[2020] UKFTT 0014 (TC)

TC07520

VAT – zero rating of exports – evidence of export of goods – whether sufficient evidence of export provided to support zero rating – s 30(6) VATA94, Regulation 129 VAT Regulations and VAT Notice 703

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/04113

BETWEEN

A & S IMPORT AND EXPORT TRADING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE
TERRY BAYLISS

Sitting in public at Centre City House, Birmingham on 6 December 2019

Tim Brown, counsel, instructed by Salhan Accountants Ltd for the Appellant

Karleen Ellis, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns a dispute about the availability of zero rating for supplies of goods purportedly exported to China, specifically addressing the adequacy of the evidence provided to HMRC in support of such zero rating.

THE FACTS

Background

2. We received witness statements and heard evidence from Hongyu Chen, Director of the Appellant, and from Afsar Hussain, the assessing HMRC officer. We also received a bundle of documents. We find the following facts.

3. The Appellant was incorporated on 12 April 2012 and registered for VAT with effect from 1 May 2014. Its business involved the purchase in the UK of original branded goods and selling them to middle-class purchasers in China who were concerned about the prevalence of counterfeit goods (initially particularly baby milk powder) in that market. The scope of products involved expanded to cover cosmetics, skincare products and luxury goods (such as iPhones and luxury brand bags). Sales were made through a website called Taobao (similar in China to eBay) and (particularly for individual orders of luxury goods) through WeChat, a messaging platform.

4. The Appellant's VAT return for period 01/17 claimed a repayment of £48,474.43. It was selected for checking. A visit was arranged, which took place on 8 May 2017, when officer Hussain attended and met with Mr Chen and the Appellant's accountants.

5. During the visit, Mr Chen explained that the Chinese authorities required purchases of goods from overseas suppliers to be below a certain value, as a result of which the Appellant had incorrectly described and undervalued the goods on the export shipping documents. Mr Chen also explained in his witness statement that he "sometimes" entered deliberately vague or even misleading descriptions of the goods on the customs declaration form CN23 "in order to reduce the possibility of theft in transit".

6. Subsequently HMRC's enquiries extended to other VAT periods and ultimately an assessment in the total amount of £152,181 in respect of periods 07/15 to 07/17 was notified by HMRC on 7 March 2018 and appealed. There is no dispute about the quantum of the claim or the periods in respect of which it applies. The only issue is whether the requirements for zero rating of the relevant supplies have been satisfied.

Evidence of export

7. We were taken to some specific parts of the document bundle. First, there were some documents relating to the purchase, sale and purported export of an iPhone 7 plus. This consisted of a duplicate purchase invoice dated 9 November 2016 from the Apple Store in Birmingham, an invoice to a Mengxi Lu in Beijing (which also included reference to 44 pieces of "Lush New bar"), a copy of two lines from an Alipay transaction sheet of the Appellant showing receipt of two payments totalling the invoice amount from a different sender (Alipay being equivalent to PayPal) and a shipping document of Parcelforce relating to the sending of a package to a Lu Meng Xi in Beijing on 9 November 2016. This shipping document included the customs declaration in form CN23, which gave a "Detailed description of contents" as "healthy product", a "Quantity" of 6, a "Net Weight Kg" of 1.05 and a "Value GBP" of 10, with a "Total Value GBP" of 60 and a "Gross weight kg" of 7. Thus there was nothing on the shipping document to show that an iPhone had been included in the shipment.

8. We were also shown a print-out of Alipay transactions over the period 1 August to 31 October 2016 and the significance of the various entries (which were partly in Chinese) were explained to us. No link could however be established between any of the items whose purchase was supposedly reflected in that print-out and evidence showing the export of those items. There was evidence of various shipments to China, and (albeit in Chinese) of various listings of products on TaoBao, but neither for HMRC nor for the Tribunal at the hearing was the Appellant able to establish a clear link connecting any particular sale of a product with a properly evidenced export of that product.

THE LAW

9. The provisions for zero rating of exports derive from Art 146(1)(a) of Directive 2006/112/EC, which provides that Member States shall exempt the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor. In the UK, this is implemented under authority of section 30(6) Value Added Tax Act 1994 ("VATA"), which provides that "a supply of goods is zero-rated by virtue of this sub-section if the Commissioners are satisfied that the person supplying the goods… has exported them to a place outside the member states… and … if such other conditions, if any, as may be specified in Regulations or as the Commissioners may impose are fulfilled." Regulation 129 of the Value Added Tax Regulations 1995 provides:

> **Supplies to overseas persons**
>
> (1) 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, or
>
> (iii) an overseas authority, 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.

10. VAT Notice 703 "explains the conditions for zero rating VAT on an export of goods, that is, when the goods leave the EC. It also provides guidance on what you should do when you export goods in specific circumstances." Under the heading "Legal status of this notice", the following text appears:

> Under UK VAT law, HMRC may specify conditions to prevent evasion, avoidance or abuse. This notice lays down the conditions, which must be met in full, for goods exported outside the EC to be zero-rated. Plain English has been used wherever possible but as these conditions have legal status, some legal wording has been necessary.
>
> **Text shown in boxes has the force of law.**

11. Under the heading "Conditions for zero rating direct exports", in paragraph 3.3 of the Notice, the following text is stated to have the force of law:

> A supply of goods sent to a destination outside the EC is liable to the zero rate as a direct export where you:
>
> - make sure that the goods are exported from the EC within the specified time limits (see paragraph 3.5)

- obtain official or commercial evidence of export as appropriate (see paragraphs 6.2 and 6.3) within the specified time limits
- keep supplementary evidence of the export transaction (see paragraph 6.4), and
- comply with the law and the conditions of this notice

12. Under the heading "Time limits for exporting the goods and obtaining evidence", in paragraph 3.5 of the Notice, the following text appears:

> You must export the goods from the EC and obtain valid evidence of export within the time limits shown in the table below. In all cases the time limits are triggered by the time of supply…
>
> If you have not exported the goods within the time limits, or do not hold the necessary evidence to show that the goods have been physically exported, you must not zero rate the supply and must account for VAT at the appropriate UK rate…

13. The table referred to states that in the case of direct exports (with which we are here concerned), the time limit for exporting the goods and for obtaining evidence is, in each case, three months. The table is declared to have the force of law.

14. Section 6 of the Notice contains the following text:

> **6.1 What this section covers**
>
> This section explains the evidence that is required for a supply of goods exported outside the EC to be zero-rated for VAT.
>
> For VAT zero rating purposes you must produce either official evidence as described in paragraph 6.2 or commercial evidence as described in paragraph 6.3. Equal weight is put on official and commercial transport evidence but both must be supported by supplementary evidence to show that a transaction has taken place, and that the transaction relates to the goods physically exported. If the evidence of export provided is found to be unsatisfactory, VAT zero rating will not be allowed and the supplier of the goods will be liable to account for the VAT due…
>
> **6.2 Official evidence**
>
> …
>
> **6.3 Commercial transport evidence**
>
> This describes the physical movement of the goods, for example:
>
> - authenticated sea-waybills
> - authenticated air-waybills
> - PIM/PIEX International consignment notes.
> - master air-waybills or bills of lading.
> - certificates of shipment containing the full details of the consignment and how it left the EC, or
> - International Consignment Note/Lettre de Voiture International (CMR) fully completed by the consignor, the haulier and the receiving consignee, or Freight Transport Association (FTA) own account transport documents fully completed and signed by the receiving customer.

…

6.4 What supplementary evidence is available

You are likely to hold, within your accounting system some or all of the following:

- customer's order
- sales contract
- inter-company correspondence
- copy of export sales invoice
- advice note
- consignment note
- packing list
- insurance and freight charges documentation
- evidence of payment and/or
- evidence of the receipt of the goods abroad.

You must hold sufficient evidence to prove that a transaction has taken place, though it will probably not be necessary for you to hold all of the items listed.

6.5 What must be shown on export evidence

The text in this box has the force of law.

The evidence you obtain as proof of export, whether official or commercial, or supporting must clearly identify:

- the supplier
- the consignor (where different from the supplier)
- the customer
- the goods
- an accurate value
- the export destination, and
- the mode of transport and route of the export movement.

Vague descriptions of goods, quantities or values are not acceptable. For instance, 'various electrical goods' must not be used when the correct description is '2000 mobile phones (Make ABC and Model Number XYZ 2000)'. An accurate value, for example, £50,000 must be shown and not excluded or replaced by a lower or higher amount.

If the evidence is found to be unsatisfactory you as the supplier will become liable for the VAT due.

15. Thus the guidance under heading 6.5 as to the level of detail required in the evidence of export is not legally binding, however the requirement for the proof of export to "clearly identify" (amongst other things) the goods and an accurate value does have the force of law.

16. HMRC referred to the VAT Tribunal decision in *G McKenzie & Co (Est 1919) Ltd* [1994] No. 12949. In that case, the Appellant claimed to have exported large quantities of precious metals, however the air waybills were marked "NVD" (No Value Declared) and carried

descriptions such as "soldering paste", "grinding paste", "soldering flux (soldering material)" and "soldering material (flux/powder)". The exporter explained that the goods had been exported with labelling designed to avoid pilfering.

17. After finding that the exporter was required to hold proof of export which clearly identified the goods, the Tribunal went on to say this:

> We find as a fact that the Appellant did not hold such proof. Furthermore the Appellant failed to retain much of the commercial documentation which it did originally hold. There was no record of the orders or of the items despatched. Section 16(6) refers to "a supply". Although the singular usually includes the plural it seems to us that the evidence should be capable of being related to each supply. In this case there is no way of ascertaining what was in each consignment. Some of the packets were not precious metals at all. On any view it is not clear that all the purchases by weight have been accounted for in despatches.
>
> Given that there is no evidence of domestic sales or any diversion to Mrs Agarwalla's business the most likely explanation is that the goods went to Bangladesh. However the only matter of which we are confident is that we have not had the full story."

ARGUMENTS

18. Mr Brown argued that, taken in the round, the documents and supporting commercial evidence were sufficient to satisfy the requirements of the legislation and Notice 703; there was no requirement that a single document should record all the information required by section 6.5 of Notice 703. He referred to *HMRC v Arkeley Limited (in liquidation)* [2013] UKUT 0393 (TCC), in which the Upper Tribunal had, at [38], endorsed the following statement made by the FTT in that case:

> Paragraph 6.5 of Notice 703 does not require that the necessary proof of export must all be contained in one document. In our judgment provided that the documents can be linked together a number of documents may together 'clearly identify' the necessary matters under paragraph 6.5. Where there is a conflict between documents this may prevent the necessary linkage and may result in the matters not being clearly identified. While Mr Onwufuju [representing Arkeley] is correct in saying that Notice 703 did not stipulate that everything in the documents must be correct, the evidence of export must read as a whole clearly and correctly identify all the matters specified in paragraph 6.5. Under paragraph 3.4 which is binding the evidence of export must include either official or commercial evidence of export.

19. In his submission, Mr Chen was clearly an honest witness; the Appellant had clearly shipped a large volume of goods, for which substantial evidence had been provided; there were no allegations or evidence of bad faith or diversion of the goods; and notwithstanding the inability to link specific purchases and sales of goods to specific export movements, the evidence was sufficient to establish the relevant exports had taken place.

20. Ms Ellis argued that there was a clear lack of adequate evidence, specifically in relation to items 4 and 5 in the bullet point list in paragraph 6.5 of Notice 703 (a description and accurate value of the goods comprised in each shipment). There was therefore no adequate evidence that the goods had been sent and/or received. As was apparent from the attempts made during the hearing, it was not possible to link any of the export documents with specific goods bought and/or sold on the basis of the records presented, and the descriptions and values actually given in the export documents (which might have provided such a link) were entirely unhelpful, indicating no such link.

21. There was some suggestion that all the necessary information might be contained on a USB stick which had been offered to HMRC but which they had refused to consider. Whatever the position in relation to that matter, none of the information on any such USB stick was before the Tribunal and therefore we could not take it into account in reaching our decision.

DISCUSSION AND DECISION

22. We accept that it is not a requirement that all the necessary evidence of export needs to be contained in a single document in each case. However, the fundamental problem that we encountered is that it was simply not possible, on the basis of the evidence before us, to link up the various pieces of that evidence in a way which satisfied the requirements of paragraph 6.5 of Notice 703. Like the FTT in *Arkeley*, we consider that "the evidence of export must read as a whole clearly and correctly identify all the matters specified in paragraph 6.5" and, regrettably for the Appellant, in our view in this case it does not.

23. It follows that the appeal must be DISMISSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

24. 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.

KEVIN POOLE

TRIBUNAL JUDGE

RELEASE DATE: 8 JANUARY 2020