[2018] UKFTT 503 (TC)

TC06705

Appeal number: TC/2016/05170

VAT – assessment under s 73 VATA 1994 – sales made to the Republic of Ireland – whether a VAT registered trader in an EC Member State – whether eligible to be zero-rated – Regulation 134 of the VAT Regulations 1995 – Public Notice 725 certain paragraphs with the force of law – requisite evidence for zero-rating intra-community sales – whether burden of proof met – fairness argument on tax symmetry – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES MURPHY T/A EBUZZ **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at Tribunal Centre, George Street, Edinburgh on 1 December 2017

Non-attendance of or representation for the Appellant

Mr Mark Boyle, Officer of HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2018

DECISION

1. The appellant, Mr James Murphy trading as Ebuzz, appealed against an assessment to VAT under section 73 of the Value Added Tax Act 1994 ('VATA') raised by HMRC as the respondents.

2. The s 73 assessment is in the quantum of £17,504.50. The appellant stated that the quantum of the assessment in dispute is £8,260.68.

Appeal out of time

3. The appealable decision was issued on 15 October 2014, and the Notice of Appeal was received on 28 September 2016. As such, the appeal was notified to the Tribunal out of time.

4. HMRC do not raise any objection to the late appeal due to the misinterpretation by the appellant that HMRC had issued a later decision on 23 August 2016, following the provision of further information by the appellant on 21 July 2016. HMRC's August 2016 letter was mistaken by the appellant as the review conclusion letter.

5. The circumstances leading to the August 2016 letter being mistaken as the appealable decision are set out below. No representations for the appellant or submissions by HMRC were made in relation to the procedural issue of the late appeal. No judicial decision has been made in this respect other than to accept the parties' agreement to proceed with the appeal as if it had been made in time.

Hearing in appellant's absence

6. The hearing was originally listed for 13 September 2017 in Glasgow. The appellant telephoned the Tribunal Service on the morning to advise that he was unable to attend due to unforeseen circumstances. He was asked by the clerk to send an email to state the matter that prevented him from attending.

7. The email arrived at 9.20am and was marked 'Urgent'; the appellant advised that he was unable to attend the hearing due to an attempted break-in at his business premises during the night, which required his immediate attention. He also stated that he understood that this might mean the hearing would proceed in his absence, even though it was not his preference and said that he could be available via telephone if that was possible. He apologised for the very late cancellation and said it was due to 'a rare set of circumstances entirely outwith [his] control'.

8. As the judge for the 13 September 2017 hearing, I granted postponement and issued directions for parties to submit 'Dates to Avoid' for the hearing to be re-listed.

9. The hearing was then re-listed for 1 December 2017, and the appellant was advised of the date by letter from the Tribunal dated 28 October 2017, which also gave detailed guidance on getting to the venue and on any postponement application.

10. On the morning of 1 December 2017, when there was no appearance of the appellant near to 10am, the Tribunal Service telephoned the appellant a few times. It would seem that while the Tribunal Service did get through on Mr Murphy's number, the line was repeatedly cut off without a response.

11. The Tribunal decided that it was in the interests of justice that the hearing should proceed in the appellant's absence in accordance with Rule 33 and the overriding objective under Rule 2 of the Tribunal Rules for the following reasons: Mr Murphy had been asked for his dates to avoid for this listing; he was duly notified of the date of hearing; a previous postponement granted, with the consequential wasted costs and time involved for the Tribunal Service and HMRC; no explanation was given for his non-attendance, and no application for another postponement was made.

Evidence

12. Mr Murphy had advised the Tribunal Service (as part of the Listing Information) that he intended to give evidence. He did not provide a witness statement. His non-attendance at the hearing meant that no further evidence could be adduced from Mr Murphy in person. As a result, the appeal is determined on the documentary evidence that had been furnished. The appellant lodged 85 pages of documents, most of which (save the 'sales manifest') are duplication of the correspondence, invoices, and bank statements he had submitted to HMRC in the course of the VAT check.

13. HMRC did not call any witnesses.

14. The Tribunal was provided with a joint bundle of documents. HMRC lodged 362 pages of documents, together with HMRC's internal logbook of actions and notes recorded on the case by the various officers involved. The logbook covers the period from 10 September 2014 to 2 September 2016.

The applicable legislation

15. The following sections of the VATA are of direct relevance to this appeal:

(1) Section 3 sets out the liability to register for VAT.

(2) Section 7(1) sets out the place of supply for goods; s 7(4)(b) specifies that 'the supply is a transaction in pursuance of which the goods are acquired in the United Kingdom from another member State by a person who is not a taxable person'.

(3) Section 19 states that the value of the supply is the amount plus VAT for which it is exchanged for when it is in monetary terms.

(4) Section 25(1) states that a taxable person must account for any tax due in respect of their supplies in the relevant accounting period.

(5) Section 26 states that input tax which is to be credited to the taxpayer will only be in relation to supplies which are taxable and have been made by the taxable person in the course or furtherance of the business.

(6) Section 30 sets out the treatment for supplies of goods or services at zero rate; sub-s 30(8) states that regulations may be imposed to satisfy zero rating for exports outside Member States or for acquisitions by a taxable person in another Member State.

(7) Section 73 deals with failure to make returns, whereby an assessment of tax can be raised by HMRC for VAT which has not been declared, or for VAT repayment incorrectly claimed.

(8) Section 77 provides for the time limits for raising a s 73 assessment, namely: (i) *two years* after the end of the relevant accounting period, or (ii) *one year* after HMRC are made aware of the evidence to allow them to raise an assessment, (iii) where further information becomes available, another assessment in addition to the earlier assessment can be made, (iv) there is an overall time limit of 4 years after the end of the relevant period.

16. The relevant Regulations of the VAT Regulations 1995 to this appeal are:

(1) Reg 13 states that a registered person making a taxable supply must provide a VAT invoice to the taxable person receiving the supply.

(2) Reg 14 sets out the information required from a VAT invoice:

(a) an identifying number, time of supply;

(b) date of issue;

(c) supplier details: name, VAT registration number, address);

(d) recipient of supply details: name and address;

(e) details of the supply: type, description of goods/services;

(f) value of supply: quantity, rate of VAT and amount payable excluding VAT expressed in pounds sterling, the gross total amount in sterling, rate of discount;

(g) VAT rate applicable against each item of supply;

(h) total amount of VAT chargeable expressed in pounds sterling.

(3) Reg 22 sets out the requirements for submitting EC sales declarations where a taxable person makes supplies of goods to another member state.

(4) Reg 31 informs the taxpayer of the records that need to be kept to account for VAT.

(5) Reg 134 sets out the conditions under which supplies to a taxable person in another member state can be zero-rated.

17. Public Notice (PN) 725 stipulates the conditions for enabling a supply of goods to a VAT registered customers in another EC Member State to be zero-rated, and the following paragraphs of PN 725 have the force of law:

(1) Paragraph 4.3 sets out the evidence required to satisfy HMRC that an EC sale is eligible for zero-rating as follows:

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

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

(2) Paragraph 4.4 states the time limits to provide evidence of removal of goods:

'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 (including supplies of goods involved in groupage or consolidation prior to removal), or
- 6 months for supplies of goods involved in processing or incorporation prior to removal.'

(3) Paragraph 5.2 stipulates the details that must be shown on documents which are sued as proof of removal from the UK:

'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 "2000 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.'

18. Public Notice 731 states that VAT is due from the amount that is collected by the agent from the customer (para 5.2); and that VAT is due from the gross amount of the taxable supplies (para 5.8). Both paragraphs have the force of law.

Factual background

UK VAT registration and application for transfer, ROI VAT registration

19. The appellant was required to notify his liability to be registered for VAT no later than 2 March 2014. The notification was not received until 24 March 2014.

20. The registration was backdated to take effect from 1 March 2014, and Mr Murphy's business (trading as Ebuzz) is described on the VAT registration as in 'retail sales via the internet in the UK and the Republic of Ireland' (ROI).

21. On 3 April 2014, HMRC wrote to Mr Murphy to enquire why he had failed to notify his liability. The letter asked for a response by 6 May 2014, and stated that in the absence of a response, Mr Murphy was informed that HMRC 'may have to make a decision without [his] involvement and this could result in a higher penalty'.

22. There was no response from Mr Murphy until he sent in the FTN Penalty Reply Slip, dated 10 September 2014 and signed by Mr Murphy, which advised that his first meeting with White & Co was on 18 March 2014; that he was advised to hand in his books and records immediately so as to determine his rolling 12-month turnover.

23. On 26 August 2014, Mr Murphy submitted a form TR1(FT) with a view of becoming registered for VAT in the ROI as a non-resident individual.

24. On 3 September 2014, HMRC received Mr Murphy's application for a transfer of the VAT registration number assigned to him as a sole-trader, to 'Ebuzz Limited' as his new trading entity. The VAT transfer application could not be considered since Mr Murphy's VAT account showed a debt of £11,219.38 as outstanding.

25. On 30 September 2014, HMRC Penalties Team informed the appellant that no penalty would be charged for the late registration of VAT.

26. On 23 December 2014, Mr Murphy was advised that his VAT registration number was cancelled as from close of business on 1 September 2014. (A new VAT registration was obtained for Ebuzz Limited instead of a transfer of the existing VRN from the sole trader entity.)

Checks into the VAT repayment claim for period 06/14

27. On 12 September 2014, Officer Kate Webb of HMRC contacted the appellant's agent, W White and Co ('White & Co'), a firm of chartered accountants, with a request for evidence to support the figures in the VAT return for period 06/14. The return showed total output VAT payable as £17,048.99 against input VAT claimed of £23,334.11, resulting in a repayment of £6,285.12.

28. During the telephone discussion with Officer Webb on 12 September 2014, the appellant's accountant advised that:

(1) The appellant's main business activity was retail sales via the internet to private individuals in ROI.

(2) The appellant was applying for an Irish VAT number in order to zero rate the supply of goods from his UK VAT number to his RIO VAT number.

29. Office Webb requested details of 10 to 20 of the largest private individual customers and of the VAT account spreadsheet and primary records for European Community ('EC') sales.

30. On 17 September 2014, Officer Webb called the accountant to:

(1) explain that given the appellant had made ROI sales to private individuals (ie not VAT registered businesses), these would be treated as 'distance sales' and chargeable to output VAT;

(2) highlight the issues with the invoices provided, as one set of invoices were only receipts and another set were not valid invoices.

31. On 17 September 2014, Office Webb also emailed the White & Co to intimate that a penalty might be imposed as a result of the error in the return; relevant information on the Human Rights Act, Compliance checks information, and VAT Notice 725 on 'Penalties and inaccuracies' were attached for the appellant's reference.

32. On 18 September 2014, White & Co sent HMRC excel sheets with the breakdown for the figures for the VAT return 06/14, enclosing various invoices that were queried by HMRC.

33. On 19 September HMRC emailed White & Co requesting copies of invoices in support of the claim for input tax of £8,333.33 at the date of registration. A follow-up email dated 6 October 2014 to White & Co confirmed that while VAT on purchases up to four years, and services up to six months, prior to the date of VAT registration can be reclaimed based on valid invoices, records to support the input VAT claim must be provided by Friday 10 October to allow the claim. Otherwise the claim would have to be disallowed for the 06/14 period, though the appellant could claim it in a later VAT return period upon the records being produced.

34. The 19 September 2014 email included a request for purchase invoices from suppliers known as 'Go Groopie', 'GrabOne', 'Hamble Distribution', 'Clyde Importers', and sales transactions from the summary spreadsheet of bank lodgements from 'GrabOne' and 'GrabOne Int'. The email concluded by seeking confirmation:

> 'that the "commission" header refers to commission paid from Mr Murphy to a UK distributor and the 'Irish Commission' header refers to commission paid from Mr Murphy to an Irish (ROI) distributor'

By email reply dated 3 October 2014, White & Co confirmed that the commission headers relate to UK Distributors and Irish Distributors.

35. More exchanges of correspondence and information requests took place in early October 2014 to cover the following areas:

(1) Evidence to support the input VAT on purchases made during the pre-registration period;

(2) Evidence to support zero rating of sales made to ROI –

(a) the Irish VAT registration number that White & Co indicated that he was obtaining in order to zero-rate his sales;

(b) the VAT account sheet;

(c) the European Community (EC) sales list.

36. On 14 October 2014, Office Webb called White & Co to advise that an assessment would be made as the requested information had not been received by the deadline. The decision letter dated 15 October 2014 was emailed to White & Co and issued to the appellant on the same day.

37. From HMRC internal logbook maintained for the enquiry, the entry dated 14 October 2014 at 13.44 made by Officer Collier stated: 'UCRE submitted £6,285.12', which would seem to be a reference to note that the VAT repayment claim for 06/14 in that sum had already been processed as at 14 October 2014.

38. Also on 14 October 2014, the activity log shows an entry made by Officer Webb, which includes the following details:

> '… According to Mr Murphy's agent/accountants they have applied for an Irish VRN (ROI) for Mr Murphy which will be back dated to 01 March 2014 – the same date as the UK EDR. The agent has provided me with a copy of the Tax registration application singed by Mr Murphy on 26 August 2014. The application is pending receipt of confirmation of a Limited company Mr Murphy has registered in the ROI – hence the delay. The plan is the UK VRN […] will zero rate sales of goods to the ROI VRN Limited company as a dispatch. The ROI VR will then account for sales tax in the ROI on sales to private individuals at 23% VAT. As they had back dated the Irish VAT registration and intend to declare VAT on these in ROI, the SP declared the EU sales on the 06.14 return in box 6 and 8 and paid no UK VAT.
>
> At the time the EU sales were made there was no Irish VRN and the sales were made to private individuals. Therefore these have been treated as distance sales made from the UK and OT [output VAT] is due. Once the ROI VRN has been accepted and there is evidence that Irish VAT has been declared on these sales, the assessed OT could potentially be claimed as an adjustment on a subsequent UK return.'

The decision letter of 15 October 2014

39. In summary, Officer Webb concluded that the VAT return figures for 06/14 were incorrect for the following reasons:

(1) No satisfactory evidence has been provided to back up the claim for pre-registration input VAT;

(2) No output VAT has been declared on EU distance sales to private individuals in the ROI; no evidence that the sales had been made to VAT registered persons in the ROI and the sales were therefore classed as distance sales;

(3) White & Co referred to the Irish company as acting as an agent in these sales. Furthermore, no evidence of removal of goods from the UK had been provided at any time.

40. The following adjustments were consequently made to the figures declared on the VAT return for 06/14:

VAT return box number	Amount declared	Amount adjusted
Box 1 VAT due on sales	£14,866.17	£24,039.34
Box 3 Total VAT due	£17,048.99	£26,220.16
Box 4 VAT reclaimed on purchases and other inputs	£23,334.11	£15,000.78
Box 5 Net VAT	(£6,285.12) Repayable	£11,219.38 Payable

41. By letter dated 2 June 2016, the appellant contended HMRC's decision of 15 October 2014, averring that the distance sales on which output VAT was raised on him were zero-rated supplies, and that he was due a VAT repayment of £8,260.68. Specifically, he stated the following:

> 'I note that you have charged me output tax on EU distance sales to private individuals in the Republic of Ireland; however you have not asked if these sales were to private individuals or to VAT registered companies. In fact of the £45,855.87 in EU sales shown, the sum of £41,303.42 was to the company Grab-One with a VAT number of IE[…].
>
> Given this information I believe your assessment is incorrect and I have overpaid VAT for the period and hereby and respectfully ask for a refund of the overpayment in the amount of £8,260.68.'

42. On 17 June 2016, Officer Webb replied by reiterating the information that would be required as evidence to enable the supplies to be zero-rated as follows:

> 'When I investigated your repayment claim for your first period VAT 06.14, I dealt with your then authorised accountants: W White & Co. From the spreadsheet VAT account they provided to me there were figures showing net EC sales of £45,476.89. However, there was no evidence provided to me within the time limits to show these have

been sold either to your associated Irish limited company, GrabOne (Ireland) Limited, with Irish registration number IE [number], or indeed any other VAT registered customers in another member state.

If you would like me to review of my decision then please provide the following documents within 30 days. If I do not receive the information is by **16 July 2 016** my original decision will be upheld.

1. The original or a copy of any VAT sales invoice(s) to your customer's which must clearly show the customer's EC VAT registration number, including the two-letter country prefix code.

2. Proof the goods were sent or transported out of the country to a destination in another EC member state.

3. Valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4 of the VAT Notice 725: the single market, and

4. Proof of payment made do the EEC customer (for example a copy of your business bank statement for this period).'

43. On 27 June 2016, the appellant provided HMRC with invoices to GrabOne, a VAT registered company in the ROI, together with documents from a shipping company, and the business bank statements to support the claim that the export of the goods were eligible for zero-rating.

44. By letter dated 23 August 2016, having considered the evidence provided on 27 June 2016, Officer Webb concluded as follows:

(1) From the bank statements provided for the above period, the total international receipts of £38,659.97 from 24 separate transactions from [ROI] VAT registration GrabOne. Though no cross-reference was provided to match the payments on the bank statements to the 23 sales invoices dating from 11 March 2014 to 23 June 2014, the payment dates loosely correspond with the sales invoice dates, and the bank statements are accepted as evidence of payments.

(2) These sales invoices were made out in Euros and no exchange rate was provided. Using HMRC published exchange rates at the time of the transactions, this equated to a total of £39,429.02. The difference is small enough to be due to different exchange rates used.

(3) Originals/copies of the original sales invoice is issued were requested. The sales invoices now provided are not valid VAT invoices for your sole proprietor VAT registration. They are issued from EBUZZ Ltd [VRN different], which did not become effective until 1 September 2014.

(4) The sales invoices provided also have no invoice number (which must be sequential). This is a legal requirement.

(5) The evidence you have provided as proof of removal of goods to the EU is insufficient. Section 5.1 of VAT Notice 725 The Single Markets lists examples of 'Evidence of removal'.

(6) Section 5.2 (which has the force of law) of Notice 725 lists 'What must be shown on documents used as proof of removal'. The documents of proof of removal must clearly identified the following: the supplier, the consignment (where different from the supplier), the customer, the goods, an correct value, the mode of transport and route of movement of the goods, and the EC destination.

(7) The descriptions of goods on the invoices are vague; quantities or values are not acceptable for identifying the goods. When making EC dispatches, the onus is on the business to retain evidence to zero-rate the supplies. As proof of dispatch is required to correspond to any sales invoices issued, a more detailed description is required on the sales invoices and quantities. Or you would need to keep secondary evidence in the form of purchase orders from your EC customers, or any email correspondence, for example.

45. Officer Webb made other detailed comments regarding the documents submitted for her consideration, such as: (a) inconsistent use of suppliers' VAT registration numbers between the two entities associated with Mr Murphy as a sole trader and Ebuzz Limited; (b) inconsistent use of address on the invoices, using the premises address instead of the address notified as the registered office on the VAT registration form and on Companies House record; (c) the sales invoices have £ signs next to the values but the total is rendered in Euros.

The appellant's case

46. On 21 September 2016, Mr Murphy notified his appeal to the Tribunal.

47. On 20 February 2017, Mr Murphy wrote to the Tribunal Service in response to the Statement of Case lodged by the respondents, stating the following:

> 'Contrary to the Statement of Case by the respondents, I am not in dispute with relation to Box 4 VAT reclaimed on purchases. The dispute is only concerned with Box 1 VAT due on sales and amounts to £8,260.42.'

48. In respect of witnesses, Mr Murphy confirmed that he would not be calling any witnesses other than himself, that he was 'still in dispute with the Accountants acting for [him] at the time of the overpayment'.

49. In support of his appeal, Mr Murphy lodged further information with the Tribunal on 20 February 2017, which was considered by HMRC in their letter to the appellant dated 13 March 2017, confirming that the production of documents in support of his appeal did not alter the decision.

50. Mr Murphy lodged a 3-page document for his grounds of appeal, which are summarised as follows:

(1) HMRC's decision is wrong due to the fact that we supplied goods eligible to be zero-rated; we have paid VAT on these goods. As a result of this payment, VAT has been 'overpaid' and I feel that small technical matters have been made to be the primary issue by the reviewing officer.

(2) We were very new to the process of selling to EC states. The accountant in place at the time did not know a great deal about trading internationally. From the beginning, we treated the goods as eligible to be zero-rated and as such we did not collect VAT from the company we sold the goods to.

(3) We are in dispute with our accountants which resulted in our paperwork being held against us as well as communications not being passed on such as that from HMRC. We never obtained all paperwork and we now use a more experienced firm to fix old issues.

(4) In response to Officer Webb's letter of 23 August 2016, we had to reproduce new invoices with the exact data we had used to provide the last invoices. When we changed from a sole trading business to a limited company, we had to change our VAT number.

(5) In the reproduction of invoices, 'I accidentally used the current VAT number for the LTD company rather than the past VAT number for the Sole Trading business. This was a minor issue in my opinion…'.

(6) I 'disagree that the evidence for removal of goods to the EU was insufficient, but this is yet another minor point which could be easily resolved had we been made aware of this point.'

(7) As regards the vague descriptions on the invoices, although 'this is partially true, every invoice has a supplementary document ... which shows a breakdown of the goods which were supplied for each shipment. This document would show all the additional pieces of information … Had [Officer Webb] come back to us with these comments … we would have collated these documents and provided them.'

51. In conclusion, the appellant stated his main ground of appeal as follows:

> '… I believe [Officer Webb's review conclusions] all focus on very minor technicalities and overlook the core principle which is that a VAT payment was made on goods which should have been zero rated. We never charged VAT on these goods as they were eligible to zero rated (sic) therefore at present our business has suffered a loss to HMRC of funds which should be refunded to us. …'.

52. For 'Result' in section 7 on the Notice of Appeal, Mr Murphy stated:

> 'I firmly believe that the most logical and fair outcome is for us to be reimbursed the overpayment of VAT which was made on zero-rated goods.'

HMRC's case

53. The onus is on the appellant to obtain and retain satisfactory documentary evidence in order to satisfy the Commissioners of HMRC that the goods sold are eligible for zero rating under s 30 VATA.

54. The VAT return for 06/14 was due on 7 August 2014, and the appellant was requested to provide information for zero-rated sales on 12 September 2014, which meant the appellant had sufficient time to provide evidence in support of the claim.

55. Sections of the Public Notice 725 ('PN 725') have the force of law, and on 17 September 2014, White & Co was provided with a copy of the PN 725 to explain that the appellant's sales to ROI would be treated as distance sales.

56. The respondents submit that the appellant did not provide the evidence required to show that he had made sales to a taxable person in the ROI and the sale were therefore correctly assessed as standard-rated.

57. The appellant's accountant had inferred that GrabOne were acting as an agent for the appellant for his sales to customers in the ROI. The Appellant therefore need to show that the sales from the agent were to VAT-registered customers.

58. On 2 June 2016, the appellant subsequently indicated that his sales were directly to GrabOne, but no satisfactory evidence has been provided to indicate that the title of goods has passed from the appellant to GrabOne. While the bank statements provided were evidence of payment, it was not clarified if GrabOne were the agent or the purchaser of the goods. The invoices rendered by the appellant to GrabOne failed to meet the requirements for being valid invoices.

59. The invoices provided for the sales to GrabOne are also contrasting. Those provided on 17 September 2014 were self-billing invoices, which set out the description of the goods, unit price and amount charged. Subsequently, the appellant provided two sets of invoices in relation to sales to GrabOne. The subsequent sets of invoices provided on 27 June 2016 and 20 February 2017 do not contain the relevant details to be correlated to the self-billing invoices previously provided, nor are the details between these two later sets of invoices consistent with each other.

60. The appellant has stated that he has been in dispute with White & Co, but would submit that the onus is on the appellant to obtain the original invoices.

61. As to the removal of goods from Bullet Express, the appellant's first set of evidence for the removal of goods were on 2 June 2016, which failed to provide a description of the goods or the mode of transport and movement of the goods. The invoice from Bullet Express is not a valid VAT invoice as it fails to provide Bullet Express address or a description of the goods.

62. Revised Bullet Express invoices provided on 20 February 2017, while showing the required detail of the destination of goods, failed to contain sufficient details to enable the sales manifest to be compared. These revised invoices from Bullet Express

failed to specify the supplier's address. The sales manifest was heavily redacted to block out the unit cost of the items, and the overall value of each purchase on the list.

63. The appellant did not record an EC Sales list which is a requirement for zero-rating under Regulation 22 of the VAT Regulations 1995.

64. The appellant was written to on 3 April 2014 asking for reasons as to why he had failed to notify his liability to register for VAT. The appellant did not respond until 23 September 2014. While the matter is not under appeal, the respondents submit that it is indicative of the appellant's attitude towards his tax affairs.

Discussion

The actual quantum of the assessment in dispute

65. The s 73 VATA assessment in the sum of £17,504.50 has two elements. The first concerns the refusal of input VAT claim on the pre-registration purchases. The second is to charge output VAT due on sales made to the ROI as EC distance sales.

66. As per the table of adjustments at §40 that underpinned the s 73 assessment, the first element is to reduce input VAT (Box 4) claimed from £23,334.11 to £15,000.78, which gives rise to **£8,333.33** in the assessment.

67. The second element is to increase output VAT due on sales (Box 1) from £14,868.17 to £24,039.34, which gives rise to additional VAT liability of **£9,171.17**. The output VAT adjustment is extrapolated to Box 3 entry for 'Total VAT due', from £17,048.99 as declared to £26,220.16, the difference remains as £9,171.17.

68. The combined elements of £8,333.33 and £9171.17 give the total of **£17,504.50** as the s 73 assessment.

69. The quantum of the assessment therefore takes into account the repayment claim of £6,285.12, which would have been credited to Mr Murphy. Since this repayment is found not to be due (in relation to the pre-registration purchases), the quantum of the s 73 assessment is therefore inclusive of the repayment that Mr Murphy had erroneously claimed in the return for 06/14.

70. By letter dated 2 June 2016, the appellant contended that he was due 'a refund of the overpayment in the amount of £8,260.68'. The Notice of Appeal dated 21 September 2016 does not state the sum in dispute under section 3, nor in the extensive grounds of appeal attached, but for the result of his appeal, Mr Murphy stated that he considered 'the most logical and fair outcome is for [him] to be reimbursed the overpayment of VAT which was made on zero-rated goods'.

71. By letter dated 20 February 2017 after HMRC's Statement of Case was lodged, Mr Murphy wrote to the Tribunal Service that he is not in dispute with the adjustment to the VAT reclaimed on purchases, and that the dispute is 'only concerned with Box 1 VAT due on sales and amounts to £8,260.68'.

72. From his pronouncements, it appears that Mr Murphy has not actually grasped the meaning of the s 73 assessment. His position on 2 June 2016 was that he was due a *repayment* of £8,260.68. The result he wanted from this appeal is a *reimbursement*. On 20 February 2017, he notified the Tribunal that he was only disputing £8,260.

73. Mr Murphy did not make himself available to confirm what he understands to be the 'result' should his appeal fail. Reading between the lines of his various assertions, there is a distinct possibility that Mr Murphy is under the misconception that by reducing the sum he seeks to dispute, the resulting s 73 assessment would also be reduced accordingly from £17,504.50 to £8,260.68.

74. In other words, it would seem that Mr Murphy considers the sum of *repayment* due to him as £8,260.68, and not £17,504.50. When in fact, the s 73 assessment is to levy additional VAT liability of £17,504.50 as *payable* by Mr Murphy.

75. For the avoidance of doubt, and in view of Mr Murphy's express statement that he now only disputes the £8,260.68, the status of the quantum of the s 73 assessment stands as follows:

> (1) The sum of input VAT disallowed of £8,333.33 is upheld and confirmed;
>
> (2) The sum of output VAT assessed of £910.49 (being the difference of £9,171.17 assessed and £8,260.68 disputed) is also upheld and confirmed;
>
> (3) The balance of output VAT assessed and disputed of £8,260.68 is treated as the only constituent part of the assessment under appeal.

76. In other words, even if he is to appeal against this decision, the other components of the s 73 assessment that he does not dispute in the sum of £9,243.82 (being £8,333.33 plus £910.49) are held good and enforceable.

77. Finally, in the matter of this appeal, Mr Murphy has indicated that he was contending that a *repayment* in the sum of £8,260.68 is due to him. It is important to clarify that no such repayment would ever be due even if his appeal were to succeed.

78. The disputed output VAT has never been paid over by Mr Murphy, which means even if his appeal were to succeed, it would only mean no VAT of the disputed amount would become payable, *not* that a repayment would be due to him as he seems to suggest. He has not made a claim for repayment under s 80 of VATA, and the matter in dispute concerns the output VAT *payable* by him as an exporting trader.

The issues for determination

79. The quantum of the s 73 assessment under appeal is narrowed down to £8,260.68, and concerns exclusively the EC sales made by the appellant to GrabOne. This is the position specified by Mr Murphy in his letter to HMRC dated 2 June 2016, and to the Tribunal by letter dated 20 February 2017.

80. The issues involved in determining the appeal are:

(1) whether the appellant has met the burden of proof in producing the evidence required to zero-rate supplies made to ROI: the substantive issue;

(2) whether the requisite evidence was produced within 3 months of the removal of the goods from the UK: the time-limit issue.

81. The burden of proof for each issue is on the appellant, and the standard of proof is the civil standard of the balance of probabilities.

Documentary evidence as stages of proof

82. The stages of proof in sequential order concern: (a) details from invoicing, (b) specification regarding the removal and movement of goods, and (c) the EC sales list.

83. The trail of evidence produced by the appellant came in three tranches:

(1) In September 2014 as provided via White & Co;

(2) By letter dated 27 June 2016 (received by HMRC on 21 July 2016) with enclosures;

(3) By letter dated 20 February 2017 to the Tribunal Service with enclosures.

84. The evidence provided by the appellant's agent in September 2014 was closest in time to the actual submission of the return for 06/14. From telephone discussions and correspondence, and the key facts from the agent's evidence as noted in Officer Webb's entry in HMRC's log detailed at §38 can be summarised as follows:

(1) That the Irish Company GrabOne acted as an agent for Mr Murphy in relation to Ebuzz's sales made to the ROI;

(2) That the sales to ROI were to individuals;

(3) That an application for an ROI VRN was being made for Ebuzz Ltd to enable the UK VRN sales (from Mr Murphy's sole trade or later the limited company's registration) to be zero-rated.

85. The first meeting between Mr Murphy and White & Co took place on 18 March 2014, and his first VAT return, that of 06/14 was prepared by White & Co on information as provided by Mr Murphy.

86. From the information provided by White & Co, Mr Murphy's business is 'retail sales via the internet', that being the description on the UK VAT registration form and the ROI VAT application form.

87. By 'retail', the common understanding is that the end customers are individuals, as distinct from VAT traders who buy the goods in to sell to the end consumers. Mr Murphy's mode of business would seem to acquire goods from UK and Irish distributors for onward sale to individual customers on Ebuzz's business platform. The distributors received 'commissions' from Mr Murphy, and would seem to be acting as agents for Ebuzz's business by dispatching the goods directly to Ebuzz's customers who had shopped online from Ebuzz's website platform.

88. White & Co is a firm of chartered accountants regulated by a professional institute. It would seem that it was on their advice that Mr Murphy got registered for VAT, applied for a ROI VRN, and accounted for VAT in relation to the EC sales under Box 6 and 8 and paid no UK VAT (per Officer Webb's logbook entry on 14 October 2014). The reason for not accounting for VAT was that the Irish VAT application was supposed to be backdated to March 2014 to cover the VAT period 06/14 in question.

89. In June 2016, Mr Murphy submitted to HMRC the second tranche of evidence, seeking in effect to overturn the account from White & Co in relation to his EC sales by asserting that the sales were made *direct* to GrabOne as the end customer and not to individuals in the ROI; that GrabOne has a valid ROI VRN, and hence, his sales to GrabOne were eligible for zero-rating.

90. These invoices produced by Mr Murphy are not contemporaneous records and there are numerous inconsistencies: VRN of the limited company being used at the time when there was only the sole-trade; dates of invoice falling outwith the VAT period for 06/14; vague descriptions whereby every invoice merely states 'Goods as per weekly sales manifest'. The deficiencies of these invoices have been detailed by Officer Webb's response dated 23 August 2016, and each of her observations is valid.

91. The invoices supposedly from Bullet Express are equally deficient. Nineteen invoices from Bullet Express were submitted, each stating the 'goods journey' was from 'Kilmarnock- Dublin' for '1Plt' (presumably pallet) for £60 net charge. Apart from the first invoice which bears an invoice/docket number of '884355', other invoices have no invoice/docket number. There is no variant to the content of the 19 invoices other than the date. The detailed description of goods for each consignment is singularly missing, as of all the other crucial details stipulated by PN 725, especially those under para 5.2.

92. There is no satisfactory evidence to establish that there had been movement of goods from Kilmarnock to Dublin as consignments to GrabOne. Nor was there an EC sales list to corroborate that such sales have been made to a VAT registered trader in an EC member state during the 06/14 period.

93. The third tranche of evidence came after the Notice of Appeal was lodged in February 2017, and the only material difference to the second tranche is the addition of a page of 'Sales Manifest' to each of the invoices rendered to GrabOne. Each page of Sales Manifest contains three columns under the headings of: (i) product code, (ii) description of goods, and (iii) quantity. Two more column headings for 'Value Each' (ie Unit Price) and 'Value' (ie Unit Price multiplied by quantity) are shown, but the contents of the last two columns are completed blacked out on every sales manifest.

94. These sales manifest pages are totally deficient in enabling any matching of the invoice total with the supposed items on the manifest. For example, the invoice GO 017 dated 21 May 2014 shows goods description by: 'Goods as per sales manifest' with a unit price of 1249.92 Euros and a total of invoice value of 1245.92 Euros. The invoice has a sales manifest, listing *100 LED Lights, 20 LED Pink, 100 LED White*

(50 of each), 6 Function Spray Hose (48 of) without their respective product code, and *Wild Bird Feeder (12 of), Alphabet Mats (30 of), Round solar Deck Light (50 of), Whistling Kettle (24 of)* with their respective product code. Since the unit price is missing on the sales manifest for each of the products listed, there is no way to calculate the overall value of items on the sales manifest to match the total value on the face of the invoice.

Conclusion on the substantive and time limit issues

95. Mr Murphy's grounds of appeal sought to discredit the points raised by Officer Webb why she was not satisfied that the conditions for zero-rating were met as 'minor points' or mere 'technicalities'.

96. To enable certain sales to be zero-rated is therefore an exception to the norm, and represents a concession that can only be granted by the commissioners upon the requisite conditions being met. The statute does not prescribe the conditions for zero-rating, but delegates the power to the commissioners to define the exact method and proof that is required for the commissioners to be satisfied that zero-rating can apply.

97. Such stipulations by Regulations and certain paragraphs in Public Notices are vested with the force of law, and as Templeman LJ stated in *Henry Moss of London Ltd and another v C&E Comrs* [1981] 2 All ER 86 ('*Henry Moss*'):

> '… Section 12(7) of the Finance Act 1972 empowers, but does not direct, the Commissioners of Customs and Excise by regulations to make provisions for the zero-rating of supplies of goods specified in the regulations where the commissioners are satisfied that the goods have been or are to be exported, and such other conditions as may be specified in the regulations are fulfilled.'

98. Zero-rating a supply represents a concession to be granted on the Commissioners being satisfied that certain conditions are met. The enforcement of law regarding customs duty and VAT hinges on specificity, which is given substance by technical details. The Tribunal finds that the points raised by Officer Webb, while technical, are properly raised in accordance with the relevant law.

99. On the substantive issue, Mr Murphy has not met the burden of proof in producing the requisite evidence to support his zero-rated sales to the ROI. None of the documents would seem to be contemporaneous; the details contained therein are neither sufficient nor coherent to meet the stipulated standards; the random and haphazard nature of the documents undermine their authenticity.

100. On the time-limit issue, para 4.4 of PN 725 stipulates that '[i]n *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 either 3 months or 6 months depending on the procedure prior to removal. The invoices from Bullet Express were first produced in June 2016, which was at least 24 months after the time of supply. Not only are invoices deficient to certify the removal of goods, the time limit for their production has been significantly breached.

101. The default position for a VAT trader making taxable supplies is that all sales are subject to VAT at the standard rate unless other conditions obtain for the sales to be zero-rated. On the balance of probabilities, Mr Murphy has not proved that the disputed sales to the ROI were *destined* for a VAT registered trader in ROI.

102. The appellant has not met the burden of proof for the alleged sales to be zero-rated. The EC sales were correctly categorised as EC distance sales and subject to output VAT at the UK VAT rate of 20%.

The main ground of appeal as regards tax symmetry

103. Apart from his arguments against technicalities, Mr Murphy's main ground of appeal seems to concern tax symmetry, in that the refusal to allow the EC sales to be zero-rated is unjust, since he had failed to charge output VAT on these sales.

104. Coupled with this argument seems to be Mr Murphy's misconception that his business is entitled to a reimbursement of VAT if the EC sales achieved zero-rating.

No VAT repayment would arise out of this appeal

105. The reimbursement point has been dealt with to a certain extent earlier under the discussion of the quantum of the assessment under appeal. For the following reasons, I am clear that no reimbursement can arise out of this appeal:

(1) The input VAT on the purchases in relation to the sales made to the ROI would have been duly claimed;

(2) Even if the ROI sales were to achieve zero-rating, it would merely mean no output VAT would be payable on the net sales value;

(3) No output VAT had ever been paid by Ebuzz on the ROI sales to create a potential sum (of overpaid VAT) for reimbursement.

The issue of failure to charge output VAT

106. In the case of *Henry Moss*, to enable an export to be zero-rated, '[t]he conditions require, inter alia, the taxpayer to produce a certificate of shipment on the duplicate of Form C.273; and no such certificate was produced.' The Court of Appeal overturned the decision by Forbes J, who 'held that this condition was unreasonable because the taxpayer could not comply with the condition without the co-operation of the customer, and experience shows that the customer does not co-operate'.

107. In overturning Forbes J's decision, Templeman LJ gave as part of his reason concerning the burden of VAT payment on the exporter:

> 'The taxpayer could bring pressure to bear on the customer by requiring payment by the customer of the whole or part of the appropriate value added tax as a deposit until the certificate is produced. It is alleged that such pressure would be ruinous to the export trade of the taxpayer. Whether this be true or not, and I know not, the taxpayer has a choice. He can trust the customer, and pay the

> tax if his trust is misplaced, or he can take steps to obtain security so as to ensure that the customer performs his part of the operation.'

108. Not all sales destined for an EC Member State are eligible for zero-rating; this is a fact that can be ascertained in the public domain. Paragraph 5.2 of PN 725 warns of the consequence that if 'the evidence is found to be unsatisfactory, the supplier could become liable for the VAT due'.

109. It is not open to me to find the background as to why White & Co accounted for VAT in Box 6 and 8 in relation to the EC sales: what facts were given by Mr Murphy to White & Co, and what was being discussed between client and agent, to reach the decision that no output VAT should be accounted for in the return 06/14.

110. As in *Henry Moss*, Mr Murphy equally had a choice, which was to account for output VAT on the ROI sales just as he would have done on domestic sales within the UK until he had the certainty to zero-rate his EC sales. He had recovered input VAT on the purchases related to these EC sales, and by tax symmetry, output VAT is chargeable unless conditions are met for the sales to be zero-rated.

111. Furthermore, I am not at all persuaded that the pressure faced by the exporters in *Henry Moss* not to charge their importing customers VAT is applicable to Mr Murphy as a retail trader. The ROI customers expect to have to pay VAT, and indeed at the higher rate of 23% in the ROI (compared to 20% in the UK).

Failure to 'account for' not synonymous with failure to 'charge' output VAT

112. Being an e-commerce retailer, it is not clear how Mr Murphy could have charged his ROI customers output VAT *in addition to* the listed price of purchase as shown on the Ebuzz platform. It is the standard business practice in any retail outlets, including e-commerce platforms, for prices to be listed as *VAT-inclusive*: that being the only price a retail customer is interested in, and the final price at which a tendered sale can conclude. The allocation of part of the sale price to be VAT appears on the receipt or invoice a retailer has to give to the customer at the point of sale.

113. It is not common practice for a retailer to list only the net price when tendering goods, and then add the VAT element afterwards at the point of sale, which would seem to be what Mr Murphy suggested he would have to do for the ROI sales.

114. These are facts generic to the retail industry, which together suggest that the issue in the present appeal is not so much a failure to charge the customers output VAT on the sales, but a failure to *account* for the output VAT that is inclusive in the price paid by the customers at the point of purchase.

115. Whether a UK or an ROI customer shopping on Ebuzz website would have been charged the same listed price as the tender for sale. Take as an example a bird-feeder tendered at the listed price of £12. For the UK customer purchasing it, the appellant would have to pay over one-sixth of the £12 as output VAT, making a net sale of £10.

116. For the ROI customer, the appellant would receive the same £12 (or the equivalent in Euros). However, since he had treated the sale as eligible for zero-rating, the net sale price became £12.

117. What could have been the reason or incentive for the appellant to take the chance of zero-rating his ROI sales when *accounting* for his VAT liability? It would be to obtain a higher profit margin on the ROI sales, by treating the £2 output VAT (at the 20% UK rate) that would have been payable as part of the sale receipt.

118. When the ROI sale failed to qualify for zero-rating, the VAT chargeable would be calculated as £2.40 on the net sale of £12.

119. The extent of financial detriment would seem to be the extra £0.40 of output VAT, compared to the situation if Mr Murphy had accounted for output VAT at £2 from the outset on what should have EC distance sales.

The issue of penalty

120. HMRC did not seem to have raised any penalty under Schedule 24 of the Finance Act 2007 for inaccuracies in the return for 06/14.

121. The appellant's grounds of appeal on being 'new' to VAT, and having to rely on accountants and the ensuing dispute with his accountants have no relevance to this appeal, which strictly concerns the correct treatment of the VAT accounting of the sales to GrabOne in the period 06/14, and the quantum of output VAT that should have been levied.

Decision

122. For the reasons stated, the assessment pursuant to section 73 of VATA 1994 in the sum of £17,504.50 is confirmed and upheld in full.

123. The appeal is accordingly dismissed.

124. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 6 SEPTEMBER 2018