TC03032

Appeal number: LON/2009/07067, TC/2010/06480 & TC/2010/07771

Import VAT – importer was agent not principal – is onward supply relief available – no –were post clearance demands correct – yes - was penalty notice correctly issued – yes - appeals dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRANCK AND TOBIESEN (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ALISON MCKENNA
ELIZABETH BRIDGE

Sitting in public at Bedford Square on 16 October 2013

Tim Brown of counsel, instructed by Vincent Curley & Co LLP, Tax Consultants for the Appellant

Mark Fell of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This matter comprises three appeals: firstly, the Appellant's challenge to a post clearance demand for import VAT of £707, 718.46 issued on 28 January 2009 (and upheld on review dated 6 March 2009); secondly, the Appellant's challenge to a post clearance demand for import VAT of £31,095.52 issued on 8 July 2010; and thirdly an appeal against a non-compliance penalty of £250 issued on 21 September 2010.

2. The Appellant's business is arranging the transportation of construction and agricultural machinery, which it undertakes on behalf of others on an international level. It was agreed that the Appellant does not itself buy and sell the machinery. These appeals concern seventeen transactions involving the importation of machinery from America and the onward transportation of it to the Republic of Ireland. The issue between the parties was the availability of Onward Supply Relief ("OSR"). The Appellant had claimed OSR but HMRC decided that it was not available to the Appellant as an agent and issued the post clearance demands accordingly. The penalty notice related to the Appellant's failure to declare correct particulars on Customs declarations, having applied the code for OSR which HMRC had concluded was incorrect.

3. The factual background to these appeals was not in dispute and neither party called live witness evidence. Details of the Appellant's mode of business and the transactions concerned were provided in the comprehensive witness statement of Elizabeth Whitfield-Smith, an employee of the Appellant. Details of HMRC's visit to the Appellant's business premises and its post visit decisions were provided in the witness statement of HMRC Officer Alan Mullock. The appeal hearing therefore consisted of oral submissions from both counsel, who had also submitted helpful written skeleton arguments in advance. Mr Brown's skeleton had appeared to suggest that the Tribunal should refer these appeals to the European Court of Justice, but he helpfully clarified at the hearing that he was not in fact making an application for a referral but rather reminding the Tribunal that it had the option to do so.

The Law

4. The Tribunal was referred to Articles 143 and 138 of Council Directive 2006/112/EC ("the Directive"), which (where relevant) provide as follows:

> Article 143
>
> Member States shall exempt the following transactions:
>
> …
>
> (d) the importation of goods dispatched or transported from a third territory or a third country into a Member State other than that in which the dispatch or transport of the goods ends, where the supply of such goods by the importer designated or recognised under Article 201 as liable for payment of VAT is exempt under Article 138.

Article 138

1. 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.

2. In addition to the supply of goods referred to in paragraph 1, Member States shall exempt the following transactions:

…8

(c) the supply of goods, consisting in a transfer to another Member State, which would have been entitled to exemption under paragraph 1 and points (a) and (b) if it had been made on behalf of another taxable person.

5. We were also referred to Article 201 of the Directive, which (it was not disputed) required the Appellant to be treated as the importer of the goods.

6. The Directive is implemented in domestic law by s. 30 (8) of the Value Added Tax Act 1994 ("VATA") and regulation 123 of the Value Added Tax Regulations 1995 which provide the framework for the UK OSR regime, as follows:

30 (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.

Temporary importations

123. —

(1) Subject to such conditions as the Commissioners may impose, the VAT chargeable on the importation of goods from a place outside the member States shall not be payable where—

(a) a taxable person makes a supply of goods which is to be zero-rated in accordance with sub-paragraphs (a)(i) and (ii), and (b) of section 30(8) of the Act,

(b) the goods so imported are the subject of that supply, and

(c) the Commissioners are satisfied that—

(i) the importer intends to remove the goods to another member State, and

(ii) the importer is importing the goods in the course of a supply by him of those goods in accordance with the provisions of sub-paragraphs (a)(i) and (ii), and (b) of section 30(8) of the Act and any Regulations made thereunder.

(2) As a condition of granting the relief afforded by paragraph (1) above the Commissioners may require the deposit of security, the amount of which shall not exceed the amount of VAT chargeable on the importation.

(3) The relief afforded by paragraph (1) above shall continue to apply provided that the importer—

(a) removes the goods to another member State within one month of the date of importation or within such longer period as the Commissioners may allow, and

(b) supplies the goods in accordance with sub-paragraphs (a)(i) and (ii), and (b) of section 30(8) of the Act and any Regulations made thereunder.

7. The Tribunal was also referred to Notice 720/7, which supplements VATA and the Regulations and some of which has the force of law. Notice 720/7 requires the UK importer to meet certain conditions in order to claim OSR, including the completion of EC sales lists, and the recording of EC trade figures on VAT returns. It also provides that, in order to claim OSR, the UK importer must be making a supply of the goods and not merely dispatching them.

The Appellant's Submissions

8. The Appellant's principal ground of appeal was that Articles 138(1) and (2) of the Directive have not been correctly implemented into UK legislation as VATA does not allow for persons acting on behalf of others to qualify for exemption, whereas the Directive does so provide. Mr Brown elaborated upon this ground of appeal in his detailed submissions, which we summarise as follows. Article 143(1)(d) provides that Member States shall exempt from VAT the importation of goods dispatched or transported from a third territory into a Member State other than that in which the dispatch or transport of the goods ends, where the supply of such goods by the importer (as defined by Article 201) is exempt under Article 138. It was submitted that the wording of Article 138 permits persons other than the owner of the goods to benefit from relief because, he submitted, the exemption applies when there is a physical transfer of the goods only and does not require a transfer of legal title to take place.

9. In the alternative, Mr Brown submitted that the UK OSR regime, taken as a whole, is not proportionate and breaches the EU principles of fiscal neutrality and effectiveness. We summarise his arguments on these points as follows.

10. It was submitted that the principle of fiscal neutrality had been breached because HMRC had imposed upon the Appellant the responsibility for charging import VAT whilst refusing it import tax credit, so that the UK Exchequer had benefitted from import VAT being paid on goods which did not remain in the UK but were transferred to a taxable person in Eire. In other words, the same transaction had been taxed twice (in the UK and in Eire) with no corresponding provision for an input tax claim. Mr Brown argued that the principle of fiscal neutrality between Member States required the deduction of input tax even if the Appellant had failed to comply with the conditions, and could be relied upon by a taxpayer to defeat a provision in national law which failed to have regard to the principle, following *Rusedespred OOD (Case C-138/13)* [2013].

11. With regard to the issue of proportionality, Mr Brown referred the Tribunal to *Garage Molenheide BVBA v Belgium* (Joined Cases C-286/94, C-340/95. C-401/95 and C-47/96) [1997] ECR 1 – 7281 as authority for the principle that Member States must employ means which, whilst enabling them effectively to attain domestic objectives, cause the least detriment to Community objectives. He submitted that the conditions for claiming OSR in Notice 702/7 in fact defeated the Community objective of relieving intermediate parties from accounting for import VAT on goods which do not remain in that member state and was not, therefore a proportionate measure.

12. With regard to the principle of effectiveness, Mr Brown submitted that it was breached by the conditions imposed by Notice 702/7, which made it impossible for the Appellant to exercise the rights conferred by Community law because it could not meet the condition of providing a sales invoice, not having taken title to the goods.

13. Finally, Mr Brown submitted that if import VAT were properly due, then the Appellant was entitled to claim the import VAT as input tax under article 169 (b) of the Directive. He referred the Tribunal to correspondence between the Appellant's representative and HMRC dated 8 March 2010 in which HMRC's solicitor's office had confirmed that "*The Commissioner's position as to input tax is that the goods are not supplied to your clients to be used for the purpose of any business carried on by them*". Mr Brown submitted that this communication from HMRC constituted a decision that was appealable to the Tribunal and asked the Tribunal to rule on it.

14. In a supplementary skeleton, Mr Brown sought to distinguish the four First-tier Tribunal decisions relied upon by Mr Fell (see paragraph [17] below) on the basis that in none of them was it argued that UK law is incompatible with EU law and breaches the fundamental principles of fiscal neutrality, proportionality and effectiveness.

HMRC's Submissions

15. Mr Fell submitted on behalf of HMRC that the Appellant had accepted that it had acted as an agent in connection with each of the transactions and was not a party to the contracts of sale. Further the Appellant had accepted that it did not have title to the goods at any time and had not sent VAT invoices to the purchasers, declared the value of the transactions in its financial records, recorded the values of the

transactions in boxes 6, 7 and 8 of its VAT returns or included the transactions on its EC sales lists.

16. HMRC's case was in essence that the Appellant did not qualify for OSR because it had not made a "supply" of the goods which it imported to another Member State. Furthermore, that the conditions for claiming OSR (including a requirement for the importer to complete EC sales lists and record EC trade figures on its VAT returns) had not been complied with so that the Appellant was not entitled to claim OSR.

17. Mr Fell referred the Tribunal to a number of recent decisions of the First-tier Tribunal in which eligibility for OSR had been considered. These included *Radford Racing Limited v HMRC* [2011] UKFTT 658 (TC); *Big Misters Shipping Co v HMRC* [2011] UKFTT 790 (TC); *Brooklands International Freight Services Limited v HMRC* [2012] UKFTT 587 (TC) and *Finger Foods Limited v HMRC* [2013] UKFTT 34 (TC). In each of these decisions, differently constituted panels of the First-tier Tribunal (Tax Chamber) had decided that an Appellant was not entitled to OSR because it had not taken title to the goods and so had not made a supply of them and also because the requirement to complete an EC sales list had not been complied with.

18. In relation to the Appellant's alternative grounds, Mr Fell's submissions may be summarised as follows. Firstly, that the Directive had not been incorrectly implemented because, on its true construction, the Directive precludes the Appellant claiming OSR for the same reason that the domestic legislation precludes it, namely that the Appellant did not supply the goods. Secondly, that the UK OSR regime is not inconsistent with the Directive and thirdly that the conditions imposed by the domestic regime are not only consistent with but expressly permitted by the Directive.

19. Mr Fell drew the Tribunal's attention to Article 14 of the Directive which provides that "*Supply of goods*" shall mean "*the transfer of the right to dispose of tangible property as owner*". He submitted that the correct interpretation of the Directive was therefore that the "supply of goods" (consistent with this definition) by the importer (designated or recognised under Article 201 as liable for payment of VAT) is exempt under Article 138 but that Article 138 does not confer an exemption upon a person who merely dispatches or transports the goods on behalf of the vendor or the purchaser because this is not a "supply". He drew our attention to the ECJ's decision in *Regina (Teleos plc and Others) v HMRC* (Case C-409/04) in which it was confirmed that the Intra Community Supplies exemption required there to be a supply of goods in addition to their dispatch or transport.

20. Mr Fell additionally submitted that the Appellant's case was incorrect in asserting that the UK OSR regime was inconsistent with the Directive in not providing for agents to claim OSR. He directed the Tribunal's attention to s.47 (1) (b) of VATA and paragraph 2.2 of Notice 702/7 which provide that an agent can claim OSR provided it "supplies" the goods.

21. Mr Fell's submission in relation to the conditions for claiming OSR was that these are expressly allowed by Article 131 of the Principal VAT Directive, which

provides that exemptions shall apply in accordance with conditions laid down by Member States "*for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse"*. He referred us to Lord Denning's comments in *Henry Moss of London Limited v Commissioners of Customs and Excise* [1981] STC 139 CA to the effect that the Commissioners were entitled to impose very strict conditions to prevent evasion of VAT.

22. In response to Mr Brown's submissions about breach of EU law principles, Mr Fell argued that there was no breach of the principle of proportionality because the UK OSR regime is entirely consistent with the objectives and principles of the Directive and further that the conditions required to be met for OSR are in any event a proportionate means of preventing abuse, as permitted by Article 131.

23. In relation to the principle of effectiveness, Mr Fell argued that it could not be argued that there had been a breach as the UK OSR regime was consistent with the Directive and further that it specifically provided for agents to claim OSR under s. 47 (1) (b) of VATA.

24. On the point of fiscal neutrality, Mr Fell's case was that the principle is applied so as to ensure that businesses in direct competition with one another are treated equally. However, businesses such as the Appellant's which are engaged in importing goods from outside the EC may not be said to be in direct competition with businesses engaged in intra-community trade, so in his submission the principle of fiscal neutrality was not engaged. He also argued that the wording of the Directive had priority over the principle in any event.

25. Finally, in relation to the issue of a VAT input tax claim, Mr Fell submitted that Mr Brown's argument was misconceived because it must rest upon an assumption that the post clearance demands were correct, which was denied. He also argued that the Tribunal had no jurisdiction to consider this argument because an appeal can only be heard by the Tribunal where HMRC has made a decision falling under s. 83 VATA, and there has been no such decision in this case because the correspondence referred to was a statement of position in relation to an existing appeal on other matters. Furthermore, an "appeal" against this "decision" is a non-starter because the Appellant has not yet paid the tax in relation to the first post clearance demand, so it is not even in a position to make an appeal in relation to a refusal of an input tax claim. In relation to the second post clearance demand note, the "decision" relied upon pre-dates the demand so could not found an appeal. And finally, an input tax claim could in any event only be made if the goods imported were used for the purpose of the Appellant's business, which was agreed not to apply here.

Conclusion

26. We conclude that Mr Brown's argument that the physical movement of goods only, absent an accompanying transfer of the right to dispose of the goods as their owner, is incorrect in the light of the definition of "supply" in Article 14 of the Directive. In this case, there was no transfer of the right to dispose of the goods as

owner as, by its own admission, the Appellant never acquired (and consequently could not transfer) that right. We reject Mr Brown's argument that the domestic OSR regime is inconsistent with the Directive, as it seems to us that they both rely on the same definition of "supply" and that the Appellant, not being a person making a supply, is not entitled to the exemption. As it was accepted that there was no supply of the goods by the Appellant, we must dismiss the two appeals against the post clearance demands on that basis.

27. In relation to the conditions attached to a claim for OSR, we conclude that the UK OSR regime imposes conditions which fall within the latitude given to Member States by Article 131 and we do not find that they subvert the principle and objectives of the Directive or that they are disproportionate. As it was accepted that the Appellant was in breach of the conditions, the appeals are also rejected on that basis.

28. Turning to the principle of effectiveness we conclude that, having found that the UK OSR regime is compliant with the terms of the Directive, Mr Brown's arguments in this regard are not sustainable. We accept Mr Fell's submissions with regard to the principle of fiscal neutrality and conclude that the principle is not engaged in the circumstances of this case.

29. In relation to the Appellant's argument that HMRC's letter dated 8 March 2010 constitutes an appealable decision to deny input tax, we note the context of the correspondence and, if called upon to decide the issue we would be minded to accept Mr Fell's submission that the letter was HMRC's clarification of its position within existing proceedings rather than a free-standing decision which engages rights of appeal. However, it does not seem to us that we have jurisdiction to determine that matter in any event. We note that the Appellant's first Notice of Appeal pre-dates that "decision" and that its subsequent amendment to the grounds of appeal (raising the issue of a possible input tax claim) was made after March 2010 but does not refer to an appeal against a specific decision. The Appellant's second Notice of Appeal was filed after March 2010 but also does not refer to a specific decision. In the circumstances we conclude that there is no determinable appeal before us in relation to that issue and that we have no jurisdiction to decide, in the context of the present appeals, whether the Appellant is entitled in the future to make an input tax claim.

30. Mr Brown did not specifically address the question of the penalty notice but we conclude, having found that OSR was incorrectly claimed, that the penalty was appropriately levied in respect of the mis-declaration and we also dismiss that appeal.

31. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 8 November 2013