[2021] UKFTT 0408 (TC)

TC 08318

VAT – zero-rating – whether evidence of export – no – whether breach of principle of proportionality – no – penalties – whether behaviour deliberate – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/06140

BETWEEN

CPR COMMERCIALS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE FAIRPO
MR L BROWN

The hearing took place on 8 June 2021. The hearing was held using the Tribunal video hearing platform because of restrictions arising from the COVID-19 pandemic. The documents to which I was referred are a documents bundles of 1827 pages, an amended third schedule and documents amounting to 31 pages, an authorities bundle of 583 pages and skeleton arguments from both parties.

Mr D Bedenham, Counsel, for the Appellant

Ms E Hickey, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. This is an appeal against three Value Added Tax ("VAT") assessments, and the associated Penalty Notices, issued by HM Revenue and Customs ("HMRC") as follows:

(1) A Notice of VAT Assessment ("the First Assessment") for £23,911 output tax and Notice of Penalty for £12,553.24 for deliberate inaccuracies in periods ending 05/13 to 10/15. The Notice of VAT Assessment was issued on 19 August 2016; the Notice of Penalty was issued on 7 December 2016. The VAT in this assessment related to transactions with Declon Properties Limited, registered for VAT in Southern Ireland.

(2) A Notice of VAT Assessment (the "Second Assessment") for £22,155 output tax and Notice of Penalty for £11,629 for deliberate inaccuracies in periods ending 08/12 to 04/14. The Notice of VAT Assessment was issued on 1 October 2015; the Notice of Penalty was issued on 27 October 2015. The VAT in this assessment related principally to supplies to D Keys, registered for VAT in Southern Ireland, and a small number of other supplies.

(3) A Notice of VAT Assessment (the Third Assessment) for £52,754 output tax and Notice of Penalty for £34,158 for deliberate inaccuracies in periods ending 09/13 to 06/15. The Notice of VAT Assessment was issued on 18 May 2017; the Notice of Penalty was issued on 30 June 2017. The VAT in this assessment related to transactions with Deise Commercial Sales & Hire, registered for VAT in Southern Ireland.

2. The VAT assessments were raised under s73 VAT Act ('VATA") 1994 on the basis that the Appellant ("CPR") had not provided sufficient evidence of dispatch of the goods from the UK. The penalties were issued under Schedule 24 Finance Act 2007 on the basis that the behaviour which led to the assessments was deliberate but not concealed.

3. It should be noted that the assessments relate to periods before the UK ceased to be a member state of the European Union and so distinguish between supplies made to an EU member state and supplies made to third countries. In addition, supplies to Northern Ireland at the relevant time were supplies within the UK for all VAT purposes.

Background

4. CPR is a supplier of used commercial vehicles, with customers both within and outwith the UK.

5. On 1 October 2014, HMRC carried out a compliance check on CPR's VAT returns for the VAT periods 01/12 to 04/14. Following correspondence, HMRC issued the assessments and penalties set out at point 1 above.

6. On 17 May 2016, HMRC carried out a compliance check on CPR's VAT returns for the VAT periods 05/13 to 10/15. This check was specifically in relation to transactions with one customer, Delcon Properties Ltd. Following correspondence, HMRC issued the assessments and penalties set out at point 2 above.

7. A review was requested in respect of each of these assessments and penalties on 7 September 2016. The review conclusion upheld the assessments and penalties.

8. On 17 June 2016, HMRC asked to check the records relating to supplies made to one particular customer, Denis Buckley. As no response had been received, on 19 August 2016 HMRC issued a Notice to Produce documents (under paragraph 1 of Schedule 36, Finance Act 2008) requesting the records by 19 September 2016, in order to respond to an enquiry from Revenue Ireland under Article 7, Regulation 904/2010/EU. On 22 August 2016, the notice was

challenged and an independent review of the notice was requested. On 6 September 2016, HMRC responded to advise that the records requested were statutory records and that it was not possible to appeal against a request for the production of statutory records. A penalty notice was issued on 7 November 2016 as no records had been received, and penalties were subsequently levied. As no information had been received, the assessment and penalties set out at point 3 above were issued. A review was requested; the review conclusion upheld the assessment and penalties.

Relevant law

Zero-rating

9. VATA 1994 s30(6) (as relevant):

> A supply of goods is zero-rated by virtue of this subsection if the Commissioners are satisfied that the person supplying the goods—
>
> (a) has exported them to a place outside the member States
>
> … if such other conditions, if any, as may be specified in regulations or the Commissioners may impose are fulfilled.

10. VATA 1994 s30(8):

> Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where—
>
> (a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both—
>
> (i) the removal of the goods from the United Kingdom; and
>
> (ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and
>
> (b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.

11. Regulation 129 of the VAT Regulations 1995 provides as relevant:

> Where the Commissioners are satisfied that –
>
> (a) goods intended for export to a place outside the member states have been supplied to:
>
> i. a person not resident in the United Kingdom;
>
> ii. a trader who has no business establishment in the United Kingdom from which taxable supplies are made;
>
> …and
>
> (b) the goods were exported to a place outside the member states, the supply, subject to such conditions as they may impose, shall be zero-rated.

12. Regulation 134 of the VAT Regulations 1995 provides as relevant:

> Where the Commissioners are satisfied that –
>
> (a) A supply of goods by a taxable person involves their removal from the United Kingdom
>
> (b) The supply is to a person taxable in another member state [and]

(c) The goods have been removed to another member state …

the supply, subject to such conditions as they may impose, shall be zero-rated.

13. Article 131 of the VAT Directive (2006/112/EC) provides that:

> The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

14. Article 138 of the VAT Directive provides the following relevant exemption:

> Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

Penalties

15. Paragraph 1 of Schedule 24 FA 2007 provides:

> (1) A penalty is payable by a person (P) where–
>
> (a) P gives HMRC a [VAT return], and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to–
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
>
> (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

16. Paragraph 3 of Schedule 24 FA 2007 provides:

> (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is–
>
> 'careless' if the inaccuracy is due to failure by P to take reasonable care,
>
> 'deliberate but not concealed' if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> 'deliberate and concealed' if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)

VAT notices – EU supplies

17. Para 4.3 of VAT Notice 725 (which is marked as having the force of law) states that a supply from the UK to a customer in another member state is liable to the zero rate where:

> (1) the supplier obtains and shows on their VAT sales invoice the customer's EC VAT registration number, including the 2-letter country prefix code, and

(2) the goods are sent or transported out of the UK to a destination in another EC Member State, and

(3) the supplier obtains and keeps valid commercial evidence that the goods have been removed from the UK within the relevant time limits

18. Para 4.4 of VAT Notice 725 (which is marked as having the force of law) states that the time limits for removing the goods and obtaining valid evidence of removal will begin from the time of supply. For goods removed to another member state the time limit in this context is 3 months.

19. Para 5.2 of VAT Notice 725 - proof of removal. This section has the force of law and requires that the documents used as proof of removal clearly identify:

(1) the supplier

(2) the consignor (where different from the supplier)

(3) the customer

(4) the goods

(5) an accurate value

(6) the mode of transport and route of movement of the goods, and

(7) the EC destination

20. Para 5.5 of VAT Notice 725 (which does not have the force of law) gives examples of the information required where the customer arranges for the removal of the goods from the UK, as in this case, and makes it clear that the UK supplier should have clear information as to the destination of the goods and evidence of the method and route of transport (at least), together with the date of removal from the UK.

VAT Notices – exports to outside the EU

21. VAT Notice 703 para 3.3 sets the conditions for zero-rating direct exports outside the EU, and has the force of law. It requires that the supplier:

(1) make sure that the goods are exported from the EC within three months

(2) obtain official (produced by Customs systems) or commercial evidence (such as a waybill or CMR) of export as appropriate within the specified time limits

(3) keep supplementary evidence of the export transaction; and

(4) comply with the law and the conditions of this notice

22. Para 6.5 of VAT Notice 703 (which has force of law) requires that the export evidence clearly identifies:

(1) the supplier

(2) the consignor (where different from the supplier)

(3) the customer

(4) the goods

(5) an accurate value

(6) the export destination, and

(7) the mode of transport and route of the export movement

Burden of proof

23. In relation to the assessments, the burden of proof is on HMRC to show that they were made to best judgement. Thereafter, the burden of proof is on CPR to show that they have satisfied the conditions to zero-rate their supplies and provided documentation to show that the goods were dispatched from the UK by CPR.

24. In the case of sales to Buckley/Deise, no invoices had been provided by the time the assessment was made and so this assessment was based on available reports of supplies. There was some discussion as to whether the specific amounts were correct. It was agreed that the hearing should consider the overall issue as to whether these supplies should be zero-rated and that the parties would endeavour to resolve the question as to the specific amount assessed.

25. In relation to the penalties, the burden of proof is on HMRC to show that the penalties were correctly calculated and issued.

26. In each case, the standard of proof is the civil standard of the balance of probabilities.

Appellant evidence and submissions

Zero-rating

27. Mr Wright, a director of CPR, provided two witness statements and gave oral evidence at the hearing. He provided a substantial number of documents, including copy purchase and sales invoices, copies of 'driver declarations' in respect of vehicles, logs of notifications to the Driver and Vehicle Licensing Agency (the "DVLA"), correspondence from the DVLA showing that vehicles were recorded as having been 'permanently exported' and copies of vehicle information obtained from HPI Ltd (an automotive industry vehicle check service).

28. When a vehicle was sold, CPR would be given a reference number by the purchaser, which was generally the registration number of the relevant vehicle and then the vehicle would be transported to the relevant port on a low loader. All that was required at the port was this reference number. The vehicle was left at the port and Mr Wright stated that the vehicle could not leave the port otherwise than on a ship. He stated that the vehicle would then go on the ship on which it was booked. The customer arranged and paid for the ship transport in each case and CPR had no further information about the transport arrangements. CPR had asked customers for copies of the ferry tickets but had not received any.

29. Mr Wright stated that, in each case, CPR had a sales invoice showing the EC VAT number for the customers and showing delivery addresses outside the UK. He agreed that the invoices did not include a country prefix. He had not known that EC VAT numbers required a country prefix and would have put the prefix on the invoices if he had known it was required. He agreed that the invoices did not include any details of the mode of transport or route. The driver declaration, however, stated the destination of the vehicle.

30. For each vehicle, once they had been paid, CPR would send DVLA the logbook slip which stated that the vehicle had been permanently exported. The vehicle could not then be used on the UK roads. The CPR handwritten notes and the HPI check information obtained showed that the vehicles had been exported either at the time, or very close to the time, of the sale to a country outside the UK. In some cases, where the date of export in the HPI check is later than the date on the driver declaration, Mr Wright stated that CPR may have been waiting for payment. The DVLA would not be informed until all the details were available.

31. Mr Wright agreed that he was aware of VAT Notice 725. He was familiar with the requirement to obtain evidence within three months of removal but if the vehicle, for example, sat in the yard for six weeks after sale, there would be a shorter time and evidence may not be available.

32. He considered that CPR had provided clear evidence of the sale and removal of the vehicles and could not understand why the evidence was not considered to be satisfactory by HMRC. He contended that there was no purpose to his zero-rating the supplies as CPR could not gain by it. There would be no reason for CPR to undertake all of the DVLA paperwork if the vehicles were not exported.

Breach of principle of proportionality

33. It was submitted that, as there was evidence that the goods had been removed from the UK, CPR were entitled to zero-rate the supplies. To the extent that the formal obligations provided for in the VAT Notices had not all been satisfied, *Euro Tyre* (Case C-21/16) and *Mecsek-Gabona Kft* (Case C-273/11) were authority for the submission that the transactions should be taxed taking into account their objective characteristics and should be zero-rated where the substantive requirements of the directive have been satisfied. It was a breach of the principle of proportionality to insist on the formal obligations: all the required information other than the mode of transport or route was included on the sales invoice and the driver declaration.

Penalties

34. If CPR was entitled to zero-rate the supplies then there was no inaccuracy and the penalties were not appropriate. If the export evidence was found to be insufficient then, following *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC), it is the knowledge and intention of the particular taxpayer at the time that should be considered.

35. Mr Wright's evidence was that he believed he had obtained and provided clear evidence of the sale and removal of the vehicles, and CPR had provided all of the information that was available in relation to these sales. CPR had endeavoured to correctly rate the VAT and had taken appropriate steps to do so.

36. It was submitted that the inaccuracy was not the result of a deliberate act by CPR and, as the supplies would ordinarily be zero-rated, CPR should not be punished for technical shortcomings.

37. It was submitted also that, if a penalty was due, HMRC could and should have suspended the penalty.

HMRC evidence and submissions

Zero-rating

38. HMRC submitted that they had received none of the documents that were listed in para 5.1 of VAT Notice 725 and had been provided with no evidence that any of the vehicles had been removed from the UK by CPR within three months of the date of supply. The DVLA information relied upon by CPR did not confirm when vehicles had left the UK, nor who had been responsible for their removal.

39. HMRC submitted that, as CPR had been unable to provide these documents, it followed that they had not retained adequate business records to support figures submitted on VAT returns. Para 6, Schedule 11, VATA 1994 and Regulation 31 of the VAT Regulations 1995 require that such records be retained. CPR had therefore failed to comply with this legal requirement.

40. HMRC submitted that the assessments had been made to best judgement as they were raised only in respect of items where insufficient evidence was available, and these had been identified. Output tax had been taken out of the gross value of the sales. The assessments had been based on the evidence available to HMRC at the time that the assessments were made.

Breach of principle of proportionality

41. HMRC submitted that CPR had not stated which requirements of VAT Notice 725 were disproportionate, nor why they were disproportionate.

42. Nevertheless, HMRC submitted that Article 131 of the VAT Directive provides that the exemption apply in accordance with conditions set by member states to ensure the correct application of the exemptions and prevent evasion, avoidance and abuse. HMRC contended that the requirements in VAT Notice 725 were intended to ensure these matters. The requirements also provided certainty for taxpayers so that it was clear what was required in order to zero-rate supplies. It was submitted that it was not disproportionate to require commercial proof that goods have been dispatched to another member state in circumstances where the zero-rating was only applicable when the goods had so been dispatched.

Penalties

43. HMRC submitted that in *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) the Tribunal had taken the view (§63) that "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". The Tribunal added that '"it is a question of knowledge and intention of the particular taxpayer at the time."

44. HMRC had first enquired into CPR's VAT affairs following a VAT visit in December 2008 and had issued a VAT Assessment for output tax on the basis of a lack of evidence of removal of goods to a country outside the UK. CPR had been advised of the requirements of VAT Notice 725 at that time.

45. Another VAT Assessment for lack of export evidence was issued on 21 September 2011, and the requirements of VAT Notice 725 again pointed out.

46. HMRC submitted that, after two VAT Assessments issued for the same lack of export evidence, CPR were well aware of the need to obtain, retain and produce evidence of the removal of the goods from the UK. HMRC submitted, therefore, that the behaviour which led to the sales being zero-rated in the absence of any such evidence could only be deliberate.

47. The potential lost revenue to which the penalty had been applied was the value of the under-declared output tax. HMRC submitted that this was a prompted disclosure, as CPR had not disclosed the errors to HMRC at a time when they had no reason to believe that hMRC had discovered it.

48. HMRC had reduced the penalty for the quality of disclosure, giving the following in respect of the first two VAT assessments:

(1) telling: 15% out of a maximum 40% as CPR had failed to accept that the supplies should be standard-rated

(2) helping: 15% out of a maximum 40% as CPR had failed to comply with requests for details of supplies made to David Keys, after agreeing to do so, and did not obtain alternative evidence for other sales

(3) information and documents: 20% out of a maximum 30% as CPR had provided access to documents available at the time of HMRC visits but had not provided any further documentation for the transactions assessed.

49. The reduction allowed was, therefore, 50% between the maximum 70% and minimum 25% which applies to deliberate but unconcealed behaviour, where disclosure is prompted. The resulting penalty was, therefore, 52.5% of the potential lost revenue.

50. With regard to the penalty for the third VAT Assessment, HMRC applied a smaller reduction, as follows:

(1) telling: 0% out of 40% as no information had been provided

(2) helping: 15% out of 40% as EC sales had been declared, enabling the assessment to be quantified

(3) information: 0% out of a maximum 30% as no documents had been provided.

51. The reduction in this case was therefore 15% between the maximum and minimum and so the resulting penalty was 64.75% of the potential lost revenue.

52. HMRC noted that there were two small amounts (totalling £128) in respect of the first VAT Assessment which were agreed to have arisen as a result of an error by CPR and had not been appealed. No deliberate penalty had been levied in respect of these amounts.

Discussion

53. Although HMRC made short submissions as to why the assessments had been made to best judgement, CPR had challenged the assessments on the basis that they had provided adequate evidence rather than on the basis that HMRC had not used best judgement in establishing the amount of the assessment. As such, we do not consider it necessary to deal with HMRC's submissions further in this respect.

Zero-rating

Evidence of export in general

54. Mr Wright stated that once a vehicle was unloaded at Liverpool, the vehicle could not be removed from the port. It could only be loaded onto a ship and sent. This evidence was not challenged, but neither was it supported by any further evidence. No evidence was provided to show that, for example, ships from Liverpool or Immingham could only go to a non-UK destination.

55. In every case, the customer would arrange for the transport and CPR had no information about the transport. Mr Wright considered that the vehicle would go on "the next ferry" although he also said that the vehicle would go on the ship on which it was booked. It was confirmed that CPR had no evidence or information as to what route was actually taken.

Driver declarations

56. CPR transported the vehicles involved in these transactions to either Liverpool or Immingham port. The only documentary evidence provided in respect of this were the "driver declaration" completed by CPR's driver when he dropped off the vehicles at the port. The declaration is a printed form, completed in handwriting, which includes the vehicle registration number (or other identifying number for trailers), the "shipping ref" which is either "Liverpool" or "Immingham" and therefore is the port rather than any specific reference number. The form includes confirmation of various checks on the vehicle. The form includes a box for 'destination' and a comments box, as well as details of the driver, his address, driving licence number and mobile phone number. The form is signed and in almost all cases has a date and time.

57. Most of the driver declarations provided state "Ireland" in the box marked 'destination' and in the 'comments' box state "Final destination S. Ireland". This distinction between destination and final destination, and the distinction between "Ireland" and "S. Ireland" does not preclude the possibility that the vehicle referred to in each case could have been shipped to Northern Ireland. Noting that Mr Wright's evidence was that CPR did not have any details of

the transport arrangements, no evidence was provided to explain on what basis the driver was able to provide any details for the destination and final destination.

58. Both CPR and their agent acknowledged in correspondence that at least some of the vehicles were transported to Northern Ireland. Although Mr Wright believed that there was no way for the offloaded vehicle to leave the port otherwise than on a ship, there was no supporting evidence to confirm this. There was also no evidence that ships departing the ports in question served only non-UK destinations.

Other information

59. The invoices provided for the disputed supplies do not include any information as to delivery - neither a delivery address, nor any indication as to whether the vehicles were to be shipped or collected. There are no bills of lading or any other evidence as to the vehicle being booked onto a ship or the destination of any vehicle.

60. None of the evidence provided by CPR for the disputed transactions included details of the mode of transport and route of movement, nor the destination. The correspondence address given for the customer does not automatically mean that such address is the destination. Even if CPR believed that the vehicles would then be removed from the UK, there is no documentary evidence to support this. The fact that the vehicles were dropped off at a port might indicate that the mode of transport was by ship but does not clearly state such. The route of movement is also not provided on any of the documentation.

61. Mr Wright stated that CPR had asked for evidence of shipping to be supplied but customers did not respond. Mr Wright said that CPR had now stopped dealing with customers who had not replied to this request. CPR also did not receive consignment notes as the CMR would be useless for an unaccompanied vehicle unless it was signed and returned. CPR did not therefore ask for these. In cross-examination, Mr Wright accepted that CPR had no evidence that the vehicle had been received abroad, although he considered that the customer would contact CPR if they had not received the goods, and no customer had so contacted them. There was no explanation as to why the customer would contact CPR in such a case when the customer was responsible for transportation from the UK docks.

62. In contrast to these disputed supplies, we note from the evidence in the bundle that CPR did have transport information in at least some other sales which are not included in the assessments: one vehicle exported to Africa is stated on the invoice to be "Delivered to Mombassa" and a copy of a consignment note detailing the ship and place of discharge was provided in relation to this.

63. We consider that CPR have not shown, therefore, that the vehicles which were the subject of the transactions to which the assessments related were exported from the UK. CPR have no evidence to show the destination of the vehicles after they were left at the port by CPR's driver.

Export status - DVLA and HPI

64. Mr Wright stated in his witness statement that "As soon as a vehicle heads to the port for export DVLA have to be informed of permanent export. This is done by CPR sending them the export part of the V5 Logbook.". There was no suggestion that the DVLA undertook any independent corroboration of the information provided to them by CPR.

65. From the documentary evidence, being CPR's handwritten log, the date on which the DVLA were notified of an export was often some months after the vehicle was stated to have been exported. Mr Wright's explanation was that CPR would only advise the DVLA of the export once the payment had been received. It was not explained why CPR were apparently prepared to export vehicles for which they had not received payment.

66. Although the DVLA had confirmed for some vehicles that the vehicles had been declared as permanently exported, this confirmation was received some years after the sale of the vehicles, when CPR asked for confirmation during the course of the enquiry. The DVLA did not confirm when the notification had been made, nor by whom. We find therefore that the confirmation of permanent export does not provide clear evidence that the vehicles were exported by either CPR or their customer, nor that the vehicles were exported within three months of the date of sale.

67. The HPI checks produced by CPR generally had a date where the vehicle was recorded as having been exported (if they had any information as to export). The date on which the HPI checks were run was shown on the pages as being in 2018 or later. Where there was reference to the vehicle having been exported, there was no information as to who had exported the vehicle. We note also that the date on the HPI checks was said to be derived from the DVLA information. As noted above, the export declaration to the DVLA was undertaken by CPR. The date given is, therefore, apparently the date advised by CPR rather than an independently verified date.

68. A comparison of the export date shown on HPI checks and the date of the corresponding driver declaration shows in many cases that the date the vehicle was dropped off at the port was the day after the date shown on the HPI checks. We find that any export date in the HPI checks therefore cannot be regarded as evidence of export.

69. Further, a number of vehicles which CPR stated had been exported were shown in the HPI checks as not exported. For example, a vehicle ("JXN") is shown as having been dropped at Liverpool on a driver declaration dated 2/11/14 at 08:30. A handwritten note dated 7/11/14 states that the vehicle was exported on 1/11/14. This note is signed "E A Wright". Mr Wright's witness statement says that the vehicle was exported 2/11/14. The HPI check does not say that the vehicle has been exported. It also indicates that the vehicle is still in the ownership of first registrant. The sales invoice for the vehicle, to Deise Commercial Sales & Hire, is dated 1/11/14. The DVLA information did include a positive export marker.

70. Another vehicle ("FRX") sold to Deise Commercial was said to have been exported on 30 October 2013. No driver declaration was provided. The HPI check had the 'Exported' flag as "No". It was noted to have been previously registered overseas, which CPR contended should be regarded as evidence of export. However, we note that the 'start date of the current keeper' in the UK was 31 December 2013, barely two months from the sale by CPR. It seems unlikely that the vehicle was exported from the UK and re-imported within two months.

71. In some cases, Mr Wright suggested that the lack of export marker may be because the vehicle had been registered on a private plate, or that perhaps the information had been superseded later as the DVLA and HPI check information were obtained some years later. We consider that this shows precisely why export information should be obtained at or close to the point of sale.

72. In one case, a vehicle sold to Declon Properties ("JPV") was a trade-in from Deise Commercial for another vehicle on 3 January 2014 according to the invoice for the sale of that other vehicle. The driver declaration for JPV states that it was dropped at the port on 29 January 2014, two days after sale on 27 January 2014. The HPI check information gives the date of export as 10 May 2013. In cross-examination, Mr Wright stated that this vehicle was either exported before the invoice date, or it went whilst waiting for payment. Neither explanation is consistent with the acquisition by trade-in date of the vehicle by CPR in January 2014.

73. In two cases the HPI check information provided was a duplicate of that provided for a different vehicle. One of the vehicles was not shown to have been exported at all, as the HPI

check for that vehicle does not have any export information and the DVLA letter is for a different vehicle.

74. Mr Wright stated that the DVLA/HPI information showed that the vehicles had been marked as exported. However, as noted above, we do not consider that a positive export marker in the DVLA status, or the HPI check information, shows anything other than that the DVLA have been told that the vehicles have been exported. It is not evidence that the vehicle has in fact been exported.

First Assessment – supplies to Declon Properties Limited

75. With regard to supplies made to Declon Properties Limited, Mr Wright explained that this was a company registered in the Republic of Ireland, with a valid Irish VAT number. He stated in his witness statement that the delivery address in each case was to an address in the Republic of Ireland. In correspondence with HMRC, CPR's agents stated that payment for the supplies to this customer was made in cash.

76. Having examined the invoices, we find that there is no delivery address stated. The invoices are addressed to either "Deacon Properties Limited" or "Delcon Properties Limited" (there was no explanation as to why the name differed; that on the VAT registration is Declon Properties) and include in the purchaser details an address in County Limerick, which is in the Republic of Ireland, and is the address shown on the VIES check for Delcon Properties Limited. We note that HMRC had established that the address shown for Delcon Properties Limited was the registered address of the company. HMRC stated that they had reviewed the location using Google street view, and it was clearly a residential street and so could not have been the delivery location.

77. The VAT number stated does not include the "IE" prefix for Ireland but is otherwise the same as that shown on the VIES check for Delcon Properties Limited. Although CPR included in their documents many pages which show a VIES check for Delcon Properties Limited, these pages are all dated the same day (23 May 2013) and the same time (15:13:06). It appears that the VAT details for Declon Properties were checked only once, shortly after the first sale by CPR to Declon on 21 May 2013.

78. We consider that the address on the invoices is simply a correspondence address. It is not described as the delivery address. The invoices describe the vehicle being sold each case but contain no delivery information at all, nor even any indication as to whether the vehicles are to be delivered by CPR or are to be collected by the customer.

79. The handwritten notes of sale contain only the date, the name of the customer, the vehicle type and registration, and the price. Again, there is no delivery information or any indication that the vehicle is to be delivered and not collected.

80. Mr Wright's evidence was that the only details of transport provided by Declon Properties would be a reference number. As this was usually the registration plate number for the vehicle, this cannot have provided any details as to the route or final destination of the vehicle.

81. The information put forward by CPR as evidence of export for vehicles sold to Declon Properties was the following:

> (1) the sales invoice, which we do not consider provides any evidence of export as it does not show the delivery destination of each vehicle nor even whether it was to be delivered or collected. Sale to a customer with a non-UK VAT number is not evidence of export.

(2) the driver declaration, which for the reasons given earlier we consider does not provide evidence that each vehicle was exported to Southern Ireland.

(3) a DVLA/HPI checks. As set out above we consider that these are not evidence of export.

82. We therefore conclude that CPR have not obtained or retained any evidence of export in respect of vehicles supplied to Declon Properties. CPR have apparently assumed that the vehicles were exported to Southern Ireland because the customer's registered address is in Southern Ireland and the customer has a Southern Ireland VAT number. In order to zero-rate a supply, a trader requires evidence and not simply an assumption.

Second Assessment – supplies to D Keys and others

83. The VAT number used on invoices addressed to "D Keys" was shown to be registered to Mr Keys at an address in County Antrim in Northern Ireland, albeit that the registration for VAT was with the Republic of Ireland. It was agreed that this VAT number was de-registered on 4 October 2013. Two invoices were issued by CPR after this date on 2 and 14 November 2013, containing that VAT number. Mr Wright's evidence was that he would not have known about the reregistration.

84. We note that HMRC's visit report notes (dated 1 October 2014) stated that the entry for Mr Keys' VAT number had been updated to show the number as deregistered "since [the officer] had last looked at the trader details on VIES on 25/11". It was not entirely clear whether this was a note added after the visit, and so referring to 25 November 2014, or whether it was referring back to 25 November 2013. In practice, it makes little difference as even if it was in 2013, it appears that a check of the VAT registration when the November 2013 invoices were issued would not have shown the de-registration.

85. Although Mr Wright and CPR did not provide any evidence that they had checked the VAT registration (in contrast to supplies to Declon Properties, as set out above), we find from the HMRC evidence that it is unlikely that they would have realised that the company had been de-registered for VAT at the time that they submitted the two invoices in November 2013.

86. Mr Wright stated that CPR had based the zero-rating on the fact that Mr Keys had a VAT number registered in the Republic of Ireland. Mr Wright stated that he believed that Mr Keys traded in both Northern Ireland and Southern Ireland, although no reason was given for that belief.

87. CPR's evidence was that the Northern Ireland address on the invoices to Mr Keys arose because the "customer's Northern Ireland address was mistakenly supplied". However, there was no evidence was to what the mistake was and, to the extent that CPR believed the vehicles were to be delivered in the Republic of Ireland, where that delivery was supposed to take place. No alternative address for Mr Keys in the Republic of Ireland was provided.

88. In a letter dated 26 March 2015, CPR wrote to HMRC and stated that vehicles sold to D Keys were invoiced to and paid from Mr Keys' company in Southern Ireland. We note that the invoices were addressed to Mr Keys, not to a company. The vehicles "are delivered to his yard in Northern Ireland to await transit shortly after into Southern Ireland. We cannot supply in the short period of time given (letter received from [HMRC] 11th March 2015) the list of sales required".

89. In a letter dated 7 September 2016, CPRs advisers referred to "time spent whilst goods stationed in Northern Ireland" and that "the location in Northern Ireland was merely a midpoint between [CPR] and the customer's place of business in Southern Ireland. In reality this was merely … a transit point". We note that this letter states that the goods were not used whilst in

Northern Ireland. There was no supporting evidence provided for the contention that the vehicles were exported to Southern Ireland.

90. In the hearing, Mr Wright stated that this referred to "only a couple of lorries which could not get to the Republic". He stated that the vehicles would go on the ferry to Dublin and the vehicles were then driven by Keys to Northern Ireland before being returned across the border. There was no explanation as to why this was done, and we considered that it seemed more likely that the description in the letters was accurate.

91. This information does not, therefore, provide any evidence that CPR was entitled to zero-rate the sales to Mr Keys. We also note Mr Wright's evidence that CPR "were going off the Southern Ireland VAT number" for zero-rating purposes. We consider that this means that CPR applied zero-rating to a supply on the basis of the location of registration of the VAT number rather than as a result of CPR having obtained evidence as to where the vehicle was being taken from the port.

92. For the same reasons as set out above, we do not consider that the sales invoices, DVLA/HPI checks and driver declarations in respect of the sales to Mr Keys provide evidence of export.

Second assessment - supply to Russia

93. This transaction was a sale of a trailer chassis; as a chassis has no registration plate there is no DVLA/HPI check information available. The invoice, dated 21 May 2013, is addressed to Autobolt Plius Limited with a correspondence address in Kalingrad. The invoice notes that the vehicle is to be delivered to Immingham Port but has no further delivery information.

94. We note that the driver declaration for the vehicle stated to have been shipped to Russia includes "Russia" in both the destination and comments boxes. The driver declaration is undated, although a time (13:00) is given.

95. Mr Wright stated that the vehicle would have been taken to the port in Immingham in order to be shipped to Rotterdam and then driven to Russia. No documentary evidence of this onward journey was provided, and it was unclear how, if the customers dealt with all of the onward shipping from the port, CPR would be aware of the route taken. Mr Wright had accepted in the hearing that CPR did not have onward route information.

96. For the same reasons as set out above, we do not consider that the sales invoice and driver declaration provide evidence of export of this vehicle to Russia.

Second assessment - other supplies

97. The invoices for supplies (one each) to C Campbell and JMD Haulage had no correspondence address for the customer, and no indication as to where the vehicles were to be delivered (or even that they were to be delivered at all). They also contained no VAT numbers. Mr Wright's evidence was that the VAT number would have been checked to be an EC number and he did not know why the number and address had been omitted from these invoices.

98. No HPI or DVLA information was provided for the supply to Campbell, only an undated driver declaration. The HPI check for the vehicle supplied to JMD Haulage shows an export date of 11 April 2014, but the driver declaration for the drop off of the vehicle in Liverpool is dated a day later, 12 April 2014. In any case, as above, we consider that the HPI check cannot support zero-rating of these supplies by CPR.

99. The invoice for a sale to "Fran European" on 10 January 2013 includes an address in Southern Ireland but no VAT number. There is, in common with the other relevant invoices in this matter, no delivery information or delivery address on the invoice. The driver declaration is dated 11 January 2013. The HPI check on this vehicle states an export date of 24 March

2015, some two years after the date of sale. We consider that this cannot support zero-rating of the supply by CPR.

100. A further vehicle (an Audi) for which the supply was zero-rated was agreed not to have been exported, having been supplied to a business in London.

Third Assessment – supplies to Denis Buckley/Deise Commercial Sale & Hire

101. Mr Wright's evidence was that Deise belonged to Mr Buckley, and that it was a "trading style". He believed that the company was registered for VAT in Southern Ireland, and the address on the invoices was in County Waterford. He said that the company name and address had been confirmed as existing, although no evidence of this was provided to the Tribunal. It was unclear whether Deise Commercial Sale & Hire was a company or an unincorporated business.

102. The VIES VAT number validation produced by CPR for this Southern Ireland VAT number is in the name of Denis Buckley, with an address in Waterford which is not the same address as the correspondence address for Deise Commercial Sale & Hire. The validation check was carried out on 30 January 2013, at 16:37. There was no later validation check provided to us.

103. HMRC produced a handwritten letter from a Mr Denis Buckley to Revenue Ireland, containing the same VAT number as that used on invoices to Deise Commercial and providing an address in Northern Ireland, stating that he had never owned or rented a property or business in the Republic of Ireland, nor owned or hired vehicles in the Republic of Ireland. Mr Wright stated that he did not consider that this showed that Buckley had not traded with CPR.

104. For the same reasons as set out above, we do not consider that the sales invoices, DVLA/HPI checks and driver declarations in respect of the sales to Deise Commercial, provide evidence of export.

Conclusion as export

105. It was agreed for CPR that the export evidence needs to show the destination and mode of transport/route taken to deliver the vehicle.

106. None of the invoices provided to us in respect of these transactions shows the destination of the vehicle, only a correspondence address for the purchaser. We consider that CPR assumed that a non-UK VAT number or correspondence address meant that the vehicle's destination would be that address, but they did not obtain any evidence to confirm that assumption.

107. The customer made the arrangements for transport of the vehicle from a port in the UK but provided no documentary evidence to show what this involved. Accordingly, the only documents provided which state a destination are the driver declarations and we find that the information on these was based on CPR's assumption, not from information provided by their customers.

108. Similarly, CPR assumed that delivery of a vehicle to a port meant that it was to be exported from the UK and could not be removed from the port back onto the UK roads. No evidence of the actual mode of transport or route taken was obtained from the customer. No evidence was obtained to confirm where the vehicle had been taken by the customer.

109. For the reasons set out above, the DVLA information (whether direct or via HPI) shows only that the DVLA were told by CPR that the vehicle had been exported. This information is not evidence of export, it is only evidence that a particular document was sent to the DVLA.

110. We conclude, therefore, that CPR have not obtained and retained appropriate evidence of export to support zero-rating of the relevant transactions and that they should, therefore, have charged VAT at the standard rate on such supplies.

Breach of principle of proportionality

111. CPR contended that they had broadly complied with the requirements of the VAT Notice and that it was disproportionate for HMRC to insist upon being provided with specific documents where there was evidence that the vehicles had been exported.

112. CPR also argued that it was disproportionate for HMRC to require that the evidence be obtained within three months of the date of supply, where the goods could be shown to have been removed from the UK. The decision in *Collée* (Case C-146/05) indicated (§§29-31) that the principle of fiscal neutrality required that the exemption (zero-rating in the case of the UK) should be allowed where the substantive requirements had been met, even if some of the formal requirements had not been met. In this context, it was argued that the three month limit for obtaining information was a formal requirement, not a substantive requirement.

113. The decision in *Mecsek-Gabona Kft* was also noted (§§34-35) to have concluded that it is

> "the vendor's obligation to establish that the goods have been dispatched or transported to a destination outside the Member State of supply. … it has been difficult since the abolition of border controls between the Member States for the tax authorities to check whether or not the goods have physically left the territory of that Member State. As a result, it is principally on the basis of the evidence provided by taxable persons and of their statements that the national tax authorities are to carry out the necessary checks". Further (§43), "once the vendor has fulfilled his obligations relating to evidence of an intra-Community supply, where the contractual obligation to dispatch or to transport the goods out of the Member State of supply has not been satisfied by the purchaser, it is the latter which must be held liable for the VAT in that Member State" and (§42) "account must be taken of the fact that the evidence that the vendor might submit to the tax authorities depends essentially on information that it receives for those purposes from the purchaser".

114. However, we consider that it is also important to note that in *Mecsek-Gabona Kft* the vendor had CMRs returned by the purchaser from its address which stated that the goods had been transported to Italy. The vendor had also shown that the goods were collected by foreign-registered vehicles and the registration numbers of these vehicles had been provided to the supplier in advance. That is considerably more evidence of export than has been provided in this case.

115. As set out above, we find that CPR has shown only that they delivered vehicles to a UK port and left them there. They have no evidence as to what happened to the vehicles thereafter, although in some cases CPR appear to have been aware that vehicles were shipped to Northern Ireland. As also set out above, the fact that CPR advised the DVLA that the vehicles had been exported is not evidence that the goods were in fact exported. The sale of vehicles to an entity or person with a non-UK VAT number is, similarly, not evidence of export.

116. In this context, we do not agree that there has been any breach of the principle of proportionality: CPR has provided nothing other than their assumption that, as the vehicles were delivered to a port and had been purchased by someone with a non-UK VAT number, those vehicles had been exported from the UK. In contrast to the position in *Mescek-Gabona Kft* CPR have received no information from their purchasers that states where (and when) the vehicles were taken after being left at the port.

117. It is clearly not a breach of the principle of proportionality for a taxpayer to provide clear evidence of export in order to be able to zero-rate a sale as an export. Indeed, the CJEU in *Mescek-Gabona Kft* concluded (§55) that:

> "Article 138(1) of Directive 2006/112 is to be interpreted as not precluding … refusal to grant a vendor the right to the VAT exemption for an intra-Community supply, provided that it has been established, in the light of objective evidence, that the vendor has failed to fulfil its obligations as regards evidence".

118. As set out above, we consider that CPR has failed to provide objective evidence that the substantive requirement, that the vehicles have been exported, has been met. They are therefore not entitled to zero-rate the relevant supplies. As also set out in *Collée* (§31), fiscal neutrality does not permit exemption where "… non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied".

119. We find that there has been no breach of the principle of proportionality in this case in requiring evidence of export.

120. We are therefore not required to consider the question of whether the three month time limit for obtaining such evidence is in breach of the principle of proportionality. However, we do note that Mr Wright, in giving evidence, commented that "a lot can happen over time" in cases where the HPI checks, carried out several years after the transactions, indicated either a later date for export or that the vehicle was still in the UK at the time of the check. It seems to us that it is precisely this sort of uncertainty that supports the need for contemporaneous evidence to be obtained.

121. With regard to the de-registration of David Keys, we have agreed - as set out above - that this alone would not be invalidate the zero-rating of an export to Mr Keys within a few days of the deregistration. We agree that the decision in *Mescek-Gabona Kft* (§65) supports this contention. However, HMRC's decision that CPR was not entitled to zero-rate the supplies was based not only on the deregistration but also the lack of evidence of export. As noted above, we find that there has been no breach of the principle of proportionality in this case in requiring evidence of export.

Penalties

122. It was not disputed that HMRC had previously raised VAT assessments on CPR for failure to provide adequate export evidence and that HMRC had drawn CPR's attention to the requirements of VAT Notice 725. Mr Wright stated that he was aware of the Notice. We noted his evidence that it might be difficult to obtain evidence in time if there was a delay in removing the vehicle from the yard after the time of supply. However, as there was no indication that CPR had attempted to get any of the required evidence of export, we did not consider that this hypothetical difficulty provided any mitigation in respect of penalties.

123. It is somewhat perplexing that CPR continued to zero-rate supplies for which it had no evidence of export. There was no evidence provided to show that they had sought any advice (whether from HMRC or an adviser) as to how to comply with the requirements of VAT Notice 725.

124. Considering the "knowledge and intention" referred to in the decision in *Auxilium Project Management Limited* in the light of the earlier assessments we consider that, after two VAT assessments and repeated information from HMRC as to the evidence required to zero-rate such supplies, CPR cannot have reasonably concluded that they had sufficient evidence of export when they zero-rated the supplies. In these circumstances, we find that the behaviour

which led to the under-assessment was, therefore, deliberate as the returns had been submitted when CPR was at least reckless as to whether it had the required evidence to zero-rate.

125. We have reviewed the mitigation given by HMRC in respect of these penalties and see no reason to disturb their conclusions. We also note that HMRC considered whether there might be special circumstances which would merit a reduction in the penalty and concluded that there were none. We, similarly, do not see any reason to disturb that conclusion.

126. There was also a brief submission from CPR that, if upheld, the penalty should have been suspended. Penalties are suspended where it is reasonable to consider that a company will benefit from a chance to correct the behaviour that led to the penalty. Given that the company has had previous VAT assessments for the same issue and yet has continued to zero-rate transactions for which it does not have evidence of export, it is difficult to see how suspending the penalty in this case would achieve that aim.

Decision

127. In summary, we find that CPR has not demonstrated that it obtained and retained sufficient evidence of export to support zero-rating the relevant transactions and, as such, the assessments are upheld. We consider that the penalties are appropriately calculated and also upheld.

128. The appeal is dismissed.

Right to apply for permission to appeal

129. 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: 15 NOVEMBER 2021