So the request was reasonable and justified.

26. HMRC accepted that the exact form of the request varied during the course of the correspondence. Mr Henn-Macrae stated that he found this confusing and conflicting. However, we agree with Mr Jones that the form of the request crystallised in the formal letter from Mrs Templeman dated 13 April 2011. That letter formally requested clearly defined information, gave a deadline for reply, and warned of the consequences of non-compliance. Mr Henn-Macrae should have been in no doubt what he was required to do after he received that letter.

The concern over the DPA

27. We accept that Mr Henn-Macrae had a genuine concern whether provision of details of his non-business customers might put him in breach of the provisions of the DPA. The advice he received when he telephoned the Information Commissioner's Office concerned him and he challenged HMRC. Mrs Templeman referred the question internally and HMRC took almost a year to give an answer to Mr Henn-Macrae. However, a clear reply was eventually given, explaining that provision of the requested information to HMRC was permitted by s 35 DPA. The error in the date of the legislation (stated as 1988 rather than 1998) was unfortunate but expression of the view taken by HMRC was clear. If Mr Henn-Macrae was not convinced by that explanation, he did not appear to take any further action. We conclude that Mrs Templeman's letter dated 17 February 2011 was sufficient to address any concerns of Mr Henn-Macrae, if he had chosen to consider it fully. After that point he should have had no further concerns relating to the DPA.

The proportionality of the penalty

28. In *International Transport Roth GmbH v Home Secretary* [2003] QB 728 (not cited to the Tribunal) the Court of Appeal considered whether certain statutory penalties (related to illegal importation of immigrants) were so severe as to be invalid as being incompatible with a citizen's human rights. Simon Brown LJ stated (at ¶ 26):

> "… ultimately one single question arises for determination by the Court: is the [statutory] scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted? In addressing this question I for my part would recognise a wide discretion in the Secretary of State in his task of devising a suitable scheme, and a high degree of deference due by the Court to Parliament when it comes to determining its legality. Our law is now replete with dicta at the very highest level commending the courts to show such deference."

29. Such a test is also applicable in taxation matters – see the European Court of Human Rights in *National and Provincial Society v United Kingdom* [1997] STC 1466 (at ¶ 80) (not cited to the Tribunal):

> "According to the court's well-established case law ... an interference, including one resulting from a measure to secure the payment of taxes, must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of art 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued. Furthermore, in determining whether this requirement has been met, it is recognised that a contracting state, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation …"

30. Applying that test to the penalties provided for by s 9 we note:

(1) The fixed penalty is in the amount of £250, which is not an excessive amount.

(2) The daily penalties are in the amount of £20 per day, which is not an excessive amount. Of course, daily penalties could aggregate to a large sum but that would occur only where there was continued delay by the taxpayer.

(3) The taxpayer has a defence if he had a reasonable excuse for a failure (s 10).

(4) The taxpayer has a right of appeal to this independent Tribunal.

31. Taking together all those factors we conclude that the scheme of penalties in s 9 cannot be described as unreasonable or unduly harsh. It certainly falls within the "margin of appreciation" described by the ECHR in *National & Provincial* and thus is

not "devoid of reasonable foundation". Accordingly, we conclude that the penalty regime in s 9 is not ineffective by reason of disproportionality.

Conclusions

32. As stated at ¶¶ 25 & 26 above, the request for information was reasonable and justified, and its scope was clear from the formal letter from Mrs Templeman dated 13 April 2011. As stated at ¶ 27 above, the letter from Mrs Templeman dated 17 February 2011 was sufficient to allay any concerns of Mr Henn-Macrae concerning the DPA. As stated at ¶¶ 28 to 31 above, the penalty regime in s 9 is not ineffective by reason of disproportionality.

Decision

33. For the reasons stated at ¶ 32 above we DISMISS the appeal and uphold the assessment of the £250 penalty.

34. 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.

TRIBUNAL JUDGE

RELEASE DATE: 15 March 2012