[2012] UKFTT 587 (TC)

TC02264

Appeal number: TC/2011/01504

IMPORT VAT – external transit – goods incorrectly declared to OSR – whether* Terex Equipment Ltd C-430/08 *obliges HMRC to correct procedure used and remit duty – no on facts as deliberate action by taxpayer – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BROOKLANDS INTERNATIONAL FREIGHT SERVICES LIMITED — **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
I B ABRAMS

Sitting in public at Bedford Square, London on 15 May 2012 with written submissions received from HMRC on 30 July 2012 and from the Appellant on 7 August 2012

Mr D O'Driscoll, for the Appellant

Miss H McCarthy, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal against HMRC's decision of 26 January 2011 on review to uphold its C18 post clearance demand note for £5,645.55 of import VAT.

The facts

2. The facts were not in dispute. The appellant company is a freight forwarder. Its client, Noble Drilling Services Inc ("Noble"), was based in Texas US, and contracted with the appellant to deliver an urgent consignment of parts and spares to an off-shore oil drilling platform in Libyan waters. The consignment remained the property of Noble. The appellant did not at any stage own the goods.

3. The reason for the appellant's involvement by Noble was that the consignment included parts too large to airfreight direct from the US to Africa. For practical reasons, the parts had to be air freighted to the UK and then moved by road to Italy and then shipped to Libya via Malta. The appellant sub-contracted the transport within Europe and on to Libya to a company called Arends.

4. On 29 October 2009 the consignment was imported into the UK from the US. The appellant was the importer. The appellant was not in a position to declare the goods to the external transit procedure (we outline this in detail below). This was because this procedure would have required the appellant or Arends to give a guarantee for the duty on the goods to HMRC: neither the appellant nor Arends had used this procedure before and did not have a guarantee already in place. Arranging one from scratch would have taken a couple of weeks and the consignment was too urgent to wait. The appellant chose instead to declare the goods to onward supply relief ("OSR"). It paid customs duty of some £1,058.13 but did not pay the import duty of £5,645.55 because of its claim for OSR.

5. HMRC accepted that as a matter of fact the consignment left the EU by the route shown on the documents held by the appellant.

6. Some time later a VAT audit by HMRC officers discovered that the appellant had claimed OSR in respect of these goods but that no entry in respect of them had been made on an EC Sales List, which is one of the requirements for claiming OSR. HMRC therefore issued the C18 post clearance demand note for unpaid import VAT which is the subject of this appeal.

The law

The VAT charge

7. VAT is chargeable on the importation of goods into the UK from outside the EU. Section 1(2)(c) of the Value Added Tax Act 1994 ("VATA") provides:

> "(1) Value added tax shall be charged, in accordance with the provisions of this Act –
>
> (a) …..
>
> (b) …..
>
> (c) on the importation of goods from places outside the member States, …..
>
> (2) …
>
> (3) ….
>
> (4) VAT on importation of goods from places outside the member States shall be charged and payable as if it were a duty of customs.

8. Section 15 of VATA sets out when goods are imported. They 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: section 15(2)(b).

9. It was not disputed that the appellant was the importer of the consignment. Therefore under these provisions, unless a relief was applicable, the appellant is liable to the VAT charge demanded by HMRC.

Onward Supply Relief

10. The appellant claimed onward supply relief ("OSR"). The legal provision which provides for this relief is set out in the VAT Regulations 1995 which provide at Regulation 123 (1) that:

> "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. Section 30(8) VATA states in so far as relevant:

> "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."

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 (in force on 1 January 2007 and therefore in force at the time of the importations the subject of this appeal).

14. OSR is mandatory under the Principal VAT Directive 2006/112/EC 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) ….."

15. Article 138 provides for exemption on cross-border transactions. Although it uses the word "exempt" this is given effect to by the UK's zero rating provisions. The effect of Article 143 (d) is therefore that an import is free of VAT *if* the onward supply to a taxable person in another member State is zero rated.

16. It is, therefore, apparent that the appellant was not entitled to claim OSR in respect of this consignment. OSR depends on an onward zero rated supply by the importer to a VAT registered person in another member state. But 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.

OSR and EC Sales Lists

17. Although OSR is a mandatory relief, national tax authorities are allowed to some extent control the application of this relief as Article 145 (2) 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."

18. HMRC do impose conditions on the relief. The conditions are contained in Notice 702/7 at paragraph 2.5:

> "The following conditions have the force of law
>
> 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 within 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 an extension (see below for contact details) and
>
> 5. complete EC sales lists and record EC trade figures on VAT returns. (If you are an agent you need to read paragraph 2.2.)"

19. It was the appellant's case that HMRC ought to allow it to complete a late EC Sales List in order to meet the requirements for OSR. But it follows from what we have said above, that even if the appellant had completed an EC Sales List in respect to the transfer at the time, this would make no difference as it 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. It could not have validly put this consignment on an EC Sales List at the time and therefore there is no point in doing so late.

20. The appellant could never have been entitled to OSR: contrary to the appellant's belief, its failure to meet the OSR rules was not a technical default in failing to complete the EC Sales list but a fundamental failure to meet the prerequisites of entitlement.

Agency rules?

21. The appellant also claimed that it ought to be able to amend its EC Sales list retrospectively as HMRC's public notice 702/7 on OSR was not as clear as it might

have been at the time of the transaction on the position of agents, as verified by the fact that the notice was later amended. HMRC do not agree that its public notice was unclear before or after the amendment was made.

22. We understand the appellant's point to be that the Notice did not (in his opinion) make a clear distinction between an agent in the legal sense who is able to transfer the title to goods on behalf of its principal, and an agent in the colloquial sense who merely acts on someone else's behalf more generally, such as a freight forwarder physically moving goods on behalf of its client. It suggests that it misunderstood the notice and thought agents in the sense of freight forwarders could claim OSR.

23. Even if the appellant were right that the Notice was misleading and it was misled by it into thinking it could claim OSR when it could not, this does not alter the position that it was not entitled to OSR under the Directive or under UK law. We have no discretion and no power to judicially review HMRC: we must apply the VAT legislation as it is. Therefore we do not need to consider whether the notice was misleading or whether the appellant was misled by it. But we note that the appellant did not satisfy us that it had acted in reliance on the public notice: if it had relied on the public notice it would have completed an EC sales list.

External Transit procedure

24. This procedure allows the movement of non-community goods within the EU but without payment of import duties or VAT. The liability of the goods to duties is suspended while the goods are moved and discharged when the customs authorities are able to determine from the departure documents that the goods have correctly left the EU in accordance with their transit documents. It was referred to at the hearing as the T1 procedure.

25. The law on this procedure is currently contained in Regulation (EC) 955/1999 amending Council Regulation (EEC) no 2913/92. It provides, in addition to the documentary requirements, that:

> "Art 94 1 The principal shall provide a guarantee in order to ensure payment of any customs debt or other charges which may be incurred in respect of the goods…..
>
> 2….
>
> 3….
>
> 4 Persons who satisfy the customs authorities that they meet higher standards of reliability may be authorised to sue a comprehensive guarantee for a reduced amount or to have a guarantee waiver. The additional criteria for this authorisation shall include:
>
> (a) the correct use of the Community transit procedures during a given period;
>
> (b) cooperation with the customs authorities, and

(c) in respect of the guarantee waiver, a good financial standing which is sufficient to fulfil the commitments of the said persons.

26. As mentioned, neither the appellant nor its contractor, Arends, had a guarantee with Customs in place. Mr O'Driscoll explained that external community transit is rarely used by UK businesses as goods passing between two places outside the EU do not normally have to pass through the UK. The appellant had never needed to use this procedure in its prior 35 years of existence. Its contractor, Arends, which moved the consignment from the UK to Malta, did not hold a guarantee with Customs as its business was the movement of goods from one place in the EU (the UK) to another (Malta). It did not need the external community transit procedure to do this.

27. Guarantees are expensive to put in place and maintain and take time to arrange. Neither the appellant nor Arends could obtain a guarantee in time to undertake this urgent transaction. So, as we have said, the appellant decided instead to import the goods under OSR.

28. Because the appellant did not seek to use the external transit procedure as it could not provide the required guarantee, the necessary documents for the external transit procedure were not completed, the goods were not sealed, and the necessary checks on the documents were not carried out by the Maltese customs authority when the goods left the EU. The T1 procedure was not followed.

29. Nevertheless, as we have said, HMRC accepted that the goods had in fact left the EU by the route declared by the appellant.

The Terex decision

30. Although at the hearing the appellant accepted that it ought to have used the external transit procedure and not OSR, its position was that, in the circumstances that HMRC accepted that the goods had left the EU, it would have been entitled to relief had it fulfilled the preconditions for external transit (having the guarantee and T1 documents), then it ought to be allowed to retrospectively complete an EC Sales List and claim OSR or be allowed to retrospectively rely on the external transit procedure in reliance on the decision of the CJEU in *Terex Equipment Ltd and others v HMRC* C-430/08 and C-431/08.

31. In *Terex* the taxpayers imported components into the UK in order to manufacture equipment which was then exported outside the EU. The components were imported under the inward processing procedure which allowed customs duties to be suspended. When the completed equipment was exported, the taxpayers' agents incorrectly declared the goods as exports rather than re-exports.

32. HMRC refused to allow the taxpayers to revise their export declarations and refused to remit the duties, for which post clearance demands were issued.

33. The CJEU pointed out the importance of Community procedures. By incorrectly declaring the goods to be exports (rather then re-exports) the taxpayers inadvertently removed the non-EU goods from customs supervision. This meant

HMRC lost the opportunity to double check on export that the goods under duty suspension were the same as those goods being exported. This amounted to a removal of the goods from customs supervision under article 203 and gave rise to a customs debt.

34. Nevertheless, the CJEU held that under article 78(3) the position could be regularised by revising the export declaration if in fact the objectives of the inward processing procedure had not been threatened. This would be the case where the goods under duty suspension had in fact been re-exported. Article 78 obliges customs authorities to amend customs declarations after the release of the goods in question:

> "Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking into account the new information available to them."

The extent of Terex?

35. HMRC's position is that *Terex* only applies to form filling errors. In *Terex,* the taxpayers' agents incorrectly completed a form on export, inadvertently taking the goods out of the Inward Processing Relief regime to which they were subject. They were allowed to correct this error so the goods (retrospectively) remained in the IPR regime.

36. We are satisfied that *Terex* does not allow an appellant to benefit from a relief to which it would not be entitled to even if the forms had been completed correctly: the appellant claimed OSR and failed to complete an EC Sales list, which was one of the requirements of OSR. However, as we have said, even completing an EC Sales List would not have entitled the appellant to OSR because they made no supply of the goods. Therefore, retrospectively allowing them to complete an EC Sales List would not entitle them to OSR. And therefore, *Terex* would not apply to allow them to complete an EC Sales List.

37. But does it allow them to retrospectively place the goods in the external transit procedure, to which (HMRC do not deny) the appellant would have been entitled had the appropriate procedures including the giving of guarantees and customs checks been carried out in advance? HMRC say it does not permit them to do this because it was not a case of incorrectly completing a box on a form, but a fundamental failure to place the goods under the right procedure. They were, at the appellant's choice, placed in OSR rather than in the TI procedure.

38. And further, if the Tribunal were to apply *Terex* by analogy, the result would be that a fundamental part of the external transit procedure, the guarantee, would be undermined. It would allow taxpayers to claim external transit procedure retrospectively simply by turning up with evidence of export. It would allow goods to transit Europe without the seal required to be applied on arrival, and without the compulsory transit documentation.

39. The appellant points out that it was not the intention of the EU to subject to customs duty goods which merely transit the EU. The purpose of the external transit procedure is to prevent abuse of the freedom from duty for goods in transit by ensuring that the goods which enter the EU actually leave the EU without being "consumed" in the meantime. But in this case HMRC are satisfied that the goods did simply transit the EU, so the objectives of the EU are compromised, says the appellant, if it must pay the duty.

40. Whether *Terex* would apply in a case where the goods were imported under the wrong procedure in the first place is not immediately obvious. Although allowing a taxpayer to benefit from a procedure retrospectively appears to drive a coach-and-horses through the protection built into the directive (such as guarantees and customs checks) to prevent fraudulent abuse of the reliefs, nevertheless it is clear that at least in respect of IPR, the CJEU in *Terex* was prepared to permit this where the taxpayer actually satisfied the national tax authorities that (barring formalities) it was entitled to the relief. And is there a fundamental difference between incorrectly completing a form and completing the wrong form?

Deliberate action

41. We are sympathetic to the appellant on this point and, were it determinative of the appeal, might have considered a reference to the CJEU on the issue to be appropriate. However, we do not decide the matter as it is hypothetical. Even assuming that *Terex* required HMRC (where they are satisfied that goods would have been entitled to relief under the T1 procedure) to treat the claim for OSR as a claim for the T1 procedure, it is clear from *Terex* that the appellant would nevertheless remain liable to the tax.

42. This is because the CJEU in their conclusion in *Terex* state:

> "[63.] Where it is apparent, in the final analysis, that the import duties were not legally owed when they were entered in the accounts, the measure necessary to regularise the situation can consist only in remission of those duties….
>
> [64] That remission is to be made in accordance with art 236 of the Customs Code if the conditions laid down by that provision are fulfilled, in particular that there has been no manipulation by the declarant and that the application for remission has been submitted within the time-limit….."

43. It is clear from this that it is not enough for the appellant to show that it would have been entitled to the procedure claimed but for an error: it must go further and show that it is entitled to remission of duties in accordance with Article 236.

44. That Article provides as follows:

> "[236] …Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not

> legally owed or the amount has been entered in the accounts contrary to Article 220(2).
>
> No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.
>
> …"

45. In other words, even if HMRC (as they are satisfied the goods were exported) were bound by *Terex* to take action under Article 78 to regularise the position and treat the goods as subject to the external transit procedure, they can only remit the duty otherwise due where the liability to the duty was not the "result of deliberate action by the person concerned".

46. As HMRC point out, it was a positive decision by the appellant not to apply for the external transit procedure. We outline this in paragraphs 4, 26 and 27 above. Article 236 is quite clear that where the liability arises due to a deliberate (rather than inadvertent) error, taxes are not to be remitted. So it would be pointless to decide whether *Terex* required HMRC to alter the paperwork as in any event under Art 236 HMRC are not liable to repay the tax. We therefore conclude this appeal against the appellant.

Penalty?

47. The appellant's position is that the VAT charge is in effect a penalty on the appellant for not following the correct procedures. And as a penalty it ought to be mitigated because the VAT ought not to be payable: the goods came into the EU in transit and left it again shortly afterwards unaltered and unused.

48. The appellant may consider the VAT as a penalty but in law it is not. It is a VAT charge arising under operation of the law and there is no power on HMRC or this Tribunal to mitigate it.

Unfortunate position

49. We sympathise with the position in which the appellant finds itself. The goods originated outside the EU and merely passed through the UK and other parts of the EU in transit and then only because there was no scheduled plane large enough to fly the goods direct from the US to Libya. On arriving in the UK, theoretically the goods ought to have been free of import VAT under the external transit procedure.

50. Time was of the essence to its client so the appellant could not use the external transit procedure as it would have taken two or three weeks to set up the necessary guarantee. As the appellant was merely transporting goods belonging to someone else, it was not entitled to use OSR nor can it reclaim the import VAT it is liable to pay because it is not attributable to any supply made by it. Had it understood the VAT rules better and had time to prepare, the VAT could have been avoided.

51. Nevertheless, for the reasons given we dismiss the appeal.

52. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 13 September 2012