[2017] UKUT 0215 (TCC)

Appeal number: UT/2016/0123

INFORMATION NOTICE - PENALTIES – whether wording of penalty notice issued by HMRC allowed further time for compliance with information notice – no - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

SPRING CAPITAL LIMITED

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge John Walters QC

Sitting in public at Royal Courts of Justice, Strand, London on 16 May 2017

Michael Upton, advocate, instructed by Russel & Aitken, solicitors, for the Appellant

Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by the Appellant, Spring Capital Limited ('Spring Capital'), against the decision of the First-tier Tribunal (Tax Chamber) ('FTT') released on 13 April 2016 with neutral citation [2016] UKFTT 0232 (TC) ('the Decision').

2. Spring Capital had appealed to the FTT against three assessments for daily penalties issued by the Respondents ('HMRC') because HMRC considered that Spring Capital had failed to comply with the requirements of an information notice ('the Information Notice'). In the Decision, the FTT (Judge Mosedale) rejected several arguments put forward by Spring Capital and dismissed the appeal. The only ground of appeal pursued by Spring Capital in this Tribunal is that the FTT erred in law in holding, as it did at [19] of the Decision, that certain letters ('the Penalty Notices') from HMRC (containing materially identical wording) did not have the effect of allowing further time to comply with the Information Notice so that the liability to a daily penalty would not have arisen until the latest of the specified times.

3. The only issue in this appeal is whether the Penalty Notices provided, as Spring Capital contends, further time for something required to be done, within the meaning of paragraph 44 of Schedule 36 to the Finance Act 2008, or provided an opportunity for Spring Capital to provide outstanding information without incurring additional penalties, as HMRC argue.

4. For reasons given below, we have concluded that HMRC did not, in the letters, allow further time for compliance with the Information Notice and Spring Capital's appeal must be dismissed.

Factual background

5. There is no challenge to the FTT's findings of fact in relation to the Penalty Notices which are set out at [2] to [8] of the Decision. So far as material to this appeal, the facts are as follows.

6. On 24 February 2012, HMRC opened an enquiry into Spring Capital's corporation tax return for the accounting period ended 30 April 2010. On 5 March 2013, HMRC issued the Information Notice to Spring Capital under paragraph 1 of Schedule 36 to the Finance Act 2008 ('FA 2008'), requiring the company to provide information and produce documents in respect of the period under enquiry. The notice asked for 11 items in total, with item 8 being subdivided into three. The specified date for compliance with the Information Notice was 14 April 2013. The period for compliance was later extended, by a letter dated 16 May 2013, to 16 June 2013 (and there is no dispute as to this). Spring Capital did not provide the information sought and on 30 August 2013, HMRC issued a £300 penalty under paragraph 39(2) of Schedule 36 to the FA 2008.

7. Spring Capital appealed to the FTT against this penalty. The appeal was heard on 22 December 2014. Before the appeal was heard, Spring Capital provided items 2, 10 and 11 required by the Information Notice to HMRC. At the date of that hearing, items 1 and 3 - 9 remained outstanding, but item 1 was provided during the course of the hearing. On 5 January 2015, the FTT dismissed the appeal and upheld the £300 penalty.

8. As Spring Capital had not provided items 3 - 9 of the Information Notice, on 20 February 2015, HMRC issued daily default penalties under paragraph 40 of Schedule 36 to the FA 2008 for the period 20 August 2013 to 19 February 2015 totalling £16,110 at the rate of £30 a day ("the February Penalty Notice"). The February Penalty Notice included the following:

> "**About our notice to provide information and produce documents**
>
> I enclose a copy of the notice that we sent to the company on 5 March 2013. We wrote to the company again on 5 April 2013. We charged the company a £300 penalty. I have marked the copy of the notice to show what we still need. As the company has not given us everything we asked for, I am now charging the company a further penalty.
>
> The penalty is £30.00 a day, from 30 August 2013 to 20 February 2015. This is a total of 537 days.
>
> **The total amount of the penalty is £16,110.00.**
>
> The law covering this penalty is in paragraphs 40 and 46 of Schedule 36 to the Finance Act 2008.
>
> **What to do now**
>
> To avoid any further penalties, the company should let me have what we have asked for by 22 March 2015. If the company does not do this we may charge further penalties of up to £60 a day.
>
> If the company is having difficulties in doing what I have asked, please contact me as soon as possible on [telephone number].
>
> The company also needs to pay the £16,110.00 penalty by 22 March 2015."

9. On review, the penalties were reduced to £10,950 to cover only the period 20 February 2014 to 19 February 2015 on the ground that HMRC had been out of time to impose daily penalties for the earlier non-compliance.

10. Spring Capital provided items 3 - 7 and 9 on 13 March 2015, and item 8(a) on 24 March 2015 so that only items 8(b) and 8(c) were outstanding as at that date. HMRC imposed further daily penalties at the maximum rate of £60 per day for the period 21 February to 22 March 2015, totalling £1,800 by letter dated 24 March 2015, ('the March Penalty Notice'). It also contained a section headed "What to do now", which was identical to that in the February Penalty Notice, save as to the amount of the penalty and the date for providing the information and paying the penalty of £1,800 which was changed to 23 April 2015.

11. As Spring Capital did not provide items 8(b) and (c), further daily penalties at the maximum rate of £60 per day were imposed for the period 25 March 2015 to 9 July 2015 totalling £6,420 by letter dated 9 July 2015 ('the July Penalty Notice'). The "What to do now" section in the July Penalty Notice was also identical to that in the February and March Penalty Notices except for the amount and the date, which was changed to 8 August 2015.

12. Spring Capital appealed against the February, March and July Penalty Notices.

Legislation

13. Paragraph 1 of Schedule 36 to the FA 2008 provides that an officer of HMRC may issue a notice ('an information notice') requiring a person to provide information or produce a document if the information or document is reasonably required for the

purpose of checking the person's tax position. So far as material to this appeal, paragraph 39 provides that HMRC may issue a £300 penalty for non-compliance where a person fails to comply with an information notice

14. Paragraph 40 of Schedule 36 allows HMRC to issue daily penalties after a £300 penalty has been imposed under paragraph 39. It provides:

> "(1) This paragraph applies if the failure … mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure ….
>
> (2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure … continues."

15. Paragraph 44 allows the time for compliance with an information notice to be extended by HMRC in relation to either a £300 penalty or a daily penalty:

> "A failure by a person to do anything required to be done within a limited period of time does not give rise to liability to a penalty under paragraph 39 or 40 if the person did it within such further time, if any, as an officer of Revenue and Customs may have allowed."

16. Paragraph 46 provides that:

> "(1) Where a person becomes liable for a penalty under paragraph 39 or 40, HMRC may
>
> (a) assess the penalty, and
>
> (b) notify the person."

The Decision

17. There were five contested issues before the FTT (see [10] of the Decision) but only one is being pursued on appeal, namely whether HMRC had allowed further time for compliance with the Information Notice in the Penalty Notices thus engaging paragraph 44 of Schedule 36 to the FA 2008. The FTT dealt with that issue at [11] to [20] of the Decision. Mr Upton, who appeared for Spring Capital in the FTT and before us, contended that the wording of the Penalty Notices clearly allowed Spring Capital further time to comply with the Information Notice. The FTT did not accept this submission, holding at [18] and [19]:

> "18. … But I think that the reference to allowing further time in paragraph 44 must be read in context, and that context was allowing further time to comply with an information notice. So the question is not whether [the HMRC officer] allowed further time, but whether he allowed further time to comply with the information notice.
>
> 19. And I think a fair reading of what [the HMRC officer] said was that he would not impose further penalties if there was compliance by a certain date; he was saying that HMRC would not further penalise continuing non-compliance if the non-compliance was brought to an end by the specified date. It was not further time to comply with the information notice, but a deadline which, if complied with, would mean no further penalties would be imposed for the continuing failure to comply. In other words, the appellant was allowed further time before more penalties would be imposed for noncompliance: it was not allowed further time for compliance."

18. The FTT dismissed Spring Capital's appeal and confirmed HMRC's assessments in the amounts of £10,950, £1,800 and £6,420, making a total of £19,170.

Applications for permission to appeal

19. Spring Capital applied to the FTT for permission to appeal to the UT against the Decision. The FTT (Judge Mosedale) refused to grant permission to appeal in relation to this ground (there were other grounds that are no longer pursued) because, in her view, it was a finding of fact and, accordingly, there was only limited scope for arguing that it amounted to an error of law and, secondly, because a challenge to the finding had no reasonable prospect of success.

20. Spring Capital applied to the Upper Tribunal which granted permission to Spring Capital to appeal on the sole ground that the FTT erred in law in holding that the Penalty Notices did not have the effect of allowing Spring Capital further time to do something required to be done within the meaning of paragraph 44 of Schedule 36 to the FA 2008 so that no liability to a daily penalty arose until the latest of the specified times.

21. In granting permission to appeal to the Upper Tribunal, Judge Berner said:

> "6. I consider it at least arguable that this finding is not solely one of fact, but is of mixed fact and law. What HMRC said in their letters is a finding of fact; what those words should be construed to mean in the context of para 44 of Sch 36 is a question of law. Matters of construction were dealt with by the FTT at [18], and it was on that basis that the conclusion was reached at [19] that what HMRC had said did not amount to the allowing of more time for anything required to be done within the meaning of para 44."

22. We agree with the observations of Judge Berner which are consistent with the views of the Upper Tribunal (Judge Bishopp and Judge Falk) in *B & K Lavery Property Trading Partnership v HMRC* [2016] UKUT 525 (TCC), [2017] STC 829. In that case, the Upper Tribunal rejected the appellant's submission that the construction of a closure notice was solely a question of law and concluded, at [39], that it was a mixed question of fact and law. In reaching its conclusion, the UT referred to Chitty on Contracts (32nd edition, 2015) at 13-047:

> "The construction of written instruments is a question of mixed law and fact. The expression "construction" as applied to a document includes two things, first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. Construction becomes a question of law as soon as the true meaning of the words in which an instrument has been expressed and the surrounding circumstances, if any, have been ascertained as facts."

23. It appears to us that the same approach should apply when construing a penalty notice, even though it is not a contract or agreement, and we understood the parties to be agreed on this point at the hearing. In this case, there was no dispute as to the meaning of the words used in the Penalty Notices or the surrounding circumstances that gave rise to the Penalty Notices.

Discussion

24. The issue in this appeal is what was the true effect of the Penalty Notices. Spring Capital contends that, in the Penalty Notices, HMRC allowed Spring Capital further time to comply with the Information Notice. Mr Upton submits that each Penalty Notice extended the time until the July Penalty Notice which provided a final date for compliance of 8 August 2015. HMRC contend that no such extension was given.

25. In our view, the correct approach to determining the meaning and effect of documents such as the Penalty Notices is well established – see *HMRC v Bristol and West Plc* [2016] EWCA Civ 397, [2016] STC per Briggs LJ at [26] which applied Lord Steyn's dictum in *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd* [1997] AC 749 at page 767G to the interpretation of closure notices. The Penalty Notices must be approached objectively. The issue is how would a reasonable recipient in the position of the intended recipient, namely Spring Capital, have understood the Penalty Notices. In considering this question, the Penalty Notices must be viewed in their proper context, bearing in mind the recipient's, that is Spring Capital's, knowledge of any relevant context.

26. We start by looking at the wording of the Penalty Notices and considering how the reasonable recipient would have understood them. Spring Capital relies on the two paragraphs under the heading "What to do now". Mr Upton submitted that, on a fair and clear reading, the first paragraph in the section was an allowance of further time to comply with the request for information. Mr Upton also contended that the invitation to call the HMRC officer if the company was having difficulties in doing what the officer asked showed that further time had been allowed and could, if the officer agreed, be further extended.

27. We do not accept that the first paragraph under the heading "What to do now" can be interpreted as allowing Spring Capital further time to provide information. We consider that would require a strained reading of the two sentences in the paragraph when read in the context of the rest of the Penalty Notice. In the first part of the excerpt quoted at [8] above, the officer states "I am now charging the company [ie Spring Capital] a further penalty" then sets out the calculation which shows that the penalty has been calculated at a daily rate to a date immediately before the date of the letter, before giving the total amount of the penalty in bold. It is not suggested that those paragraphs contain any allowance for further time to comply with the Information Notice or do anything other than impose a penalty. Spring Capital's interpretation of the paragraph under the heading "What to do now" ignores the word "further" that appears twice in the paragraph as an adjective qualifying "penalties". The inclusion of "further" can only mean that the penalties referred to in the paragraph are additional to some already existing penalty, i.e. the penalty that has been charged earlier in the letter (or in earlier Penalty Notices). That this is the correct reading is made perfectly clear by the final sentence of the section which states, in the case of each Penalty Notice, that Spring Capital must pay the penalty charged earlier in the letter by the date specified for the provision of information not previously provided. It is clear, therefore, that the letter is imposing two obligations: to pay the penalty imposed by that Penalty Notice and to provide information not previously provided; in both cases, by the date specified in the Penalty Notice. If the information is provided by that date then no penalties will be charged for the period to that date.

28. Our analysis is not affected by the invitation to Spring Capital to call the officer if the company is having difficulties. Consistent with our reading of the other parts of the letter, our view is that, in that sentence, the officer is doing no more than offering to consider whether to extend the deadline by which the outstanding items of information must be provided if further penalties (ie additional to penalties already charged) are not to be incurred.

29. Mr Upton questioned whether the HMRC officer had the power to grant a limited period of relief from penalties, eg from the date of the Penalty Notice to the date for compliance stated in it, and then reimpose penalties if the information was not provided by that date. He submitted that nothing in Schedule 36 to the FA 2008 grants HMRC such a power. We agree that there is nothing in paragraph 44 of the Schedule that specifically allows HMRC to suspend the imposition of penalties but, in our view, paragraph 46, by the use of the word "may", allows them to do so. Paragraph 46 provides that HMRC have a discretion whether to assess a penalty and notify the person. It appears to us that, in the Penalty Notices, HMRC were indicating how they would exercise that discretion in relation to the further penalties in the event that Spring Capital complied with the Information Notice and provided the outstanding information by a specified date.

30. Next, we ask whether there is anything in the context in which the Penalty Notices were sent that indicates that the reasonable recipient would have had a different understanding of their effect. Mr Upton submitted that the Penalty Notices should be read in the context of the provisions of paragraph 44 of Schedule 36 to the FA 2008 which applies where an HMRC officer has 'allowed a person further time to do anything that is required to be done'. Mr Upton contended that the Penalty Notices referred to information which was required to be provided ("what we still need") and named a date by when that should be done. We consider that the submission seeks to put the cart before the horse in that it tries to make the wording of the Penalty Notices conform to the words of paragraph 44. We consider that the proper approach is to take the words of paragraph 44, properly construed, and see if they apply to the Penalty Notice. For the reasons already given, we do not consider that they do and the existence of a provision such as paragraph 44, as part of the contextual scene, does not suggest any other interpretation.

31. We consider that HMRC's letter dated 16 May 2013 to Spring Capital is part of the context in which the Penalty Notices should be viewed. In that letter, HMRC granted Spring Capital an extension of time for compliance with the Information Notice. The relevant passage was clear and unambiguous:

> "I propose to allow the company a further 30 days to comply with the notice, but am afraid that if the information and documents are not received by then I will have no alternative but to seek authority to the issue of a penalty."

32. The words used in the letter of 16 May 2013 to extend the time for compliance reflect the wording of paragraph 44 of Schedule 36 to the FA 2008. If the Penalty Notices were intended to allow further time for compliance then we would have expected them to use language similar to that used in the letter of 16 May 2013. The fact that they did not do so would, in our view, have indicated to the reasonable recipient of the Penalty Notices that something else was intended.

33. Mr Upton also submitted that, as a matter of principle, the policy reasons behind certain rules of construction such as the principle against doubtful penalisation in relation to legislation and the contra proferentem rule in relation to the interpretation of contracts should be applied to the construction of the Penalty Notices in this case which would then favour the reading contended for by Spring Capital. We do not accept these submissions for two reasons. First, the Penalty Notices are not legislation and, just as the Court of Appeal observed in *Fidex Ltd v HMRC* [2016] STC 1920, at [51], that "it is not appropriate to construe a closure notice as if it is a statute", we consider that it is not

appropriate to use the principles of statutory interpretation to construe a penalty notice even though it is issued pursuant to a statutory power. Secondly, and more fundamentally, the principles relied on by Spring Capital only apply where there is some doubt or ambiguity in the words to be construed and, in our opinion and for the reasons explained above, there is no such doubt or ambiguity in this case. Accordingly, we have not felt it necessary to address Mr Upton's careful submissions on these points in any more detail.

34. For the reasons given above, we do not accept that the Penalty Notices at issue in this appeal allowed Spring Capital further time to provide the information requested within the meaning of paragraph 44 of Schedule 36 to the FA 2008 and, accordingly, we conclude that the FTT did not make any error of law in the Decision.

Disposition

35. For the reasons given above, Spring Capital's appeal against the Decision is dismissed.

Costs

36. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Judge Greg Sinfield
Judge of the Upper Tribunal

Judge John Walters QC
Judge of the Upper Tribunal

Release date: 1 June 2017