Neutral Citation: [2024] UKFTT 949 (TC)

Case Number: TC09330

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2022/11127

VAT – zero rating – goods sold and transported to third party – whether goods were exported by the Appellant – yes – appeal allowed

Heard on: 6 September 2024
Judgment date: 24 October 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC
IAN SHEARER

Between

PROCUREMENT INTERNATIONAL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown of counsel instructed by The VAT Consultancy

For the Respondents: David Corps litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was a video hearing using Microsoft Teams. A face-to-face hearing was not held because it was expedient not to do so. The documents to which we were referred were contained in a document bundle of 1986 pages, an addendum to the bundle of 12 pages and a supplementary bundle of 381 pages together with a skeleton argument from each party and an authorities bundle.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. The appeal concerns VAT assessments issued pursuant to section 73 Value Added Tax Act 1994 (**VATA**) for prescribed accounting periods 06/17 to 12/20 and 06/21 together with a decision to deny a VAT credit under section 25(3) VATA for the period 03/21 VAT return (together **Appealed Decisions**). Together the VAT in dispute is £485,258.33.

4. The Appealed Decisions were made because HM Revenue & Customs (**HMRC**) consider that Procurement International Limited (**Appellant**) incorrectly zero-rated certain supplies made by it. The Appealed Decisions were calculated by reference to an information request from and provided by the Appellant. Following the hearing we raised a number of queries with the parties which revealed that the full extent of HMRC's concern regarding the extent to which the Appellant had zero-rated supplies had not been fully communicated to the Appellant such that it is likely that the Appealed Decisions did not fully assess the amount which would have been due had HMRC's conclusions on the facts and law been as they presented before us. In the end, as we have determined the substantive issue in principle in the Appellant's favour, any under-assessment carries no consequence.

5. We are called to determine only whether supplies made by the Appellant and treated as zero-rated "direct exports" (i.e. supplies outside the EU in the period pre-31 December 2020 and outside the UK from 1 January 2021) were properly zero-rated.

6. For the reasons set out below we find that the supplies were correctly zero-rated.

EVIDENCE AND FACTUAL FINDINGS

Evidence available to us and approach to evidence

7. As indicated, we were provided with very substantial documentary evidence in this appeal. We reminded the parties of their obligations as determined in the *Swift & others v Fred Olsen Cruise Lines* [2016] EWCA Civ 785 at [15] as accepted as applicable to the Tribunal in *Adelekun v HMRC* [2020] UKUT 244 (TCC) i.e.:

> "... It cannot be assumed that just because a document appears in a hearing bundle that the tribunal panel will take account of it; if a party wants the tribunal to consider a document, then the party should specifically refer the tribunal to it in the course of the hearing (see *Swift & others v Fred Olsen Cruise Lines* [2016] EWCA Civ 785 at [15]). This is not least to give the tribunal adequate opportunity to consider and evaluate the document in the light of the reliance a party seeks to place on it, but also to give the other party the opportunity to make their representations on the document. That is particularly so where, as here, there were several hearing bundles before the FTT relating to the various previous proceedings and the one containing the relevant additional documents was voluminous comprising 434 pages."

8. The parties confirmed that the majority of the bundle was not pertinent to our decision as the bundles mainly consisted of invoices between the Appellant and its customers and other

associated documents. We were taken to two example transactions which both parties agreed were sufficient and on which we could base our decision. That calls into question why such a large bundle was necessary but as it was an electronic bundle, no trees needed to die.

9. We were also provided with two witness statements. One was from David McAdams, an officer of HMRC. His statement narrated how and, on what basis, HMRC had arrived at the decision to assess (and to uphold on subsequent review). The statement was accepted by the Appellant and Mr McAdams was not cross examined. The second was from Ms Debbie Espley (though it had been prepared in her married name), Finance and Human Resources Manager for the Appellant. Ms Espley was subject to limited cross examination.

Burden of proof

10. This appeal principally concerns a question of applying the law to what are essentially agreed facts. However, to the limited extent that there was a dispute of fact, and as regards the inferences to be drawn, the burden of proof rests with the Appellant to show that its supplies should properly be zero-rated. They must do so on the balance of probabilities.

Evidence concerning the Appellant's business

11. The Appellant's business is that of a reward recognition programme fulfiller. In essence, and, as we understand it, the Appellant supplies goods to customers who run reward recognition programmes on behalf of their customers who, in turn, want to reward to their customers and/or employees. The reward programme operators (**RPOs**) provide a platform through which those entitled to receive rewards can choose and order such rewards. The RPO will then place orders with the Appellant for requested goods.

12. We summarise the process by which the Appellant receives, processes, delivers, and invoices by reference to the evidence from Ms Espley and documents to which we were referred:

(1) The Appellant has a catalogue of available products.

(2) The RPOs can offer some, or all of, the full product range to their customers and thereby ultimately to the reward recipients (**RR**).

(3) When a RR chooses to redeem a reward the RPO places an order for the reward goods with the Appellant. The order may be received by email but is usually received directly through an online portal (application programming interface/file transfer protocol).

(4) The Appellant maintains a stock of the most commonly ordered items in its warehouse. Where an ordered item is in stock the order will automatically be processed for picking, packaging and dispatch. The orders are processed in the order in which they are received.

(5) Where the Appellant does not hold the item in stock, the receipt of the order will prompt the Appellant to place an order with its own supplier for the goods. Once the goods are received by the Appellant the item is picked, packed, and dispatched in the same way as an in-stock item.

(6) Once an item has been picked it is attributed or ascribed to the specific order to be fulfilled.

(7) The Appellant uses two alternative shipping methods. For items small enough to fit through a letterbox and/or small value items (less than £50) the Appellant uses Royal Mail, and the service is uninsured. For larger and/or higher value items the Appellant uses UPS. Standard insurance under the Appellant's agreement with UPS is limited to

£60 per individual package but additional insurance can be purchased for higher value items. The Appellant's Enterprise Resource Planning (ERP) system will determine which shipping method will be used. The relevant shipper will be notified automatically.

(8) Pursuant to the agreement between the Appellant and UPS, UPS provides services of delivery including relevant customs clearances etc. on behalf of the Appellant.

(9) All items are collected from the Appellant by the relevant shipper and then shipped directly to the RR at the address provided to the Appellant by the RPO and associated with the specific order.

(10) The Appellant receives a daily shipment report (at least from UPS). That report shows, line by line, the shipments made. The RR is individually identified and cross-referenced to the Appellant's order number. The delivery address and tracking numbers are identified together with other information relevant to shipping such as weight and other details. The shipment service charge, declared value of items shipped and, we assume, associated insurance cost, whether a residential surcharge is applied, fuel surcharge, and duty/tax surcharge where goods are delivered outside the UK are all listed to give a total UPS charge.

(11) The Appellant contracts on the same terms for each RPO. However, each RPO will be invoiced at a regularity agreed between the Appellant and the RPO, we understand usually volume based. Thus, for example, BI Worldwide Ltd (**BIW**) is billed twice per month.

(12) The contracts are subject to standard terms and conditions which, as far as relevant to our decision, provide:

(a) A definition of buyer (the person who buys or agrees to buy the goods) and it was agreed that in all cases the buyer under these terms was the RPO (clause 1(a)).

(b) Orders for goods are deemed to represent an offer to purchase (clause 2(b)).

(c) Acceptance of delivery is deemed to be conclusive evidence of the RPO's acceptance of the conditions (clause 2(c)).

(d) Payment is due within 30 days of the issue of the invoice (time being of the essence) (clause 3(b)).

(e) Delivery dates are estimates and may be delayed up to 30 days after which the "Purchaser" (a term not defined) may cancel the contract (clause 6).

(f) The goods are deemed accepted "after delivery to the Buyer" and the goods may not be rejected after that date (clause 7).

(g) The goods are at the RPO's risk "as from delivery" but title in them does not pass "from the [Appellant]" until the RPO has paid the price of the goods plus VAT and no other sum is outstanding. The Appellant reserves the right to retake possession of any goods where title has not passed and to enter the "Buyer's or a third party's premises to terminate any other order" and to stop other orders in transit (clause 8).

(h) Goods lost or "damaged on delivery to the designated premises of the Buyer" shall, at the sole discretion of the Appellant be repaired or replaced provided that a claim is made in writing "by the Buyer" within seven days of invoice for lost items and immediately on arrival for damaged goods (clause 9).

(i) Where the RPO accepts or is deemed to have accepted goods the Appellant has "no liability whatever" in respect of the goods (clause 10(b)).

(13) All goods to be delivered to RRs outside the UK are delivered duty paid (**DDP**) or delivered at place (**DAP**), usually, we understand, by UPS. These are standard terms under INCOTERMS pursuant to which the Appellant remains at risk in respect of the goods and liable for all carriage costs and is responsible for performing or contracting for the performance of all customs (export and import) obligations. The Appellant is responsible for all fees, duties, tariffs, and taxes. Accordingly, the Appellant is responsible for and at risk until the goods are delivered "by placing them at the disposal of the buyer at the agreed point, if any, or at the named place of destination or by procuring that the goods are so delivered". Under DDP the buyer is entitled to nominate a place of delivery which may or may not be its own premises. DAP is, for present purposes, materially and relevantly identical to DDP, in particular the buyer nominates the place of delivery.

(14) In terms of the invoices to RPOs we were taken to two of the Appellant's invoices. The Appellant and HMRC each referred us to a different invoice.

(a) The first was that dated 15 March 2021. It runs to 154 pages and covers a period of shipments from 26/02/21 to 15/03/21. Due date for payment is shown as 14 April 2021, payment terms 30 days. For each individual item procured for BIW the invoice shows a product reference number, description of order, posted shipment date, quantity, unit of measure, unit price, VAT identifier and amount.

(b) The first item listed has a reference number APL-00625. The description of the order provides the customer reference number (we presume that this is BIW's customer reference number as it is different for every line item), an order number (we understand this to be the Appellant's order number, on this line SO685786) and a brief description of the item, in this example "Apple Watch SE GPS 40mm Black Sport Band" and separately but within the same line item "Carriage and Packing UK". Date for both the item and the carriage and packing is 26/02/21. Quantity for each 1, unit of measure for the watch "PCS", unit price of the watch £224.17, and for carriage and packing £7.20. The VAT identifier is down as VAT20, and the amount reflects the unit price (on the basis that there was only one on this line item).

(c) The second line item contains the following information: Reference no: BEAU-0043; description: customer reference 4317174_5100823, order no SO662362, Clinique for Men Moisturising Lotion 100ml, Carriage and Packing UK; date for each of the product and carriage/packing 26/02/21, 3 units of each of product and carriage/packing; unit price £20.39 and £9.15; VAT identifier: NO VAT; total £61.17 and £27.45 (reflecting 3 product items).

(d) The final page identifies the total amount due for goods and carriage/postage as £87,349.48. VAT of £8,255.74 is shown and is broken down between the total value of products sold (together with carriage/packing) against which the VAT identifier was VAT20 and separately for NOVAT. VAT is calculated as due at 20% on the value of goods and carriage/packing labelled with the VAT20 identifier.

(e) Ms Espley explained that the VAT identifier was driven by the location of the recipient of the goods.

(f) HMRC took us to the invoice dated 29 January 2021 again to BIW. It was for shipments during the period 15 January 2021 to 29 January 2021 and was due for payment on 28 February 2021. It was 143 pages and was in the same format as that dated 15 March 2021.

(g) HMRC traced a specific order SO673753 (a product ref no APL-00717, customer reference 4376788_5176622, Apple iPhone 12 128GB Black, price £752.66 plus "Carriage and Packing UK" of £34.75 and a delivered duty paid (DDP) charge of £12.45) through to the corresponding UPS daily report. This showed it as shipped on 29 January 2021 to the RR in Bahrain. The UPS document showed shipment service charge was £91.25, declared val (752.66 GBP) £8.80, duty/tax forwarding surcharge £15.53, fuel surcharge £14.62, peak surcharge – residential £0.10 on a package with a billable weight of 0.5kg, giving rise to total UPS charge £130.30. The Appellant's invoice treated the supply as zero-rated (NOVAT).

(15) If items are lost or damaged in transit the RR will notify the RPO as the RR has no direct means of contacting the Appellant and has no contract with them. Provided that the correct and agreed procedure for notification of damage is followed (we were not provided with any specific details of what these were other than the standard terms which indicate that notification must be "immediate", and that delivery is deemed to be acceptance of the goods with no further recourse against the Appellant), the goods will be replaced or repaired at the Appellant's cost. However, where the loss or damage was caused by UPS, the Appellant will claim against UPS, and it is UPS's insurance that will make good the loss.

(16) In the main the RPOs make payment at or just before 30 days. Invoices are rarely, if ever, paid early. Ms Espley accepted that invoices may be issued prior to delivery (as goods on the invoice may have been shipped on the date of invoice) and whilst it was conceivable that payment may occur prior to delivery, that was unlikely, given usual shipper delivery timescales.

13. Following further clarification after the hearing, we understand that the Appellant used the NOVAT identifier in the following circumstances:

(1) In the period prior to 31 December 2020, where the RPO provided an EU VAT registration number, and the goods were sent to an RR in the EU. This was irrespective of any presence the RPO may have had in the UK.

(2) For all periods in respect of supplies where the goods were sent to an RR outside the EU and from 1 January 2021 where the goods were sent to a RR outside Great Britain.

14. We understand that Mr McAdams formed the view that where the RPO was registered for VAT in the UK the Appellant should not have treated any supply delivered to an RR outside the UK (pre-31 December 2020 including to an EU RR) or outside Great Britain (from 1 January 2021). He considered that the UK presence of the RPO caused the supply to be made to the RPO in the UK/GB and subject to VAT at the standard rate. However, when requesting the information to allow him to quantify the Appealed Decisions he requested information regarding "exports". Whilst the correspondence was written after 1 January 2021 (when all supplies made outside Great Britain were properly referred to as exports) the periods for which he proposed to assess included periods up to 31 December 2020 when the term "export" was limited to supplies made outside the EU. The Appellant only provided details of supplies made to RPOs with a UK presence which had been zero-rated as exports and not those zero-rated as intra-EU dispatches.

15. There are very few findings of pure fact necessary in this appeal and accordingly, these are identified in our discussion and conclusions on the legal issues.

RELEVANT LAW

16. As identified above the decisions under appeal before us concern supplies of goods made pre and post 1 January 2021 where those supplies were zero-rated as exports (i.e. those delivered to a place outside the EU in the period to 31 December 2020 and outside Great Britain from 1 January 2021). Our decision is limited to the decisions before us. However, the route by which we reach our conclusion involves consideration of case law concerning intra-community supplies.

17. The parties were agreed that the Brexit changes made no difference to the analysis in this case and the relevant VAT accounting in the UK. Our approach to interpretation and application of the EU and domestic provisions to the post-Brexit periods in the Appealed Decisions is governed by sections 2 – 6 European Union (Withdrawal) Act 2018 as they stood when the Appealed Decisions were issued, as most recently confirmed by the Supreme Court in *Lipton and another v BA Cityflyer Ltd* [2024] UKSC 24).

Legislation

18. We start with the relevant provisions of the PVD as they were drafted in the period covered by the Appealed Decisions which we summarise.

(1) Article 2 provides that VAT shall apply to: a supply of goods as defined in Article 14(1)...

(2) Article 14(1) defines a supply of goods as "the transfer of the right to dispose of tangible property as owner".

(3) Article 17 creates a deemed supply for consideration where a taxable person transfers goods forming part of the assets of his business from one member state to another provided that the transfer is made for the purposes of the business and the goods are collected or delivered on behalf of the taxable person.

(4) Articles 31 and 32 provide that where goods are dispatched or transported, the place of supply is deemed to be the place where the dispatch or transport begins; and where there is no dispatch or transport, the place of supply is where the goods are located at the time of supply. The place of supply rules do not distinguish between supplies of goods made in country, intra-Community or exports. However, Article 40 provides that the place of an intra-Community acquisition of goods is the place where the dispatch or transport of the goods ends.

(5) Article 63 provides generally that the chargeable event shall be when goods or services are supplied.

(6) Article 146 provides for exemption where there is a supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor.

19. For completeness, and in order to understand the case law principles to which we refer below, and which we consider assist in the determination of this appeal, we note:

(1) Articles 2(b) and 20 provide for there to be an intra-community acquisition of goods where a taxable person acquires the right, as owner, to dispose of moveable tangible property where the goods are dispatched from one member state to another and where the dispatch or transport is made by or on behalf of the vendor or the purchaser.

(2) Pursuant to Article 68 the chargeable event for an intra-community acquisition is when the acquisition is made.

(3) The place of supply for an acquisition is where the dispatch of those goods ends in accordance with Article 40.

(4) Article 138 provides for the exemption of a supply of goods dispatched or transported to a destination outside the member state of the supplier to another member state by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

20. The relevant domestic provisions, at the relevant time are as follows:

(1) Section 4 VATA brings within the scope of the UK scheme of VAT any supply of goods made in the UK by a taxable person in the course or furtherance of a business carried on.

(2) Section 5 provides that the terms of Schedule 4 shall apply for determining what is or shall be treated as a supply of goods or services.

(3) The relevant time of supply, or basic tax point, provisions are found in section 6(2) VATA which fixes the time of supply of goods involving removal as the time they are removed. This is subject to an overriding tax point if the supplies are invoiced or paid for before the tax point created by the removal. Pursuant to section 6(5) where an invoice is issued within 14 days of the basic tax point the time of supply can be deferred to the date of the invoice.

(4) Section 7 VATA lays out the basis on which the place of supply is determined. 7(2) states that:

> "if the supply of any goods does not involve their removal from or to the United Kingdom they shall be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise shall be treated as supplied outside the United Kingdom".

(5) Relevantly, subsection 7(7) then provides that where, inter alia subsection (2), does not apply because the supply involves removal of the goods to or from the UK, the supply shall be treated as made in the UK where their supply involves their removal from the UK and as outside the UK in any other case.

(6) Section 30(6) VATA provides that a supply of goods is zero-rated where such supply is made in the UK and HMRC are satisfied that the person supplying the goods has exported them and met such other conditions as laid down in regulations or by HMRC.

(7) Section 30(8) VATA otherwise provides for zero rating of supplies of goods as specified in regulations where HMRC are satisfied that the goods are to be exported.

(8) Pursuant to Schedule 4 the transfer of the whole of the property in goods (paragraph 1(1)) and the transfer of possession under an agreement which expressly contemplates that the property will pass at some time in the future and no later than when the goods are paid for (paragraph 1(2)(b)) is a supply of goods.

(9) Regulation 129 Value Added Tax Regulations 1995 (the vires for which is section 30(8) not section 30(6)) provides the framework for the zero-rating goods removed from the UK by and on behalf of the purchaser of the goods.

21. Notice 703 is the notice issued pursuant to the vires provided for under section 30 and concerns exports (pre-Brexit supplies outside the EU, post-Brexit supplies outside Great Britain). Notice 725 was the notice dealing with intra-Community dispatches. Notice 703 has

force of law as far as it sets the conditions for zero rating which are not otherwise specified in the legislation. The parts relevant to this appeal are set out below. The paragraph numbers identified first are those in the pre-Brexit version of the Notice and those in brackets afterwards are to the post-Brexit version. There was no material difference in the terms of the Notice save for the obvious change in status of supplies made to EU countries.

(a) Paragraph 1.6 (1.4) draws the distinction between direct exports (under section 30(6) VATA) and indirect exports (under section 30(8) and regulation 129);

(b) Paragraph 1.7 (1.5), legal status of this notice, explains that the notice lays down conditions which must be met in full for goods to be zero-rated as exports.

(c) Paragraph 2.3 (2.3) defines an exporter as the person who supplies or owns goods and exports or arranges for them to be exported to a destination outside the UK or EU or who supplies goods to an overseas person who arranges for the goods to be similarly exported.

(d) Paragraph 2.5 (2.5) permits the appointment of a freight forwarder or other party to manage the export transactions and declarations on behalf of the supplier of exporter.

(e) Paragraph 2.10 (2.8) define a direct export as arising where the supplier sends goods to a destination outside the UK (in the pre-Brexit version "and EU"), and is responsible for arranging the transport or appointing a freight agent.

(f) Paragraph 2.12 (2.9) addresses indirect exports i.e. where an overseas customer (or their agent) collects the goods and arranges for them to be taken out of the EU/UK .

(g) Paragraph 3 (3) sets the conditions and time limits for zero rating. 3.1 (3.1) and 3.2 (3.2) provide guidance on the scope and purpose of the conditions. Paragraph 3.3 (3.3), with the force of law, then sets out the conditions to be met for direct exports. The conditions as prescribed concern the time limit within which the goods must have been exported and the documentary requirements to prove removal from the UK, the detail of which is provided later in the Notice. Paragraph 3.4 (3.4) sets the conditions for indirect exports.

(h) Paragraph 4.1 (4.1) deals with a situation in which there are multiple transactions leading to one movement.

CASE LAW

22. The authorities to which we were referred by the parties were limited and, with respect, and in our view excluded some key cases which have facilitated us in reaching our decision. Some of the cases to which we refer below concern intra-community transactions in goods; however, in our view, those cases nevertheless shed light on the approach we should adopt in determining this appeal. From the case law we have identified we derive a number of propositions:

(1) VAT is a territorial tax, which requires the PVD to provide a clear demarcation of sovereignty of the member states which ensures that supplies are taxed where final consumption occurs (*EMAG Handel Eder OHG v Finanzlandesdirektion fiir Karnten* C-245/04 (***EMAG***) paragraph 32).

(2) In the context of a supply of goods involving the dispatch or transport to another member state the exemption provided for under Article 138 is mirrored by the associated obligation to tax the receipt of the goods in the receiving member state as an acquisition (*EMAG* paragraph 40).

(3) In the context of intra-community supplies, where there are two successive supplies of the same goods, but the goods are subject only to a single intra-Community movement, the exemption and associated acquisition obligation can be ascribed only to one of the two successive supplies (*EMAG* paragraph 45).

(4) An intra-Community supply of goods and associated liability to account for VAT on those goods as an acquisition becomes applicable only where the right to dispose of the goods as owner has transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported to another member state such that they have physically left the territory of the member state of supply (*Regina (Teleos plc and others) v Customs and Excise Commissioners* C-409/04 paragraph 42).

(5) The same principle as is identified in (4) above applies to exports to third countries exempted under Article 146 (*BDV Hungary Trading Kft v Nemzeti Adó- e´s Vámhivatal Köze´p-magyarországi Regionális Adó Fo˝igazgatósága* C-563/12 paragraph 24).

(6) The concept of a right to dispose as owner does not require there to be a transfer of formal legal ownership (certainly in a domestic law transfer of title sense) but the transfer or disposal of economic ownership which will usually entail at the very least the placing of the property at the disposal of the other party, as determined by reference to all the facts and circumstances by the national court (*Staatssecretaris van Financien v Shipping and Forwarding Enterprise Safe BV* Case C-320/88 (***SAFE***) paragraph 7, 8, 12 and 13).

(7) The place of departure of the goods represents the place of supply for VAT purposes only in respect of the supply giving rise to the dispatch/transportation. Any other supply in the chain of transactions relating to such goods will be where the goods are located (*Euro Tyre Holding BV v Staatssecretaris van Financiën* C-430/09 (***Euro Tyres***) paragraph 25).

(8) In order for a supply to involve the dispatch/transport of the goods there must be a temporal and material link established between the supply of goods in question and the transport of those goods as well as continuity in the course of the transaction (*X v Skattenverket* C-84/09 (***X***) paragraph 33).

(9) Where the dispatch or transport of the goods is effected by or on behalf of an intermediate supplier in a chain of transactions (i.e. the purchaser under the first transaction and supplier under the second), which supply represents the supply involving the dispatch/transportation of goods will depend on an overall assessment of all the specific circumstances (*Euro Tyres* paragraph 27).

(10) Where A supplies to B with B intending to collect the goods and move them it is reasonable for A's supply to B to be considered the supply eligible for exemption and made in the member state of departure (subject to evidencing the removal of the goods). Where however, B informs A that prior to departure the goods will be sold by B to C the dispatch/transport of the goods will only attach to the supply from B to C as A was not party to the supply effecting the dispatch/transport (*Euro Tyre* paragraphs 33 – 37).

(11) The question who holds the right to dispose of the goods whilst they are transported is strictly irrelevant; however, the circumstance that the transport is effected by the owner of the goods or on his behalf might play a role in the question of to which in a series of transactions the movement is ascribed (*Euro Tyres* paragraph 40).

(12) The circumstance that the goods are not transported to the address of the first person acquiring the goods does not exclude the possibility that the transport was undertaken in the context of the first supply. The address at which the transport finishes is thereby irrelevant (*Euro Tyres* paragraph 42).

(13) The purpose of the dispatch/transport must be materially linked, as a condition of the contract to the supply of those goods and not for some other purpose (i.e. further processing of the goods) (*Fonderie 2A v Ministre de l'Economie et des Finances* C-446/13 paragraph 28 and 30).

23. In addition to the case law considered above we also take the view that the case law concerning the approach to be adopted in determining whether a supplier makes a single composite supply, or several independent supplies, is of some relevance.

24. For present purposes we consider it appropriate to note the twelve principles derived from EU and domestic case law, summarised in the Upper Tribunal (**UT**) judgment in *HMRC v The Honourable Society of Middle Temple* [2013] UKUT 250 (TC) (***Middle Temple***). The twelve principles are that:

(1) every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split;

(2) the essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply;

(3) there is no absolute rule, and all the circumstances must be considered in every transaction;

(4) formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent;

(5) there is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply, which it would be artificial to split;

(6) in order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable;

(7) the fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant;

(8) there is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element;

(9) a service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied;

(10) the ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties;

(11) separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive;

(12) a single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality.

25. Finally, we considered the First-tier decision in *ASOS plc v HMRC* [2018] UKFTT 353 (TC). That case concerned goods sold by an online retailer to customers with a number of

delivery options. Standard delivery was free but other delivery options gave rise to a charge to the customer. Following conclusion of the contract (on standard terms) for purchase, the goods were despatched from ASOS's warehouse in accordance with the selected delivery option. As this was a retail transaction, the terms and conditions required payment for the goods before dispatch but similar terms regarding delivery were included as those in the present case. If the goods were returned within 28 days, as provided for under the standard terms, ASOS refunded the price of the goods but retained the delivery charge. ASOS claimed that the retained delivery charge was a penalty and not liable to VAT. Following a very comprehensive review of the case law concerning single versus multiple supplies, the FTT confirmed that there was a single supply of delivered goods. In consequence, on return of the goods, that supply was cancelled in part and the consideration reduced to the retained sum (equal to the delivery charge).

PARTIES' SUBMISSIONS

Appellant's submissions

26. The Appellant's arguments supporting zero-rating of the supplies appear to have evolved over time.

27. Initially, it was contended that the supplies represented direct exports as explained in HMRC published and internal guidance. The Appellant contended that it supplied goods to an RPO at a destination of the RPO's choosing (i.e. the location of the RR) and as such the goods were exported by the Appellant and not by the RPO.

28. Such an analysis and conclusion was said to be entirely consistent with the guidance provided by HMRC to its officers in Manual VEXP20300 which explains that a direct export occurs when the complete transaction from supply to export is under the control of the UK supplier and that the location of the customer is not a relevant factor provided that the goods are exported under the control of the supplier.

29. The Appellant contended that despite the supplies being made by it to the RPO and then onward by the RPO the dispatch/transport of the goods related only to its supply to the RPO and was not therefore a situation of the type where there were multiple supplies and a single movement (as considered in the cases referred to above) or an indirect export.

30. As the goods supplied by the Appellant to the RPOs were consumed outside the UK it was right that they are not subject to taxation in the UK. Applying the approach set out in guidance and by reference to the specific language of Article 146, it was only the Appellant which would be entitled to zero-rate the goods as it is the Appellant and not BIW that dispatched and transported the goods and held the relevant documentation of such dispatch.

31. As the argument evolved, and with some emphasis before us, the Appellant contended that by reference to the contractual terms between the Appellant and the RPO there was, in any event, no transfer of the right to dispose as owner in the goods until they were delivered to the RR. This carried the necessary consequence that the goods were not in the UK when they were supplied and hence there could be no question that the supply was subject to VAT in the UK. The movement of goods from the UK following receipt of an order for delivery outside the UK was said to be a movement of own goods, such movement being zero-rated for VAT purposes..

32. Counsel also referred to the judgment of the Court of Justice of the European Union in *Fast Bunkering Klaipeda* (Case C-526/13) to justify a conclusion that delivery direct to the RR did not change the analysis.

HMRC's submissions

33. HMRC contend that the Appellant makes a supply of goods to a UK registered business at a time when the goods are situated in the UK and, as such, there is a standard-rated supply. HMRC accept that the RPO then supplies the goods to the RR by way of export. HMRC

thereby accept that consumption takes place outside the UK and that UK VAT will not be levied on such consumption, but they contend that the removal of the goods to a place outside the UK/EU is by the RPO and not the Appellant, despite the Appellant arranging the transportation and removal of the goods.

34. HMRC appear to accept that title does not pass under the Appellant's standard terms and conditions until full payment is made. HMRC contend that may be at a time when the goods are still in the UK (depending on how quickly the invoice is paid). However, HMRC's principal case is that that there is a supply of goods pursuant to paragraph 1(2)(b) Schedule 4 VATA (transfer of possession pursuant to an agreement that title will transfer no later than payment). Possession is transferred at the point at which the goods are picked by the Appellant and assigned to a specific order from the RPO for delivery, at the RPO's direction, to the identified RR. At that time, the goods are located in the UK and the supply is not one which involves their removal from the UK by the Appellant. Thus, where the RPO is registered for VAT in the UK neither the provisions for a direct or indirect export can apply, and the supply is taxable at the standard rate with the subsequent removal by the RPO qualifying as an export of own goods as reflected in paragraph 4.1 of Notice 703.

DISCUSSION

35. The parties agree that the Appellant makes a supply of goods, meeting the terms of Article 14 PVD and section 5, and paragraph 1 of Schedule 4, of VATA, to the RPO who then makes a supply of those goods (though they disagree as to precisely when that supply is made). The parties are also agreed that the goods have left the UK. Further, there is no dispute that the conditions as to the time limit for export and all relevant documentation have been met.

36. We must determine whether the supply by the Appellant should properly be classified as an export i.e. using the language of Article 146 it is a supply of goods dispatched or transported outside the UK/community by or on behalf of the Appellant and thereby zero-rated. In answering that question we need to consider all of the facts and circumstances.

37. In this regard we find:

(1) The Appellant is engaged in the business of reward scheme fulfilment. Although we had no direct evidence from the RPOs we consider that it is entirely reasonable to infer that fulfilment requires not only that there be a supply of the ordered goods but also that the goods are delivered direct to the RR.

(2) In that sense, delivery is an inseparable, indispensable component of the supply from the perspective of the RPO. That conclusion is not affected by the separate identification of delivery and associated costs and taxes on the invoices to the RPO.

(3) The contract provides for delivery of the goods and not for them to be collected by the RPO to then be transported by or on behalf of the RPO. On this basis the transportation/movement of the goods is proximate to the transfer of economic ownership by the Appellant.

(4) The Appellant is aware from the outset that the goods will be delivered to the RR and agrees to make the supply on that basis.

(5) The RPO does not take physical possession of the goods prior to their removal.

(6) UPS are appointed as the Appellant's agent and not that of the RPO.

(7) UPS collects the goods as agent for the Appellant and transports them at the Appellant's direction for delivery direct to the RR.

(8) The terms of supply between the Appellant and the RPO are DDP/DAP such that the risk in the goods remains with the Appellant until they are delivered to the RR.

(9) Consistent with DDP/DAP terms, the destination is appointed by the RPO, but delivery is not under the direction and control of the RPO.

(10) Whilst the Appellant issues invoices relating to goods which may not have been delivered, invoices are issued after or proximate with the collection of the goods by UPS. In the case of BIW invoices are issued twice per month.

38. On the basis of the facts as we have found them and by reference to the position agreed between the parties, we consider that the Appellant makes a supply of goods as provided for in paragraph 1(1) Schedule 4 VATA and not paragraph 1(2) as asserted by HMRC.

39. We reject as entirely fanciful HMRC's submission that the RPO takes possession of the goods whilst the goods are within the Appellant's warehouse once they are picked (meeting the description in paragraph 1(2) Schedule 4 VATA). At the point at which the goods are picked, they are simply allocated to an order. The title and risk in them remains with the Appellant and it is the Appellant's agent which takes physical possession of them for the purposes of delivering them to the RR. There is no sense in which the RPO takes possession of the goods. Contractually, and in accordance with the INCOTERMS, the RPO takes possession on delivery to the RR and not before.

40. Applying the approach identified in *Middle Temple* as set out in paragraph 24 above to the facts we have found that the supply is a single composite supply of delivered goods to the RPO (reflecting the conclusion in *ASOS*).

41. By reference to the principles derived from the CJEU case law identified at paragraph 22 above, we determine that the dispatch/transport of the goods is properly to be ascribed to the supply made by the Appellant. In particular we note:

(1) Although there are multiple supplies starting with that by the Appellant to the RPO before the goods enter into final consumption, the movement of the goods can only be ascribed to one of the supplies;

(2) That to which it is ascribed requires consideration of all of the facts and circumstances and is not dependant on when title or even economic ownership passes though that may be a relevant factor;

(3) The relevant temporal and material link between the transportation and delivery of the goods is to the Appellant's supply rather than the RPO's supply despite that the goods are delivered to the RR;

(4) It is the Appellant that arranges, contracts for and pays for the delivery services from UPS.

42. We do not consider that the removal can be ascribed to the supply by the RPO to its customer as, save for providing the address of the RR, the RPO is not involved and does not control the movement. We infer that provided that delivery is made, the RPO has little interest in how, or through whom, the Appellant ensures that delivery is made.

43. Having so concluded, we reject the Appellant's submission that it transported its own goods to a place outside the EU/UK then making a supply of goods.

44. Based on our conclusion, it is our view that the time and place of supply of delivered goods are determined by reference to section 6(2)(a) (rather than (b)) and 7(7) VATA. In this regard, we note that sections 6(2), 7(2) and 7(7) VATA determine the time and place of supply by reference to where there is a removal of the goods. There is no definition within VATA of

the term "removal". However, it appears to us that the parliamentary choice of the word in section 7(2) and (7) VATA (and its predecessor provisions) was intended to reflect, and implemented, the requirements now prescribed in Articles 31 and 32 PVD (which uses the relevantly similar language to the Second and Sixth VAT Directives) . Those Articles provide for the place of the supply of goods dependent upon whether the goods in question are dispatched or transported. Removal for the purposes of section 7 VATA must therefore be interpreted in that context.

45. Paragraph 21.3 in *Bennion & Bailey on Statutory Interpretation* as approved in *MC v Secretary of State for Work and Pensions* [2018] UKUT 44 [24] confirms that there is a presumption that where the same word is used more than once within an Act, its use will bear the same meaning on each occasion of use. Thus, we conclude that "removal" for the purposes of section 6 VATA carries the same meaning.

46. We therefore conclude that the Appellant's supplies are supplies of goods which are to be removed and which involve their removal to a place outside the EU/UK. As such the supplies are made in the UK when UPS collects the goods from the Appellant's warehouse. This basic tax point is not accelerated by the issue of the invoices but may be treated as being deferred to the date of the invoice where issued within 14 days of the dispatch. The movement of the tax point does not, however, affect the place of supply which is determined on the basis that the supply involved the removal of the goods and not by the date of such removal.

47. Similarly deduced, the supplies are, in our view, zero-rated as supplies of goods which have been exported pursuant to section 30(6) VATA. By reference to the language of Notice 703 it is the Appellant which sent the goods to a destination outside the EU/UK and was responsible for arranging the transportation. The supplies in question were not made on terms that the RPOs collected or arranged for collection of the goods in order to remove them from the UK. They are not therefore indirect exports and the provisions of Notice 703 paragraph 4.1 (which reflect the CJEU case law analysis in paragraph 22(10)) do not apply.

48. For these reasons we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 24th OCTOBER 2024