[2015] UKFTT 0239 (TC)

TC04431

Appeal number: TC/2014/01179

VALUE ADDED TAX – Import VAT – Importation of US Silver Eagle Dollar Coins – whether exempt under Art. 135(1)(e) Principal VAT Directive - no - whether misleading advice given before importation – not within jurisdiction of Tribunal.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTONIO SAVIDIS **appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
PHILIP JOLLY

Sitting in public at the Civil and Family Law Centre, 35 Vernon St, Liverpool on 24 April 2015

The appellant did not appear and was not represented

Lisa Linklater, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Antonio Savidis ("the appellant") appeals against a decision of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") dated 22 October 2013 in which they refused to repay VAT charged on two importations by the appellant of 1000 US Silver Eagle One Dollar coins (500 on each occasion).

2. The appellant, who was unrepresented, was not present at the hearing at 10.30 am, the starting time. The clerk phoned him using the mobile number he had given on his appeal form and left a message on the phone requesting him to contact the Tribunal. When by 10.45 am the appellant had neither returned the call nor appeared in the Tribunal, the proceedings began.

3. The Tribunal noted that the notice to attend the hearing had been sent to the appellant at the address given by him on the appeal form, and had given the correct time, date and location of the hearing. The Tribunal was satisfied, in accordance with Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, that the appellant had been notified of the hearing. We noted that we had been provided with submissions and authorities from the appellant, and although there was a possible dispute about the accuracy of a transcript of a telephone conversation between the appellant and an officer of the respondents we considered we would be able to resolve any possible conflict from the other documents. We therefore considered that it was in the interests of justice to continue to hear the case.

The evidence

4. We were provided with a single bundle of documents which included both the appellant's and HMRC's documents. We also had a witness statement made by Ms Sharon Barbouti, an officer of HMRC, who carried out the statutory review of the decision. Ms Barbouti's statement put in evidence her review decision and a transcript of a telephone conversation between the appellant and another officer of HMRC.

5. Shortly before the hearing, on 10 April, and after the time laid down in directions, HMRC applied to allow the admission of a further witness statement, of Mr Dapo Sanusi, another officer of HMRC. Ms Barbouti had been transferred to other duties unrelated to the case and was not available to attend. Mr Sanusi's statement was to the effect that he was also a reviewing officer in the same part of HMRC, had read Ms Barbouti's review decision and agreed with it. He also attached what was said to be a more accurate transcript of the telephone conversation. The Tribunal decided that as Mr Sanusi's statement contained nothing that could have taken the appellant by surprise as it added nothing material to Ms Barbouti's statement, it would waive the time limit in the directions for serving witness statements and admit Mr Sanusi's statement.

6. Mr Sanusi gave evidence in which he put in his witness statement which was then taken as read.

The facts

7. From the documents supplied we find the facts set out in the subsequent paragraphs of this part of the decision. The facts appeared not to be in dispute save for the accuracy of the (first) transcript of the telephone conversation though the substance of the appellant's objections to this were not clear.

8. On 25 July 2012 Mr Savidis emailed HMRC asking:

> "Hi I would like to know if there is VAT payable when importing silver coins that are legal tender, namely $1 American Silver Eagle coins and $5 Canadian Silver Maple Leaf coins, or if legal tender is VAT exempt. Regards Antonio."

9. On 2 August 2012 Mrs Sue Clements of HMRC Customs, International Trade and Excise replied, by email. The two paragraphs which answered the appellant's questions were:

> "Import Duty is not normally payable upon the vast majority of coins imported from outside of the EU and VAT is exempt on qualifying coins under Article 135. 1 (d) and (e) of The principal VAT Directive which exempts transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items. Therefore if these Coins could be considered collectors items then VAT would be payable at 20%, calculated upon the purchase price plus any freight and insurance costs.
>
> Please note that the VAT exemptions that sometimes apply to 'investment' Gold do not apply to Silver, regardless of whether it has been purchased for investment purposes."

10. On 18 December 2012 the appellant telephoned HMRC speaking to Ms Sarah Moynihan, an adviser in HMRC. The extracts below are taken from the revised transcript exhibited by Mr Sanusi's witness statement.

> "Q (the appellant): Hello I'm calling regarding importing silver coins which are legal tender.
>
> … ["…" indicates a non-committal "uh-huh" by Ms Moynihan or other irrelevant matter]
>
> Q: I sent an email about this in July … which basically asked if there was VAT payable on silver coins which were legal tender … Now I got a reply to the email saying that legal tender is exempt from VAT … However if the coins were considered collectors items then VAT would be payable.
>
> …
>
> "A (Ms Moynihan) So you need to know if they're considered collectors items or not.
>
> Q: Well, they're not, they're not, I mean it's 1 dollar, 1 dollar US coins which I want to import and they're not, they're not collectors items. It's just because I want to have … US currency on hand.

A: If they're not classed as collectors items then they would just be exempt.

…

Q: The courier company are going to question that [that there is no VAT] aren't they?

A: Well no, 'cos there might not be VAT, there's lots of different rates of VAT so that could be correct, if it's not a collectors item then it is exempt from VAT and you won't be charged import VAT.

…

A: I'm not sure about the form [C88] as that's the Customs side of it but certainly for VAT purposes it's standard rated if it's collectors items and not if it's exempt.

…

A: No not everything comes with import VAT

Q: OK, er, could you put a note on the system saying that?

A I'll put a note on the system but it won't stop anything, you import the coins and if they're not collectors items then they'll be exempt, if they incorrectly charge you then you'll be able to sort that out at the time.

Q: OK, yeah, I mean if you could put a note on saying that you've told me to import them and they'll be exempt, that'll be great."

A: I'll certainly make a note on but that's what they are if it's legal tender it's exempt.

Q: OK

A: And if its collectors items it's standard rated."

11. On 27 June 2013 the appellant sent an email to the shipper. In it he says

"I have spoken to HMRC previously and was told by them that I don't need to pay VAT on silver coins that are legal tender since being legal tender makes them VAT exempt.

The shipment with tracking number [ ] contains US legal tender and therefore should be VAT exempt according to HMRC.

…

The commodity code for silver coins that are legal tender, as given to me by the Tariff Classification Department is 7118900090.".

12. On 3 July 2013 the first consignment of silver coins was imported. The customs entry, made by UPS acting as agents for the appellant, shows the imported goods as "2010 Silver American Eagle 500-coin Monster box (sealed) .999 Fine Bullion Coin 1." The customs value for VAT is £7682.40 and import VAT of £1536.48 was charged. The invoice value is $11,395 ($22.79 per 1 dollar coin).

13. The Tariff Classification Code given is 7118100010. This code relates to "COIN: Coin (other than gold coin, not being legal tender – of silver".

14. On 10 July the appellant sent another email to the shipper. Apart from the tracking number it is identical to the email of 27 June.

15. On 22 July 2013 the second consignment of silver coins was imported. The customs entry, again by UPS acting as agents for the appellant, shows the imported goods as "2013 Silver Eagle 500-coin Monster box (SF Mint sealed) .999 Fine Bullion Coin 1." The customs value for VAT was £7622.67 and import VAT of £1524.53 was charged. The invoice value is $11,775 ($23.55 per 1 dollar coin).

16. The Tariff Classification Code given is 7118900090. This code relates to "COIN: Other – other". What this means is that they are coins and are legal tender.

17. On 7 August 2013 the appellant, acting through his agent UPS, applied on Form C285 for repayment of the whole of the import VAT. The basis of claim is that "the goods are exempt from VAT as per Customs Reference CGF2539". This is the reference number given to the appellant by Ms Moynihan at the end of their telephone conversation.

18. On 14 September 2013 Mrs Jackie Smith of the HMRC National Duty Repayment Centre sent UPS a letter telling them that she intended to refuse the claim because there was no VAT relief on silver coins imported into the UK, but she asked for any further evidence or arguments that the appellant wished to adduce to be supplied within 30 days.

19. On 22 October 2013 Mrs Smith sent a letter of refusal to UPS and set out two options available to the appellant if he disagreed with the decision. He could either request a review or appeal directly to the Tribunal.

20. On 2 December 2013 the appellant sent a letter stating he wished to appeal the decision. Among the points he made in this letter were:

> "I was told [by HMRC] that as long as the coins are not considered collectable then being legal tender would make them zero VAT"
>
> Based on the information I was given from HMRC I ordered the silver one dollar coins thinking that no VAT would be payable."
>
> I have since been informed that I was given wrong information when I called HMRC. Had I known VAT would be payable I would never have ordered the coins.
>
> Please could you consider my appeal on the grounds of having been given wrong information.".

21. On 17 January 2014 Ms Barbouti of the Customs Directorate Reviews and Appeals Team wrote to the appellant. HMRC had, she said, taken the appellant's letter of 2 December as a request for a review and she had carried out the review. Ms Barbouti upheld Mrs Smith's decision to refuse to repay the import VAT.

22. On 12 February 2014 the appellant made his appeal to the Tribunal. In his grounds of appeal he referred the Tribunal to his letter of appeal to Mrs Smith.

23. On 14 March 2014 HMRC applied to the Tribunal under Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to strike out the appeal. This application was made on the basis that the appellant's grounds of appeal were that he had been misled by HMRC, a matter over which the Tribunal had no jurisdiction. However the appellant's response to being notified of the application was to say that he relied on Article 135(1)(d) and (e) of the Principal VAT Directive ("PVD") as the grounds of his appeal. HMRC thereupon withdrew their application to strike out the appeal.

24. As mentioned the only possible area of dispute was the transcript of the telephone conversation of 18 December 2012 but we do not know in what respect the appellant disputes the accuracy of the transcript. Having compared the transcript with the statements made by the appellant on other documents such as his emails to the shipper and his letter of appeal against the decision, we have no reason to think that there is any material inaccuracy in the transcript and we find that both transcripts are accurate in so far as they record what the appellant said as well as what Ms Moynihan said.

The law

25. In its communications with the appellant, its Statement of Case and its skeleton argument HMRC have cited a substantial amount of law. This includes Articles 201 and 236 of Council Regulation 2913/92, Article 199 of Council Regulation 2454/93 and Group 15 of Schedule 9 to the Value Added Tax Act 1994 (exemption for investment gold), as well as Heading 7118 of "the Tariff". We struggle to see the relevance of much of this, except for Article 236 of Regulation 2913/92 as that is the legislation under which the appellant made his claim to repayment. By contrast the appellant has cited as his only authorities Article 135(1)(d) and (e) of Council Directive 2006/112/EC (the PVD) and Group 5 of Schedule 9 to the Value Added Tax Act 1994 ("VATA"). Article 135(1)(a) to (g) provides for an exemption from VAT for finance including the supply of money, and Group 5 of Schedule 9 to VATA is the "transposition" of those points of paragraph 1 of the Article into UK domestic law. These are indeed the relevant legislative provisions for this case.

26. HMRC suggest that it is in fact only point (e) of Article 135(1) that is relevant, and that since in the event of any conflict the PVD overrides domestic law, that is the only substantive law with the case is concerned. We agree.

27. Article 135(1)(e) of the PVD provides

> "1. Member States shall exempt the following transactions:
>
> …
>
> (e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;".

28. For completeness we also set out the relevant parts of Group 5 of Schedule 9 to VATA, and the introductory provision in section 31(1) VATA

> "31 Exempt supplies and acquisitions
>
> (1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 and an acquisition of goods from another member State is an exempt acquisition if the goods are acquired in pursuance of an exempt supply."
>
> "Item No
>
> 1 The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money.
>
> ….
>
> NOTES
>
> ….
>
> (2) This Group does not include the supply of a coin or a banknote as a collectors' piece or as an investment article.".

The submissions

The Article 135 issue

29. The appellant's submission on this issue is the argument he put in his response to HMRC's application to strike out, namely that the coins he imported are exempt from VAT as a result of Article 135(1)(d) and (e) of the PVD. From the points he had made in correspondence and the telephone call we take the appellant's argument on this to be that the silver dollar coins he imported are in fact legal tender and therefore they are not collectors items within the meaning of the Article and are exempt from VAT.

30. HMRC's primary submission on the substantive law aspect as set out in its skeleton are that the coins are outside the exemption, as they come within the exception from the exemption for "collector's items or an investment article". This phrase comprises one term from Group 5 being one of a pair of terms which together make up the exception to the exemption and one term from Article 135 which covers the two limbs of the exception. However, in the exposition of their arguments in the skeleton HMRC accept that it is only by reference to Article 135 that the appellant's claim is to be judged. As there is no suggestion by HMRC that the coins are of numismatic interest, the sole issue, they say, is whether they "are not normally used as legal tender."

31. HMRC further say that the question is to be tested by reference to objective factors, a proposition in support of which they cite *Milk Marketing Board v Commissioners of Customs and Excise* (1989) VAT Tribunal Decision 3389 on the predecessor of Article 135(1)((e), Article 13B(d)(4) in Directive 77/388/EEC (the Sixth VAT Directive). In that decision, the Chairman, Lord Grantchester said:

> "I proceed to consider whether the £2 coins distributed by Dairy Crest under the sales promotion scheme were 'collectors' pieces' or 'collectors' items'. In my view this is to be determined by reference to the nature of the coins themselves, and not by references to the purchasers who acquired them from Dairy Crest.".

32. HMRC further argued in response to a question from the Tribunal that it is not relevant whether the coins in question are in fact legal tender. Instead HMRC point to the (objective) fact that the customs declarations show that the coins are worth more than 20 times their face value, so that it is inconceivable that they would be normally be used as legal tender.

33. HMRC also point to the fact that in one of the customs declarations the Tariff Classification number used was 7118 1000 10 which they says applies to coins of silver which are not legal tender. They refer to two Public Notices, VAT 701/49/13 at paragraph 2.6 and VAT 701/21A. Finally they say that Article 135(1)(d), mentioned by the appellant, is of no relevance.

34. We agree with HMRC that Article 135(1)(d) is irrelevant, that the case turns on the wording of point (e) and that the test is objective. In this regard we note that in *Milk Marketing Board* the Chairman implied that the reason for holding that the test was an objective one was that otherwise one would have to determine the reason why "housewives and [other] persons" bought the commemorative coins in that case. Likewise we consider that an importation system in which the correct import VAT depends on the purposes or intention of the importer with regard to the goods imported or the opinion of the importer as to whether the items were "collectable" would be unworkable.

35. Nor can we see that the Tariff Classification Number selected by the importer should be determinative and binding either on HMRC or on the importer, for a number of reasons. First, one of the classifications in this case, 7118 9000 90, covers items which are both exempt and standard rated. Second, regulation 120(3) of the Value Added Tax Regulations 1995 (SI 1995/2518) makes it clear that "Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff" is not part of the legislative framework for import VAT as it provides that the Regulation "shall be excepted from the Community legislation which is to apply as mentioned in section 16(1) of the Act." ie to import VAT. And third, going back to the objective nature of the test, VAT liability ought not depend on the importer's choice of classification number.

36. But we do not agree that the question of whether the coins are in fact legal tender is irrelevant, either in law or in relation to the facts in this case. The first two questions and the last two answers in the extracts from the appellant's telephone conversation with HMRC set out in paragraph 10 of this decision show that the question of legal tender or not was clearly in the minds of both the appellant and Ms Moynihan, who in the answers mentioned drew a clear distinction between "legal tender" on the one hand and "collectable items" on the other.

37. The exemption as set out in Article 135(1)(e) (but not in Group 5 Item 1) is for coins and notes "used as legal tender", so any exception to that exemption for coins "which are not *normally* used as legal tender" (our emphasis) must be for a subset of the coins which though not normally used as legal tender might exceptionally be so used. The exception for coins or banknotes "not normally used as legal tender" cannot logically apply to coins or notes which are not in any circumstances capable of being used as legal tender, because they could never be coins which even abnormally or exceptionally could be used as legal tender.

38. In any event it seems clear that the purpose of Article 135(1)(e) and of Item 1 in Group 5, which is headed "Finance", is to exempt from VAT the day to day dealings by in particular banks with their stock in trade, money, which is being supplied for a consideration in millions of transactions daily. This money which is oiling the wheels of commerce and the banking system is clearly always going to be legal tender.

39. We interject at this point an observation about the English version of the Article. It says "used as legal tender". This implies something more than simply the legal status of the coins as legal tender. An examination of the versions of Article 135 (1)(e) in French, German, Spanish, Dutch and Swedish shows that in each of them the test is simply whether they are ("sont", "sind" etc.) legal tender or are capable of being ("sean" which is the subjunctive form of "be" in Spanish). The Italian and Portuguese versions use an adjectival phrase to denote that the coins are legal tender. We therefore think the correct UK test for the exemption is whether the coins and notes are in fact legal tender. The Irish domestic law says "in use as legal tender", but it also uses wording that contradicts HMRC's argument, as it says at paragraph 6(1) of Schedule 1 to the VAT Consolidation Act 2010 (Ireland):

> "(d) issuing, transferring, receiving or otherwise dealing in currency, bank notes and metal coins, in use as legal tender in any country, but excluding any *such* bank notes and coins that are supplied as investment goods or as collectors' objects;".

The word italicised (by us) shows that the items in the exception can only be a subset of the items in the exemption. We have perhaps laboured this point, but that is because of the matters mentioned in paragraph 36 above and because the appellant was not legally represented.

40. As to the question whether the coins are in fact legal tender, HMRC put forward no evidence to show that they were not legal tender in the USA. Had the appellant been legally represented he may well have sought to put forward evidence that they were, and from our own researches we consider that the appellant is correct, as section 5103 of Title 31 of the US Federal Code says:

> "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.".

and section 5112 of the same Title provides the authority for the US Treasury to issue these particular coins.

41. But although it is a necessary condition in our view that the coins be legal tender if they are to obtain the exemption in Article 135(1)(e) of the PVD, it is not sufficient that they are. To fall within the exemption they must not be "normally used as legal tender". Since this is, as HMRC say and we agree, an objective test, the appellant's statement in the phone conversation that he was thinking of importing them because he wanted some US dollars to hand is irrelevant.

Misleading advice?

42. The appellant submitted that he should not be charged VAT on the import because he had been given incorrect information in the email from, and telephone call with, officers of HMRC, and had he known that VAT would be chargeable he would not have bought the coins.

43. HMRC's case is that the advice given to the appellant was general rather than specific guidance, was not legally binding and that the allegation was outside the scope of the Tribunal's jurisdiction.

Decision

44. On the Article 135 issue we agree with HMRC that it is simply not conceivable that someone would "normally" use a coin worth more than $20 to purchase something worth one dollar. We therefore hold that these two importations of coins were not exempt from VAT as they fell within the exception to the exemption given by Article 135(1)(e) of the PVD.

45. But it has proved somewhat difficult to determine what the scope of the Tribunal's jurisdiction in this case is, as nowhere in the papers is there any indication of what legislation it is that governs the appeal and review process in this case.

46. We know that the charge to VAT in this case is under s 1(5) of VATA (VAT on importation) and that under section 16 VATA, legislation relating to customs duties applies to import VAT unless it is excluded. We know too that the application for repayment of import VAT was made under Article 236 of the Community Customs Code. From this we can deduce that HMRC's decision to turn down the application was a decision falling within section 13A(2)(a) Finance Act ("FA") 1994, as applied by section 16(1) VATA. From that it follows that the appeal to the Tribunal was made under section 16(1C) FA 1994 (and we are reinforced in our view by section 84(9) VATA). Having this set out in HMRC's Statement of Case or Skeleton would have been more helpful to us than the lengthy citations of irrelevant law.

47. As to the appellant's claim that he was misled into buying coins which he would not have bought had he known that he would be charged VAT, we agree with HMRC that this is not a question which this Tribunal can consider.

48. As authority for our lack of jurisdiction, HMRC cited paragraphs V1.287 and V1.274 of de Voil's Indirect Tax Service, which cover estoppel and rulings respectively. But we prefer to rely on the decision of the Upper Tribunal in *HMRC v Abdul Noor* [2013] UKUT 071 (TCC) (Warren J and Judge Colin Bishopp) which is

binding on us and states clearly that this Tribunal has no jurisdiction not to follow the law because the appellant has been misled by being given incorrect information by HMRC. If the appellant wishes to pursue this point then he must either do so by way of application for judicial review in the Administrative Court or by an official complaint to HMRC. But we should not be taken as giving any encouragement to him to do either of these things; neither are we going to say whether we think he was in fact given any misleading advice.

49. Accordingly the appeal against the two HMRC decisions not to repay VAT charged on the importation of US Silver Eagle Dollars on 3 July and 22 July 2013 is dismissed and the decisions upheld. This means that the appellant will not get back any of the VAT charged on the coins.

50. 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.

RICHARD THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 21 May 2015