Neutral Citation: [2022] UKFTT 198 (TC)

Case Number: TC08523

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/03893

VALUE ADDED TAX – denial of zero rating on sales of plant/machinery to the Republic of Ireland on the basis of failure to provide sufficient evidence of removal as required – VAT Notice 725 considered – appeal dismissed

Heard on: 14 June 2022
Judgment date: 22 June 2022

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER: DUNCAN McBRIDE

Between

MARON PLANT LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown, of counsel

For the Respondents: Giselle McGowan, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appellant appeals against the assessment of VAT dated 27 February 2019 issued by the respondents ("HMRC") pursuant to Section 73 of the Value Added Tax Act 1994 ("VATA") for the periods 05/17 to 08/17, 10/17 and 01/18 to 03/18 in the sum of £201,024.99.

2. That assessment had been raised on the basis that the appellant had not provided sufficient evidence of removal of goods from the UK to entitle it to zero rated supplies for VAT purposes ("the Alternative Assessment"). Those goods were 29 items of plant/machinery allegedly sent to the Republic of Ireland ("Ireland") on 16 occasions, involving 20 invoices. The plant/machinery is referenced by an individual transaction number in this decision.

3. The Notice of Appeal appealed not only the Alternative Assessment but also another assessment in respect of the same tax which had been raised on the basis that the appellant knew or should have known that its supplies were part of the fraudulent evasion of VAT ("the Preferred Assessment").

4. By letter dated 23 September 2020, the Tribunal granted HMRC's application for the appeal against the Alternative Assessment to be determined first, with the appeal against the Preferred Assessment to be heard subsequently if the appeal against the Alternative Assessment succeeds. This appeal is therefore only concerned with the appeal against the Alternative Assessment.

5. We had Skeleton Arguments for both parties together with a documents bundle extending to 522 pages and an authorities bundle extending to 200 pages. Mr Brown also referenced a further two FTT decisions. We heard evidence from Mr Gary Bell, a director of the appellant and Officer Michael Pye of HMRC.

The facts

6. The appellant is a private limited company whose main business activity consists of the sales of JCB excavators and other construction equipment. The majority of the sales were overseas, either in or out of the European Union.

7. Mr Bell describes the appellant as a "one-man band". Effectively he is the appellant.

8. On an unspecified date in February 2017 Mr Bell was contacted by a man called David (no surname was ever provided) who requested details of various JCBs advertised on the appellant's website. Thereafter, the appellant received an email in the following terms:-

> "From: Barry Sheenan <bsmtruckplant@gmail.com>
>
> Sent: 23 February 2017 13:23
>
> To: Maron Plant Limited <sales@maronplant.co.uk>
>
> Subject: Company Details
>
> B.S.M Truck & Plant
>
> Barry Sheenan
>
> Dunaree Lane
>
> Kingscourt
>
> Co. Cavan
>
> VAT Reg: *****
>
> (last digit <u>is</u> the letter O, <u>not</u> the number 0)

Look forward to doing business with you."

9. That afternoon, Mr Bell checked the EU VIES VAT number validation website ("VIES") which confirmed that the VAT number was that of Mr Sheenan and was registered at that address. Mr Bell did not question why he was being asked to send goods to what he believed was a limited company called BSM Truck and Plant Limited.

10. The appellant also checked the Irish Companies Registration Office website. That described the type of business as being "Business name-Individual" and gave the name as "BSM" with the address being the same as that for the VAT registration, other than being Co. Navan as opposed to Co. Cavan.

11. Between 23 February 2017 and 11 December 2017, the appellant entered into 28 transactions selling plant/machinery to an entity described on the sales invoices as "B.S.M. Truck & Plant" at the County Cavan address in Ireland. Hereinafter we refer to that purchaser as "BSM".

12. On 24 October 2017, the appellant entered into a transaction selling equipment to an entity described as Retail Brand Builders Ltd ("RBB") which also purported to be based in the Republic of Ireland. The appellant has produced an exchange of emails with David at BSM between 14.12 and 14.37 on that day with the last email enclosing a sales invoice for RBB. Payment was received the following day in two tranches.

13. It was only at 14.45 that afternoon that the appellant checked RBB's VAT details on VIES. It was a valid number. The Companies Registration Office website gave a different address for RBB but confirmed that it was a limited company.

14. In addition to the emails referred to at paragraphs 8 and 12 above and the VIES and Companies Registration Office documentation, the documentation produced by the appellant in relation to the total of 29 transactions consists of:

(1) 21 purchase invoices for the appellant's purchase of the machinery from its supplier (not all of which are related to this appeal).

(2) 20 sales invoices for the transactions, 19 of which were addressed to BSM and one to RBB. All include:

(i) the name and address of the appellant,

(ii) a description of and the price of the machinery being supplied,

(iii) the appellant's VAT number and company number, and

(iv) the purchaser's VAT number.

(3) The appellant's bank statements for the period 23 February 2017 to 21 December 2017 showing payments from a "Christopher McCann" and a "M Regan". There were also two payments from two other third parties. Mr Bell had highlighted these payments as being the payments for the plant/machinery. We observe that the first payment made by Christopher McCann had the word "Sheenan" under his name.

(4) Photographs of the two vehicles said to have transported the machinery: a Scania transporter with Vehicle Registration Number ("VRN") WKZ 1604 and a Volvo Transporter with VRN VUI 1119.

(5) 16 documents entitled "Confirmation of Shipping". Mr Bell's evidence was that he gave the driver collecting the machinery a one page document to be stamped at the port and returned in a self-addressed envelope given to the driver with it. The Confirmation

of Shipping documents contain details of the machinery being transported, the date of the document, the statement 'UK to Ireland' and the VRN of the vehicle transporting the machinery (albeit this is incorrectly stated to be WKZ 7604 rather than WKZ 1604 where this vehicle was used which was on all but two occasions.). Each Confirmation of Shipping document contains a dated stamp from "Stena Line Ports Ltd" ("Stena"). The majority are stamped on the same date as the document.

15. In summary, although there were 29 items of plant/machinery, there were 20 invoices and 16 Confirmation of Shipping documents. We observe that the invoices specify that:-

"This invoice must be paid in full within 5 working days. …

Equipment will not be released until full cleared payment has been received."

16. Notwithstanding those terms and conditions, if one compares the bank statements with the invoices and Confirmation of Shipping documents there are numerous discrepancies, for example:-

(a) The invoice for transactions 1 and 2 was dated 23 February 2017 and amounted to £61,500. The Confirmation of Shipping was dated 24 February 2017 and the Stena stamp was the day later. However, Mr McCann only made payments of £3,000 on 23 February 2017 and £58,500 on 27 February 2017. Therefore the goods were released and apparently transported before payment had been received.

(b) The invoice for transactions 3 and 4 was dated 26 February 2017 and was in the sum of £61,500. Payments totalling £60,500 were made on 16 and 17 March 2017 and therefore there was a shortfall of £1,000. The Confirmation of Shipping was dated 16 March 2017 and the Stena stamp was the day later.

(c) The invoice for transactions 5, 6 and 7 was dated 18 March 2017 and totalled £114,100. Payments totalling only £111,100 were made on 22 March 2017 and the Confirmation of Shipping was dated that day with the Stena stamp the day later. There is therefore a shortfall of £3,000.

(d) The payment for transaction 14 was made the day after the plant/machinery had allegedly been shipped.

(e) The invoices for transaction 15 and 16 were dated 19 April 2017 and 3 May 2017 respectively and the plant/machinery was allegedly shipped on 9 and 11 May 2017, with payment of £66,750 having been made on 5 May 2017. Since the invoices totalled £76,250 that is a significant shortfall and payment was late for transaction 15.

(f) Although payment was made in full for transactions 19 and 20, it was made the day after the plant/machinery had allegedly been shipped.

(g) Payment for transaction 21 was made in full but only on 16 August 2017, the invoice having been dated 2 August 2017 and the plant/machinery allegedly shipped on that day.

(h) The invoices for transactions 22 and 23 were dated 2 August 2017 and the plant/machinery was allegedly shipped that day although the total value was £74,000. Transaction 24 was invoiced on 7 August 2017, in the sum of £36,000, but the plant/machinery was only shipped on 28 November 2017.

(i) The last payments made by Mr McCann were on 11 and 16 August 2017 and (excluding the payment for transaction 21) totalled £94,500. The outstanding invoices as at 16 August 2017 amounted to £110,000. Therefore there was another shortfall.

(j) The next six payments were made by Michael Regan and totalled £159,500 with the last payment being made on 28 November 2017. The last invoice, in the sum of £42,000,

was issued on 11 December 2017. The total value of transactions 25-29 was £244,400. If one excludes transaction 29 both from the value of the invoices and the payments made, since it is accepted that that was paid by Michael Regan on 25 October 2017, the invoice value for those last four transactions was £152,900 and the payments made were only £87,970.

17. These issues were not drawn to our attention but rather I came across them whilst writing this decision. That prompted me to look at the appellant's purchase invoices for the plant/machinery. There are a number where the purchase was before the onward sale, such as transaction 19 to which Mr Brown took Officer Pye and where it is known that there was a further sale in England at auction in October 2017. In transaction 23 the sale, purchase and export are all apparently on the same day. However, examples of problems include:-

(a) The appellant sold the plant/machinery in transactions 1 and 2 on 23 February 2017 but the purchase invoice for the plant/machinery was only dated 1 March 2017. Of course, the Confirmation of Shipping suggests that the export was on 25 February 2017.

(b) There is a similar problem with transactions 5, 6 and 7 where the sales were on 18 March 2017 but the purchases by the appellant were on 22 March 2017.

(c) There is the same problem with transactions 12 and 13 where the sale by the appellant was on 7 April 2017 but the plant/machinery was only bought on 13 April 2017. The Confirmation of Shipping suggests that the export was on 12 April 2017.

18. The appellant treated the supplies in each of the 29 transactions as zero rated for VAT purposes on the basis that the goods were being despatched to Ireland. The appellant accounted for the supplies on that basis in its VAT returns, thereby recording that no output tax was due to HMRC in respect of those transactions.

19. On 14 February 2018, the Republic of Ireland Revenue Commissioners ("the Commissioners") wrote to HMRC stating that one of their customers, Mr Barry Sheenan, alleged that his VAT number had been hijacked because he had been receiving invoices to his home for vehicles that he had not purchased. The Commissioners requested information from HMRC in relation to the appellant's dealings with Mr Sheenan. The total value of the transactions involved amounted to £1,114,650. It was noted that the Commissioners had cancelled the VAT registration number for RBB because it had been registered for VAT "for purposes of fraud". The Commissioners had formed the view that a Christopher McCann had been involved.

20. In the interim, on 22 January 2018, the Commissioners had written to the appellant intimating that the VAT registration number for RBB had been cancelled for the protection of the Revenue with effect from 19 January 2018.

21. On 6 March 2018, Officer Pye and another officer visited the appellant regarding the sales to BSM and RBB. At that meeting Mr Bell confirmed that he had purchased all of the plant/machinery involved in the 29 transactions from his regular suppliers Plant Sales Direct Limited and Boundary Plant Limited. David from BSM had arranged all of the purchases from the appellant, including that for RBB.

22. Mr Bell provided the appellant's bank statements and he had highlighted the payments received for the goods on the statements. All but two of the payments were made by either Christopher McCann or Michael Regan. The payments for RBB were made by Mr Regan but also four of the payments for BSM.

23. Mr Bell's understanding was that RBB was BSM's customer. His evidence was that payments were made by bank transfer, often at the last minute when the transporter was at the

business premises and the goods were being collected. Mr Bell contacted David and once he got confirmation of the payment on his telephone he released the goods. The transport of the goods was arranged by BSM.

24. At no stage has Mr Bell suggested that he had bad debts.

25. There was a further meeting on 8 August 2018 and correspondence ensued.

26. Based on the information provided by the appellant, Officer Pye instructed a number of checks. In particular, a check was made on HMRC's OASIS system, which records 90% of vehicles and trailers travelling on ferries through British ports, to enquire when the vehicle registered VUI 1119 left the UK. The Confirmation of Shipping documents provided by the appellant showed that it travelled by ferry on 28 November 2017 and 21 December 2017. However, HMRC's checks showed that there was a journey from Scotland to Northern Ireland on 27 November 2017 with the return journey to Northern Ireland taking place on 29 November 2017.

27. A similar check in regard to the other vehicle shows 13 entries in the period 1 February 2017 to 20 March 2017.

28. On 25 February 2017, the vehicle travelled between Scotland and Northern Ireland according to the Confirmation of Shipping document and that is confirmed by HMRC's information. However, although the Confirmation of Shipping document bore a stamp from Stena, the ferry on which the vehicle travelled was owned by P&O. The Confirmation of Shipping document for transactions 3 and 4 have the Stena stamp for 17 March 2017 but HMRC's records show that the vehicle travelled from Birkenhead to Belfast on 16 March 2017.

29. The remainder of the alleged journeys by that vehicle did not take place in the period for which details have been furnished by HMRC.

30. HMRC instigated further enquiries and ascertained that the plant/machinery supplied in 17 of the transactions (transactions 2 to 15, 19, 20 and the transaction with RBB(29)) were subsequently sold by two entities based in Northern Ireland, CPMC Plant and McCann Plant & Machinery Sales to a company based in Northern Ireland, namely Equipment and Plant Services Limited ("EPS"). Those sales took place shortly after the sales by the appellant and sometimes on the same day. EPS sold the goods at auction in the UK but transport to the UK was arranged by the vendors.

31. EPS provided HMRC with invoices for the sale to it by CPMC Plant on:-

(a) 4 July 2017 of the plant/machinery in transactions 19 and 20 which was the day after the sale by the appellant and the alleged export to Ireland, and

(b) 24 October 2017 the sale to it by McCann Plant and Machinery Sales of the plant/machinery sold to RBB on the same date.

32. The VAT number provided to EPS for CMPC Plant was that of a sole trader, Christopher McCann, who was registered in the UK and the VAT number for McCann Plant & Machinery Sales was not a valid number.

33. On 27 February 2019, HMRC wrote to the appellant stating that they did not consider that the appellant had declared the correct amount of VAT in respect of those transactions because the appellant had not supplied sufficient commercial and supplementary evidence of the removal of the goods from the UK in order to zero rate the supplies and notify the appellant of the alternative assessment. The Notice of Assessment was issued on 16 March 2019.

34. On 27 March 2019, the appellant's representatives requested a review of the decision and on 3 May 2019, HMRC issued a review conclusion letter upholding the alternative assessment.

35. The appellant produced evidence dated April 2019 showing that of the JCBs sold to BSM and RBB, at that stage, three were in Ireland, four in Northern Ireland, two in another Member State and seven in Australia. The rest had not been traced.

The legislation

36. Article 138(1) of the Council Directive 2006/112/EC on the common system of value added tax ("the PVD") provides:

> "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."

37. Section 30(8), VATA (as in force at the relevant time) provided:

> "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."

38. Regulation 134 of the Value Added Tax Regulations 1995/2518 ("VATR") (as in force at the relevant time) provided:

> "Where the Commissioners are satisfied that-
>
> (a) a supply of goods by a taxable person involves their removal from the United Kingdom,
>
> (b) the supply is to a person taxable in another member State,
>
> (c) the goods have been removed to another member State, and
>
> (d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A1 of the Act, for VAT to be charged by reference to the profit margin on the supply,
>
> the supply, subject to such conditions as they may impose, shall be zero-rated."

They were not cited to us but paragraph 6 Schedule 11 VATA and Regulation 31 of VATR require that adequate records to support VAT returns be retained.

39. HMRC imposed conditions for zero rating intra-EU supplies of goods in tertiary legislation in VAT Notice 725 (parts of which had the force of law). VAT Notice 725, paragraphs 4.3, 4.6, 5.1 and 16.12 (as in force at the relevant time) provided:

> "4.3 Zero-rated supply of goods
>
> The text in this box has the force of law.

A supply from the UK to a customer in another EC Member State is liable to the zero rate where:

- you get and show on your VAT sales invoice your customer's EC VAT registration number, including the 2-letter country prefix code, and
- the goods are sent or transported out of the UK to a destination in another EC Member State
- you obtain and keep valid commercial evidence that the goods have been removed form the UK within the time limits set out at paragraph 4.4 (emphasis added)

…

4.4 Time limits for removal of goods and obtaining evidence of removal

The text in this box has the force of law.

In all cases the time limits for removing the goods and obtaining valid evidence of removal will begin from the time of supply. For goods removed to another EC Member State the time limits are as follows:

- 3 months …

…

4.6

What should I do if I cannot meet all the conditions in paragraphs 4.3, 4.4 or 4.5.

If you cannot get and show a valid EC VAT registration number on your sales invoice you must charge and account for tax in the UK at the appropriate UK rate.

If the goods are not removed or you do not have the evidence of removal within the time limits you must account for VAT as described in paragraph 16.10. No VAT is due on goods which would normally be zero-rated when supplied in the UK. You may wish to consider taking a deposit for the VAT (see paragraph 5.5) if you have reason to doubt that the goods will be removed. Extra caution may be advisable if your customer:

- is not previously known to you
- arranges to collect and transport the goods, or their transport arrives without advance correspondence or notice
- pays in cash; or
- purchases types or quantities of goods inconsistent with their normal commercial practice

…

5.1 Evidence of removal

A combination of these documents must be used to provide clear evidence that a supply has taken place, and the goods have been removed from the UK:

- the customer's order (including customer's name, VAT number and delivery address for the goods)
- inter-company correspondence
- copy sales invoice (including a description of the goods, an invoice number and customer's EC VAT number etc)

- advice note
- packing list
- commercial transport document(s) from the carrier responsible for removing the goods from the UK, for example an International Consignment Note (CMR) fully completed by the consignor, the haulier and signed by receiving consignee
- details of insurance or freight charges
- bank statements as evidence of payment
- receipted copy of the consignment note as evidence of receipt of goods abroad
- any other documents relevant to the removal of the goods in question which you would normally get in the course of your intra-EC business.

Photocopy certificates of shipment or other transport documents are not normally acceptable as evidence of removal unless authenticated with an original stamp and dated by an authorised official of the issuing office.

5.2 What must be shown on documents used as proof of removal

The text in this box has the force of law

The documents you use as proof of removal must clearly identify the following:

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

Vague descriptions of goods, quantities or values are not acceptable. For instance, ‘various electrical goods’ must not be used when the correct description is ‘2,000 mobile phones (make ABC and model number XYZ2000)’. 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 could become liable for the VAT due.

…

16.12 How do I adjust my accounts if goods are not removed or I do not receive evidence of removal?

Whether you or your VAT registered EC customer arranges for the removal of goods to another EC Member State, you can only zero-rate the supply in your records when the goods are supplied to your customer and you meet the conditions set out in paragraphs 4.3 and 4.4.

If the goods have not been removed or you do not have satisfactory evidence of removal within 3 months (6 months for goods involved in processing or incorporation before removal) and the goods would be subject to VAT in the UK, you must account for VAT. You must amend your VAT records and account for VAT on the invoiced amount or consideration you have received.”

The issues

40. There was no challenge to the assessments *per se* either in relation to timing the competency or quantum. The sole issue was whether the appellant was entitled to zero-rate the goods. The burden of proof is on the appellant to show that they have satisfied the conditions to zero-rate their supplies and provided documentation showing that the goods were despatched from the UK.

41. The appellant argues that all of the plant/machinery was despatched from the UK to Ireland. It held certain, but not all, of the documentation set out in Section 5.1 of Notice 725 to prove that and the appellant is therefore entitled to zero-rate the supply.

42. The alternative argument is that the possession of all of the documentation listed in Notice 725 amounts to a formal requirement but the transactions should be taxed according to their objective characteristics and should be zero-rated where the requirements set out in Article 138 of the PVD have been satisfied. In that latter regard the appellant relies on *Euro Tyre*[1] ("Euro"), *Mecsek-Gabona Kft*[2] and *Collée*[3].

43. HMRC argue that the appellant has failed to meet the burden of proof to demonstrate that the alternative assessment was wrongly raised. The appellant has failed to demonstrate that it held valid commercial evidence that the plant/machinery supplied by it in the 29 transactions was removed from and transported to Ireland.

Discussion

44. Bluntly, we have problems with Mr Bell's evidence. .

45. We have quoted the content of the 23 February 2017 email at paragraph 8 above because we find it very difficult to accept Mr Bell's evidence that he knew nothing about Mr Sheenan and never had any dealings with him. He told the Tribunal that he had believed that BSM was a limited company, yet as can be seen from paragraphs nine and ten above the only two due diligence checks that he did indicated that it was Mr Sheenan. The deposit of £3,000 referenced "Sheenan".

46. Mr Bell conceded that he had known that he needed to have proof that the plant/machinery left the UK to go to Ireland and that was why he had agreed to prepare the Confirmation of Shipping documents. He was familiar with CMRs and the information required. The simple fact is that he most certainly has not complied with Notice 725 in any vaguely meaningful way. An obvious example is that BSM and RBB arranged the collection and transport of the goods which is highlighted as a risk in paragraph 4.6, as also the fact that neither entity was known to him prior to the first collection.

47. Even if we ignore the deficits in payments, payments being made by third parties, particularly where there is no discernible link between those parties and the alleged purchaser, should have been a major issue for the appellant. The failure to check RBB's VAT registration number prior to issuing the invoice is evidence of extremely poor due diligence.

48. As can be seen from paragraphs 16 and 17 above there is patently a problem with the appellant's records. In our view the findings in that paragraph cast serious doubt on whether all of these transactions even occurred. Even if they did it is very odd that Mr Regan, who Mr Bell knew had made the payments on 25 October 2017 for RBB, went on to make the subsequent four payments for BSM.

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[1] KC-21/16
[2] KC-273/11
[3] KC-146/05

49. Mr Brown argued that an invoice date is not the same as the date of sale because what matters is when the goods were transferred. That is a fair point but we heard absolutely no evidence about when the goods were transferred other than it was after payment was received. In his witness statement he stated that "Equipment never left without full payment being received". As can be seen from paragraph 16 above that is clearly far from the case.

50. Payment would normally be made following receipt of an invoice. We know from the email relating to the RBB transaction (29) that the invoice was issued before payment was made and before the alleged export occurred. Since Mr Bell was adamant that he only ever dealt with David, on the balance of probability the same practice would be followed in every transaction.

51. The appellant has failed to produce any evidence as to the route taken for any of the alleged exports. The fact that the Confirmation of Shipping states "UK to Ireland" proves nothing; that does not preclude the possibility that it could have been Northern Ireland as indeed appears to have been the case in some instances, from the information provided by HMRC.

52. There are no CMRs, no Bills of Lading or any other evidence as to the plant/machinery being booked on a ship. None of the evidence furnished by the appellant includes details of mode of transport, route of movement nor the destination. The registration number, inaccurately recorded in almost all of the documents, proves nothing beyond the fact that the plant/machinery was collected from the appellant's premises. The Stena stamp certainly does not prove that the vehicle was on any ship because it is incorrect.

53. The address on the invoices proves nothing. We have no convincing evidence that the plant/machinery was even delivered to a UK port.

54. Mr Bell patently paid no attention to Notice 723. Paragraph 4.6 makes it explicit that extra caution may be advisable if a customer who is not previously known arranges to collect and transport goods. Mr Bell had no previous knowledge of either BSM or RBB and they collected the goods. In the case of BSM, in transaction 1, he released the goods before receiving payment other than a small deposit.

55. We had regard to the Upper Tribunal's findings in *MacMahon (trading as Irish Cottage Trading Co) v Revenue and Customs Commissioners*[4] where they found that zero rating would not be available where the taxpayer was a trader who did not take every reasonable measure in his power to avoid becoming involved in the tax evasion of another. Mr Brown referred us to *Euro* which is the source of that principle. At paragraph 40 the Court found that:-

> "… it is not contrary to EU law to require an operator to act in good faith and to take every step which could reasonably be asked of it to satisfy itself that the transaction which it is carrying out does not result in its participation in tax evasion (judgment of 6 September 2012, Mecsek-Gabona, C-271/11, EU:C:2012:547, paragraph 48 and the case-law cited). If the taxable person concerned knew or should have known that the transaction which it had carried out was part of a fraud committed by the purchaser and that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed, that person would have to be refused a VAT exemption (judgment of 6 September 2012, Mecsek-Gabona, C-273/11, EU:C:2012:547, paragraph 54)."

56. We are not dealing with the Preferred Assessment here but we cannot find that the appellant took reasonable steps to avoid becoming involved in tax evasion.

[4] [2012] UKUT 106 (TCC)

57. The fact that Mr Bell did not check VIES for the VAT number for RBB until after he had issued the invoice is a clear indication that he did not take even the most of basic of steps. His lack of any reasonable due diligence on BSM is also a major problem.

58. The central issue is whether the appellant has shown that it was selling, dispatching and delivering the plant/machinery to the taxable person named on its invoice. The evidence taken as a whole simply does not achieve that. There is no explanation as to why McCann and Regan made payments to the appellant or why Regan made payments for BSM after he paid for RBB.

59. The photographs of the two vehicles do not prove that the plant/machinery went to Ireland.

60. The Confirmation of Shipping documents have no details of the consignee, carrier, or route so do not comply with paragraph 5.2 of the Notice which has the force of law.

61. The Stena stamp does not assist, not least because the vehicle registration number was wrong. Whilst Mr Brown argued that it may be that some of the plant/machinery may have been transported without the vehicle so that would not be relevant there is no evidence to that effect. There is no evidence as to which port or ports were used, if they were used.

62. We agree with Ms McGowan that much of the documentation raises questions as to the destination for the plant/machinery. Specifically, it raises unanswered questions as to whether Christopher McCann or an entity associated with him was the destination. He is based in the UK.

63. To succeed in the alternative argument the appellant must prove that the plant/machinery went to Ireland as part of each transaction. That has not been done.

64. Lastly, for completeness, we record that we agree with Judge Fairpo in *CPR Commercials Limited*[5] at paragraphs 117 and 118 where she stated:

> "117. It is clearly not a breach of the principle of proportionality for a taxpayer to provide clear evidence of export in order to be able to zero-rate a sale as an export. Indeed, the CJEU in Mescek-Gabona Kft concluded (§55) that: "Article 138(1) of Directive 2006/112 is to be interpreted as not precluding … refusal to grant a vendor the right to the VAT exemption for an intra-Community supply, provided that it has been established, in the light of objective evidence, that the vendor has failed to fulfil its obligations as regards evidence".
>
> 118. As set out above, we consider that CPR has failed to provide objective evidence that the substantive requirement, that the vehicles have been exported, has been met. They are therefore not entitled to zero-rate the relevant supplies. As also set out in Collée (§31), fiscal neutrality does not permit exemption where "… non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied".

Decision

65. We conclude that the appellant has not obtained or retained valid commercial evidence of export to support zero-rating of the relevant transactions. The appellant should therefore have charged VAT at the standard rate of such supplies. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

66. 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

[5] [2021] UKFTT 0408 (TC)

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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 22 JUNE 2022