[2015] UKFTT 0199 (TC)

TC04389

Appeal number: TC/2013/05968

Import Duty and Value Added Tax - Whether re-importation of German manufactured cars, that had been exported to the USA, into the UK for re-export back to Germany attracted Returned Goods Relief from import duty and onward supply relief for VAT purposes - Appeal allowed in part

FIRST-TIER TRIBUNAL

TAX CHAMBER

DONALD SALVAGE t/a WHEELS ABROAD

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: JUDGE HOWARD M. NOWLAN

GILL HUNTER

Sitting in public at the Royal Courts of Justice in London on 13 April 2015

The Appellant in person

Sarabjit Singh, counsel, on behalf of the Respondents

DECISION

Introduction

1. This was an Appeal in relation to whether, when the Appellant had imported 8 BMW Z8 cars (manufactured in Germany between 2000 and 2003) into the UK from the USA, with a view to their immediate re-export to Germany, the Appellant was liable to import duty and liable as the importer for VAT.

2. The import duty question related to the application of the relief known as Returned Goods Relief ("RGR"), the purpose of which is to exclude from duty goods imported into the EU if the goods had previously been exported from the EU within the last three years.

3. The VAT question related to the relief from liability to VAT available to an importer known as Onward Supply Relief ("OSR"), where goods imported into the UK are to be re-despatched to a VAT-registered entity in another EU country, generally within one month of importation. This relief requires the claimant to have purchased the goods as principal, or at least, if as agent, then as agent for an undisclosed principal, such that for VAT purposes, the importer's transactions are treated as involving a supply to, and then by, the importer in question. The significance of the relief is principally that it enables the importer who has bought the goods as principal or agent acting in his own name to avoid the cash flow cost of actually paying the VAT on importation (as is usually required with any importation from outside the EU, save where deferment is available). Where the importer has acted in either of the ways just described, but OSR is not available, such an importer will usually be able to recover the VAT paid on importation in its ordinary VAT return so that, in this case, OSR is principally of cash flow concern. Where a person has acted as named agent for the VAT-registered person in the other EU country to which the goods are to be despatched, but has still acted as importer into the UK, the VAT payable on importation will not be recoverable.

4. The amounts of import duty and VAT claimed by HMRC in respect of the importations was £57,428.55 and £127,064.06 respectively.

5. The contentions in relation to the two issues were quite different. In relation to the RGR, HMRC's contentions were that the conditions for the relief were simply not met, and that any arguments by the Appellant were unsound. Our decision in relation to the RGR issues is that all HMRC's contentions are correct and that the Appellant was liable for the duty.

6. By contrast the position in relation to the OSR was that HMRC accepted that all the conditions, with the possible exception of one, were indeed satisfied and that, as regards that remaining one, they were unclear on the evidence that they had before the hearing whether this final condition was or was not satisfied. The final condition in question was the important, largely factual, one of whether the Appellant was acting as principal in relation to the transactions, or as agent for an undisclosed principal, such that he was rightly treated as both receiving and making supplies of the cars. If so, then HMRC accepted that OSR would

be available. Were the right analysis to be that the Appellant was acting as an agent for a disclosed principal such that, for VAT purposes, the Appellant's service would have been simply that of performing an agency function, rather than receiving and making the supplies of the goods, then OSR would not be available. The Appellant would then be left with the liability for VAT as the importer.

7. While we accept that the facts, and their correct analysis, are not altogether free from doubt in relation to the Appellant's status as principal, agent for an undisclosed principal or disclosed agent, our decision is that the Appellant was indeed acting as principal, or at the least as agent for an undisclosed principal (or "as an agent acting in his own name", to give that classification of agency for an undisclosed principal its other familiar name, and indeed the description used in the VAT legislation). Accordingly we allow the Appellant's appeal in relation to the VAT on importation.

The facts

8. The Appellant's evidence was that while he was now, or at the time of the transactions, winding down his business on approaching retirement, he had for at least 30 years been heavily involved in the international business of dealing in and locating for clients "collectors' cars" and classic cars. It seemed that he had many contacts throughout the world and that he was very well known to many of them.

9. As regards the present Appeal, he had been engaged by a German client who he obviously knew well to locate 8 BMW Z8 cars, an expensive model of convertible sports, or rather "grand touring", cars that BMW had made around the end of the 20th century and up until 2003. Apparently BMW had made about 3000 Z8s and particularly those with factory modifications were considered highly desirable, the best commanding prices approximately three times the original list prices when the cars were new.

10. The Appellant had had a long relationship with a US trader in California who the Appellant believed would be able to source the relevant cars, and he duly did so.

11. Ignoring, at this point, the important correct legal analysis of precisely what happened, when the cars became available at times between September and December 2011 they were invoiced to the Appellant, the Appellant in turn invoicing them to his German customer. So far as physical transportation was concerned, the cars were apparently shipped from the USA to Bremen in Germany; they were not then entered for customs purposes in Germany but were immediately on-shipped to Dover. We understand that the cars were then transported, either by rail, or on trucks, or possibly by simply being driven, through the Channel Tunnel, and then delivered to the German customer in Frankfurt. This rather strange routing was never fully explained to us. We were certainly told that if the cars were to be shipped to the UK from the USA, that would apparently, and oddly, be more costly than shipping them first to Bremen and then to Dover. Why, however, once the cars had been shipped to Bremen it was not then simpler just to move them to Frankfurt without ever bringing them anywhere near the UK we were not told.

12. The apparent consequence, in any event, of the routing of the cars that was adopted was that they were not entered for customs purposes in Germany, but they were entered for customs duty purposes by the Appellant on their arrival in the UK.

13. The Appellant had clearly believed that, because the cars were being re-imported into the EU, having initially been exported from the EU, there would be no duty, or possibly only flat rate duty of £50, to pay on account of the RGR exemption. Secondly he believed that because they were to be re-exported from the UK to Germany well within the one month period within which goods had to qualify for the OSR exemption from VAT that was otherwise chargeable on the importer, they would attract no VAT on their importation.

14. The relevant facts as regards the cars were simple, the only point of relevance being to ascertain whether they had been exported at some time in the period of three years before the dates when they were re-imported between September and December 2011. The answer to this was that they had clearly not originally been exported in that three-year period. BMW factory information indicated that of the 8 cars, 5 were exported to the USA, 1 to Guam, 1 had specification for the Italian market, and 1 for the German market. Information from CARFAX, an apparently reliable source in the USA that recorded vehicle registrations and changes of owner, indicated that the cars that had initially gone to Italy and the German customer were also exported to the USA within a few months of manufacture. It was therefore clear and not disputed by the Appellant that none of the cars had been exported in the three-year period prior to their re-importation into the EU.

15. The following facts emerged during the course of the hearing in relation to the critical issue for VAT and OSR purposes of whether the Appellant received and made supplies of the cars as principal or whether he acted as an agent for an undisclosed principal such that he was deemed by section 47(2A) to be the purchaser and supplier of the cars for VAT purposes.

- The US vendor produced invoices in favour of the Appellant, and the Appellant in turn produced invoices, with later dates, in favour of the German customer.
- While this point was not immediately obvious, since the invoice prices in the two documents were respectively in US $ and Euro, the Appellant said that the two prices were identical, and that he was separately paid what he described as commission to give him his profit margin. He said that this "commission" was roughly 1,000 Euro. It sounded as if the Appellant was not entirely sure what the amount of the commission or profit margin had been, and without suggesting that the following observation is particularly material, we were surprised that, in return for what appeared to be a considerable amount of work (not to mention, as it turns out, financial risk), the remuneration does seem to have been rather modest.
- The Appellant said that at least in relation to the first relevant purchase, the German customer had been unaware from whom the Appellant was sourcing the cars, and he also said that the US supplier knew that the cars were being purchased for a German customer but he had no idea of the identity of that customer.
- Although the invoice from the US supplier did not record the following point, and indeed the blanks were completed to suggest that the entire $ price was to be paid "on delivery of this agreement", the Appellant said that his US supplier knew that the Appellant would only in fact pay the US supplier, when in turn he had been paid by his customer. He was content to wait for payment, rather than insist on immediate payment as the invoice suggested.
- In the event, the German customer short circuited the payment mechanics and paid the US customer directly, doubtless making a small payment to the Appellant in respect of his commission or profit margin. We were shown no details or dates on which

payment was made, but on the assumption that the German customer paid the US supplier on the very date he was invoiced by the Appellant for the first supply made on 30 September 2011, it would then follow that while the US supplier had supplied and invoiced two cars to the Appellant by that date, as regards the remaining cars, the US supplier would have known the identity of the ultimate customer from the banking details. The Appellant confirmed that both his supplier and his customer appreciated that the Appellant would be sourcing and on-supplying the cars from and to the same parties in relation to as many cars as were supplied. In other words, from the US supplier's third supply onwards, he would have been aware of the identity of the ultimate buyer on account of the payment details.

- The Appellant stressed that the classic car market was one where a great deal of trust was placed on dealers when at least there had been relationships with suppliers and customers for many years. The Appellant said that this was the case in the present situation and that he had known his US supplier for a long period, and similarly known his German customer for a long period. Accordingly, he claimed that the US supplier was content to leave the invoice price unpaid until the Appellant was in turn paid by his customer. He also said that were his German customer to have been killed in a car crash, for instance, before he had bought or paid for cars that by that point the US supplier had invoiced to the Appellant, the Appellant alone would have had to pay for the cars that had been purchased and not at that point paid for. In other words the US supplier was content to rely on the integrity of the Appellant to have arranged a subsequent sale that would enable the price to be paid or, failing that, content to rely on the ability of the Appellant to sell the car or cars that had been acquired and not paid for in some other way.

The RGR issues

16. The Respondents' counsel indicated that there were five points that we needed to consider in relation to the availability of RGR, and we will now deal with each in turn.

17. The first was the issue of whether the cars were being re-imported into the EU within 3 years of their date of exportation, to which on the undisputed facts the obvious answer was that they were not.

18. The next point was one on which the Appellant placed most reliance, saying indeed that he considered that, were his understanding of the point to be wrong, then numerous other traders would be operating on the same mistaken assumption. This assumption was that there was a customs concession to the effect that duty was only payable on a flat rate basis of £50 a car, in circumstances where the earlier exportation from the EU had occurred, but occurred before the beginning of the three-year period. The Respondents' counsel said that the £50 flat rate duty concession applied only in the situation in which the importer had been unable to obtain information from the manufacturer or exporter as to the duty status of the exported vehicles or other goods, and that for the concession to apply all the other conditions for the availability of RGR had to be satisfied. Accordingly, the situation in which the flat rate duty would apply would be one where the cars, to take the example of cars, had been re-imported within the three-year period of their export, but there was insufficient evidence, for instance, from the manufacturer that the components of the car had all been produced in the EU, or duty duly paid on their importation where components had been sourced from outside

the EU. Since we are dealing here simply with a concession, and the Respondents indicated that the concession was of no relevance in any situation where the original exportation had occurred more than three years before the date of re-importation, we have to conclude that the concession was plainly inapplicable in this case. The Respondents seemed to accept that the concession had occasionally been rather confusingly explained, and we imagine that if this is so, something will be done to clarify matters.

19. The third and fourth points are related, in that the three-year rule is altogether disregarded where "special circumstances" are in point, and for present purposes there is authority for the proposition that in the case of the re-importation of cars, special circumstances will only be in point when the vehicles re-imported are collectors' or heritage vehicles. The related fourth point is that this disregard of the three-year rule is only available if the relief is specifically claimed at the point of importation. We do not need to summarise the strict conditions that govern whether re-imported vehicles rank as "collectors' of heritage vehicles". This is because, desirable as they might be, the BMW Z8s did not meet the various tests and, more relevantly, the Appellant accepted that they did not meet the relevant tests.

20. The fifth and remaining point, therefore, is the further situation that the three-year rule can be ignored if goods have been exported at some time from the EU and the importer is *"bringing his belongings and private motor vehicles back to the UK from outside the EC"*. This exemption is designed to eliminate customs duty, for instance, where someone worked abroad for a few years, having taken with him various goods of EU origin, with the goods then later being brought back (implicitly outside the three-year period). We accept that it is expressly stated that this relief or exclusion of the three-year rule is specifically said to be inapplicable when goods are re-imported in the course of business, which was obviously the case in the present case. Accordingly it is immaterial.

21. We accordingly decide that the Appellant was liable for the import duty on importing the cars and that RGR was not available.

22. While the Appellant had not claimed RGR for VAT purposes, the Respondents pointed out that it is only applicable for VAT purposes as a relief from the liability to VAT on importation when all the conditions have been satisfied, and the further condition has been satisfied, namely that the original exportation and the re-importation were made by the same person. Since the Appellant had not claimed the relief for VAT purposes, there is no relevance to this further condition to the application of the RGR relief for VAT purposes, but it may just be worth noting it.

The OSR relief

23. OSR relief is available when various conditions are satisfied, and the importer is re-exporting the goods imported within one month of importation, supplying the goods to a VAT registered trader in another EU state, and acting either as principal or agent in his own name. The Respondents accepted that all the conditions for the availability of the relief were satisfied, save that they said (on the evidence that they had at the beginning of the hearing) that it was not clear whether the Appellant had acted as principal in the sale to the German purchaser or as agent acting in his own name. Prior to the hearing, the Respondents had apparently not seen the invoices from the US supplier and from the

Appellant, and they were also ignorant of most of the information summarised in paragraph 15 above.

24. The critical question for us, therefore, is whether the Appellant acted as principal in selling to the German customer, or whether, if not, he acted as agent in his own name.

25. We deal first with the issue of whether the Appellant acted as principal in relation to the purchase from the US supplier and the on-supply to the German customer.

26. The documentation, meaning the two separate invoices, obviously indicates that the US supplier sold to the Appellant as principal, and that the Appellant subsequently sold (on a considerably later date) to the German customer, again as principal.

27. Several factors clearly throw some doubt on the credibility of the above indication that both transactions were principal to principal sales. Firstly, the US supplier appreciated that the Appellant was making a subsequent supply and the US supplier was content to defer receipt of payment (without modifying the terms of the invoice) until the Appellant in turn had received payment from the subsequent customer. Secondly it is decidedly odd, in a case where the Appellant acts as buyer and seller, for the two prices inherently to be the same, with the Appellant's profit margin being paid separately and phrased as "commission". Thirdly, all the payments were short-circuited with the German buyer directly paying the US company. Finally, at least from its third supply onwards, assuming that the US supplier paid some regard to the identity of the customer from the banking details, the identity of the ultimate customer would obviously have been known to the US supplier.

28. We entirely accept that the factors that we have just indicated do seriously confuse the analysis. It is nevertheless the case that none of the factors actually undermines the conclusion, based on the documentation, to the effect that the US supplier supplied to the Appellant, and the Appellant to the German customer. When the Appellant's evidence was that the US supplier knew the Appellant well, and appreciated that he could not afford to pay the full prices for all the cars until they had been on-sold, but nevertheless he trusted the Appellant, the feature of deferring the payment of the price (albeit not mentioned on the invoice) does not undermine the suggestion that the sale was still to the Appellant. Secondly, any lawyer would clearly conclude that if the Appellant was selling the cars to the German customer as principal, there could not simultaneously be a separate service (such as an agency service) that would command a "commission". The 1,000 Euro would therefore be more appropriately described as simply "further consideration under the on-sale". Since, however, the only reference to "commission" was the one made orally in the hearing by the Appellant and it appeared nowhere in the documentation, and it would inherently have had to be paid separately, once the German buyer had directly paid the US seller, we conclude that the features of the separate payment of the 1,000 Euro, and the loose description of that payment as "commission" were of no great significance. Finally, when the US supplier was said by the Appellant to have known from the outset that the Appellant was buying in order to on-sell to a German customer, the feature that the German buyer paid the US company directly, thereby saving banking charges, and that at least after the third transaction the US supplier might well be presumed to know of the identity of the sub-purchaser did not by any means actually change the legal analysis of the transactions.

29. Having thus concluded that none of the confusing features actually undermines the analysis that the Appellant actually acted as principal, we now turn to the critical issue of whether we consider that, had the German customer failed to pay the Appellant, such that the Appellant might have had considerable difficulty in discharging his apparent debt to the US supplier, the US supplier could have sued the German company directly. It seems to us that the answer to that question must simply be "No". The US supplier had himself completed documentation, confirming that his customer was the Appellant. The Appellant's evidence, which had not seriously been disputed, was that the Appellant had nevertheless been quite open in indicating that he was on-selling, and that he would pay or procure payment as soon as payment had been made under the sub-sale contract. Nor was it disputed when the Appellant said that, had the German customer been killed in a car crash either before the on-sale had been invoiced, or before the German had paid the US supplier, the Appellant would alone have remained liable to pay the US supplier. We conclude that none of the evidence disturbs the notion, based on the documented invoices (to the first of which of course the US supplier was the party and the party that prepared the invoice) that the US supplier was simply selling to the Appellant as principal, and had no direct rights against the German sub-buyer.

30. We accordingly conclude that, somewhat odd as the transactions may have been in the context of the Appellant being both purchaser and supplier, the Appellant did act as principal in relation to the transactions.

31. We turn now to the further question that arises if our conclusion that the Appellant acted as principal is held on appeal to be wrong. This of course presupposes that the Appellant's role is thus held to be one of agency, and the question that we must now answer is whether the Appellant acted as agent in his own name or alternatively as disclosed agent for the counterparty.

32. This issue seems to us to have been somewhat confused by the way in which the Respondents' counsel mirrored the terms of the VAT Notice (Notice 702/7) in relation to OSR, and indicated that in order for the transaction to be regarded as one where the agent "acted in his own name" the requirement was that the party claiming OSR must be "*acting in his own name* ***in relation to the onward supply***". We will explain why we consider the emphasised words to be misleading, and indeed effectively wrong.

33. Where a person is appointed as agent, whether for an intending buyer or intending seller, and the agent then contracts with the counter-party "on behalf of his identified and named principal", the legal analysis is that the sale and purchase transaction is between the principal and the counter-party. The agent's role is simply to provide the service of acting as agent, for which it will receive a commission in the usual case from the principal that appointed the agent.

34. Where the agent acts in his own name, it naturally follows that the agent is still actually the agent of either the intending buyer or the seller. In the present case we consider it entirely realistic to say that if the Appellant had actually been appointed as the agent of either the US company or the German buyer, he would obviously have been appointed as a purchasing agent for the German buyer. Assuming that the Appellant was such an agent, and that he then bought the cars from the US supplier, ostensibly as the buyer himself, then as a matter of general English law the Appellant would have created a direct contract between

his principal and the US seller. Of course the US supplier could also have sued the agent for the consideration receivable when the agent had acted as agent for an undisclosed principal, but, that point apart, the legal analysis of the purchase made by the German principal would be that it had purchased from directly from the US supplier. The same would apply in the reverse direction, had the Appellant been the US company's duly appointed sales agent, without having revealed to the German buyer that the Appellant was selling in any other capacity than as principal.

35. The critical VAT point is that when the duly appointed agent acts, as regards the counter-party (whether the buyer or the seller) in his own name, rather than "as agent on behalf of the identified principal", notwithstanding the legal analysis just indicated, section 47(2A) deems the transaction to involve two sales, one by the US seller to the Appellant, and then one by the Appellant to the German buyer. It is indisputable that section 47(2A) applies to both legs of the transaction. It deems the Appellant both to buy and then to sell. Nothing else can make sense.

36. The significance of the point just made is that it is quite wrong, reverting to HMRC's counsel's submission and to the terminology of the VAT Notice both referred to in paragraph 32 above, to talk about the agent "acting in his own name ***in relation to the onward supply***." Once the agent acts in his own name, obviously just as regards one leg of the transaction, either the purchase or the sale, it is of course obvious that as regards the other he is a duly appointed agent. For otherwise he would not be acting as an "agent, acting in his own name" at all. And once the agent is acting in his own name in the leg of the transaction with the counter-party, then both legs of the transaction must be deemed to involve separate sales and purchases. In this context it is simply meaningless to address the present question by asking whether the "agent is acting in his own name ***in relation to the onward supply***". The right question is whether the Appellant is acting, as regards the party by whom he is ***not*** the appointed agent, in a disclosed agency capacity or not, and it matters not whether that is as regards the US supplier, or the German buyer in the "onward supply leg of the transaction".

37. In the present case, it is clear that if we were wrong to analyse the two transactions involving the Appellant as a purchase as principal from the US seller and a sale to the German buyer, the only tenable alternative would be that the Appellant was a buying agent for the German purchaser. The relevant question thus is whether, as regards the US supplier, the Appellant acted expressly as an agent on behalf of the German buyer, or whether the US supplier regarded its sale (even after the US supplier might have known the identity of the German purchaser) still as a sale to the Appellant.

38. We must thus address the question of whether, once the US supplier must be presumed to have known the identity of the German company from the banking details after its second or third supply transactions, we must thereafter conclude, assuming the Appellant to have been the German buyer's agent that, as regards the US supplier, the Appellant was acting on behalf of a named and known principal, rather than still "acting in its own name". We do not reach that conclusion. Although the two tags, referring to an "agent acting in his own name", and "an agent acting for an undisclosed principal" might superficially seem no longer to apply if the US supplier knows of the identity of the German company, the right approach is to determine the legal reality, rather than just to apply the tags literally. The fundamental

question is whether, once the US supplier knows the identity of the German company, the US supplier can realistically consider itself to have a direct contract with the German company, now regarding that company as the disclosed principal behind the Appellant that it regards as an agent for a disclosed principal. We conclude that whether the US company knew or remembered the identity of the German company from the payment details or not, it is perfectly credible that it continued to regard the German company as the Appellant's sub-buyer, and particularly when the US supplier continued to invoice the cars simply to the Appellant we do not consider that the US company had, or could have claimed to have, any direct contractual rights against the German company. The dominant fact remains that the US company produced invoices treating the Appellant as the buyer of each of the 8 cars, and unless there was evidence (of which there seemed to be none) that the documented transactions were simply shams), the US supplier can have had no contractual relationship with the German company.

39. We accordingly conclude that even if we are wrong on the point that the principal analysis is sustained, we conclude secondly that if the Appellant had been a properly appointed agent of the German company, the feature that the US supplier treated the Appellant and not the German company as its customer must mean that the agent acted in his own name. Accordingly there will still have been deemed sales to and by the Appellant in accordance with section 47(2A) VAT Act 1994.

Overall conclusions

40. Our decisions are accordingly that the Appellant is liable for the import duty, RGR being unavailable, but that for VAT purposes the Appellant acted as principal or, failing that, as an agent acting in his own name, such that OSR was available and the Appellant was not liable for the VAT on importation.

Right of Appeal

41. 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.

HOWARD M. NOWLAN
TRIBUNAL JUNDE

Released: 7 April 2015