TC02454

Appeal number: TC/2011/00868

IMPORT VAT – Company consignee of goods imported into UK and shipped to France – Company did not have title to goods at any time – non-compliance with requirements of Notice 702/7 – Whether eligible for Onward Supply Relief – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FINGER FOODS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
CHRISTOPHER JENKINS

Sitting in public at Bedford Square London WC1 on 5 December 2012

Robert Kiefer, director of Finger Foods Limited, for the Appellant

Oliver Conolly, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal, by Finger Foods Limited (the "Company"), against a decision of HM Revenue and Customs ("HMRC"), to uphold its C18 post clearance demand note for £1,032.12 unpaid import VAT.

Facts

2. The facts which led to HMRC's decision are not disputed.

3. The Company is the marketing arm of its sister company Finger Foods France SA ("FFF"). It distributes products, such as popcorn and snacks, for FFF in the United Kingdom.

4. On 16 June 2009, in a "one off" transaction, plastic sweet caps (the "Goods") from outside the European Union ("EU") were imported into the United Kingdom ("UK") by the Company. The Goods had been ordered and paid for by FFF and it was FFF that had arranged for them to be transported from the UK to France. The Company was not a party to any contract of purchase or sale of the Goods and did not have title to the Goods at any time. Mr Kiefer explained that the Company's only involvement was a telephone call he made to the freight forwarders at Felixstowe to give directions on behalf of FFF. The Goods were declared at import to Customs Procedure Code ("CPC") 4200000, the procedure for Onward Supply Relief ("OSR").

5. The Company did not include the Goods on an EC sales list or record EC sales figures in its VAT returns.

6. On 28 October 2010 HMRC wrote to the Company seeking further information on its OSR declaration and, following correspondence between the parties, on 3 November 2010 HMRC issued the post clearance demand note on the grounds that the conditions of OSR had not been met.

7. Although the VAT shown in post clearance demand note was incorrectly calculated at £1,075.77 the amount in dispute is, as stated above, £1,032.12. This was confirmed in HMRC's letter of 13 January 2011 in which upheld its decision in relation to the import VAT.

Law

8. Section 1 of the Value Added Tax Act 1994 ("VATA") provides that VAT shall be charged (and payable as if it were a duty of customs) on the importation of goods into the UK from outside the EU.

9. Under s 15 VATA goods are imported when they arrive in the UK from outside the EU and a customs debt arises on them. The person liable to pay the VAT is the person liable to pay the customs debt (s 15(2)(b) VATA).

10. Insofar as it is relevant s 30(8) VATA provides:

> 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 supply in question involves both –
>
> (i) the removal of 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 the 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."

Regulation 123(1) of the VAT Regulations 1995 provides:

> 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.

11. As Judge Mosedale noted in *Brooklands International Freight Services Limited v HMRC* [2012] UKFTT 587 (TC) at [12]:

> "The combined effect of these provisions is that an import of goods is free of import VAT if the subsequent sale of them is zero rated because it is a sale to a person registered for VAT in another member State, but only if conditions specified in regulations are met. This is the relief known as onward supply relief."

13. The EU authority for these UK provisions is Art 138 and 143 of the Principal VAT Directive 2006/112/EC (the "Directive"). OSR is mandatory under the Directive, Article 143 which provides:

> Member States shall exempt the following transactions:
>
> (a)…
>
> (b) …

(c)….

(d) the importation of goods dispatched or transported from a third territory…..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;"

(e) ….."

12. Article 138 of the Directive provides for exemption on cross-border transactions. Although it uses the word "exempt", as is clear from the decision of the Tribunal in *Brooklands*, this is given effect in the UK under the zero-rating provisions. The effect of Article 143 (d) of the Directive is therefore that an import is free of VAT *if* the onward supply to a taxable person in another member State is zero-rated.

13. Article 145(2) of the Directive 17 provides:

> ….Member States may adapt their national provisions so as to minimise distortion of competition and, in particular, to prevent non-taxation or double taxation within the Community."
>
> Member States may use whatever administrative procedures they consider most appropriate to achieve exemption.

This is reflected in domestic legislation by the use of the words "such other conditions as … the Commissioners may impose" in s 30(8)(b) VATA which grants HMRC the power to impose conditions for OSR. The conditions, which have the "force of law", are set out at paragraph 2.5 of Notice 702/7 and are as follows:

Condition	you **must** …
1.	be a UK VAT registered trader. **Note you cannot claim OSR if you use a non VAT EORI number or the code GBPR**
2.	be making a zero-rated supply of goods to a taxable person in another EC country
3.	dispatch the same goods as imported. **Note you cannot process them first**
4.	remove the goods to another EC country in one month of the date of importation (which is the date when the goods enter free circulation). If you cannot meet this deadline you can apply to NIRU for extension (see below for contact details) and
5.	complete EC sales lists and record EC trade figures on VAT returns. Are an agent you need to read paragraph 2.2)

14. A "supply of goods" is defined in Article 4 of the Directive as:

> the transfer of the right to dispose of tangible property as owner

15. This is implemented into UK domestic law by paragraph 1(1) of schedule 4 to VATA which defines a "supply of goods" as:

> Any transfer of the whole property in goods is a supply of goods; but, subject to sub-paragraph (2) below, the transfer-
>
> (a) of any undivided share of the property, or
>
> (b) of the possession of goods,
>
> is a supply of services"

Submissions

16. For HMRC, Mr Conolly contended that as it was accepted that the Company was the importer of the Goods it was chargeable to VAT in accordance with ss 1 and 15 VATA and as it had not complied with the conditions in paragraph 2.5(5) of Notice 702/7 OSR could not apply.

17. In addition, he submitted, that OSR could not apply in the absence of any supply; the fact that the Company did not own the Goods and could not therefore transfer any property in them was determinative against its appeal. He referred us to *Brooklands* where Judge Mosedale found, at [19]:

> "…. it [the company] failed to meet the fundamental requirement of OSR that it make a transfer of the ownership of the goods to a taxable person in another member State. On the contrary, we find that the appellant made no transfer of the ownership of the consignment to anyone."

18. Mr Kiefer accepted that OSR could not apply as there could not be any supply by the Company if it did not own the Goods. However, he contended that by imposing a charge to VAT on the Company, even though it was accepted that FFF had paid import VAT in France, that there had been a double taxation in relation to the Goods by which HMRC was unjustly enriched. This, he submitted, was contrary to the Directive. He also referred to the imposition of VAT as akin to a penalty on the Company for not being able to fit in to the OSR regime.

Discussion and Conclusion

19. It is accepted that the Company imported the Goods. Therefore, unless OSR is applicable, the Company is chargeable to the VAT demanded by HMRC under ss 1 and 15 VATA.

20. For OSR to apply there must be a supply of goods. If not, there can be no onward supply to be relieved by OSR. A supply of goods, as defined in paragraph 1(1) schedule 4 to VATA, requires "the transfer of the whole property in goods".

21. As the Company did not own, and never had title to, the Goods it cannot have made a supply of them as it cannot transfer something it did not possess. We therefore find ourselves in the same position as Judge Mosedale in *Brooklands* who found, at [16], that:

> "…the appellant did not own the consignment at any point and it made no supply of it. The consignment at all times remained the property of Noble. The appellant was merely a freight forwarder and acted as such in moving freight belonging to its customer. A basic pre-condition for OSR relief was not met."

22. Therefore, even if it were possible to retrospectively complete an EC sales list, on the basis of the decision of the European Court of Justice in *Terex Equipment Ltd and Others v HMRC* (C-430-/08 and C-431/08 [2010] STC 575, so as to comply with the conditions of Notice 702/7, as a basic pre-condition has not been met OSR cannot apply.

23. We note that had FFF, rather than the Company, been the consignee of the Goods, it (not the Company) would have been the importer and liable to VAT. In the circumstances we have considered an alternative approach, although it was not advanced by Mr Kiefer, which is whether the Company imported the Goods as agent for FFF and able to benefit from OSR in that capacity.

24. Section 47 VATA provides:

> (1) Where-
>
> …
>
> (b) goods are imported from a place outside the member States by a taxable person who supplies them as agent for a person who is not a taxable person,
>
> then, if the taxable person acts in relation to the supply in his own name, the goods shall be treated for the purposes of this Act as acquired and supplied or, as the case may be, imported and supplied by the taxable person as principal."

25. Although in such circumstances an agent is treated as making a supply (when as a matter of general law it does not do so, as it is merely acting as agent for a principal which is itself making the supply) this is only when the agent "acts in his own name". This is clearly not the position here as FFF, and not the Company, was a party to the contract for the Goods. Therefore, although it may be possible for an agent to benefit from OSR in some circumstances these do not arise in the present case.

26. While we do sympathise with the position the Company finds itself and the fact that Mr Kiefer feels that the VAT charge is akin to a penalty leading to the unjust enrichment of HMRC as a result of double taxation we find the legal position to be clear. The VAT has arisen as a result of the operation of the relevant legislation, namely ss 1 and 15 VATA which the Tribunal is bound to apply.

27. As the Upper Tribunal (Mr Justice Warren and Judge Bishopp) recently stated in *HMRC v Hok Ltd* [2012] UKUT 363 (TC), at [56]:

> "… the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, …It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct."

Decision

28. For the above reasons we have no alternative but to dismiss the appeal.

Right to Apply for Permission to Appeal

29. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 14 December 2012