[2017] UKFTT 0063 (TC)

TC06328

Appeal number: TC/2016/04466

VAT – zero-rating - section 30(6), Value Added Tax Act 1994 - VAT Notice 703 – evidence of export - whether or not the totality of evidence fulfilled the requirements – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRANSPASE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN

Sitting in public at Taylor House, 88 Rosebury Avenue, London, EC1R 4QU on 6 December 2017.

Miss Rahman, Accountant, for the Appellant.

Mr Anharul Qureshi, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is against a notice of assessment dated 29 December 2015 in the sum of £30,016 ("the Assessment") for the under-declaration of output tax by the Appellant, Transpase Limited ("Transpase") for the periods 03/12 to 06/15. The Assessment arises out of HMRC's decision to disallow the zero-rating of the export of goods from the UK upon the basis of (on HMRC's case) the absence of sufficient evidence of export. The amount of the Assessment is not in dispute. The sole issue is as to whether or not Transpase has provided sufficient evidence of export (whether official, commercial or supporting) to comply with the requirements of paragraph 6.5 of HMRC's Public Notice 703.

Findings of Fact

2. The facts are not in dispute and are relatively brief. As such, I will make my findings of fact at the outset. In doing so, I bear in mind that the burden of proof is upon Transpase to establish that its supplies were zero-rated and that the standard of proof in doing so is that of the balance of probabilities.

3. The only witness evidence presented was the oral evidence of Mr Muyideen Animashaun, the sole director and shareholder of Transpase. I found him to be a credible and clearly honest witness and I accept his evidence as set out below.

4. Transpase was originally known as Muyi Global Limited. It carries on business in the export of beauty products, clothes and clothing accessories ("the Goods") to Nigeria. In essence, Transpase's business model was that customers living in Nigeria would contact Mr Animashaun via social media (primarily by messaging him on the "WhatsApp" platform) with requests for specified items. Mr Animashaun would then purchase the requested items from retail shops in the UK or have them delivered to Transpase via orders on UK websites. Transpase then collected together items for various customers and, when there was a sufficient number to justify doing so, arranged for them to be transported by air to Nigeria. An air waybill would be provided for each consignment which named Transpase as "Shipper", included a consignee's name and address ("the Consignee") and did not identify or itemise the Goods separately other than to refer to them all as "Personal Effects".

5. Mr Animashaun provided an explanation as to the names identified in the various air waybills as Consignees. The Consignees were not Transpase's customers, but were instead agents who would arrange for the distribution of the Goods to Transpase's customers ("the Agents"). This took place in a relatively informal manner. The Agents would receive the Goods at the airport in Nigeria and would distribute them to informal sub-agents who would then take them to Transpase's customers' addresses. Mr Animashaun would administer this through WhatsApp messages to the Agents.

6. Mr Animashaun also gave an explanation of the reference to "Personal Effects" on the air waybills. He said that there were two reasons for this. First, if the Goods were described as Personal Effects they were (in his view) less likely to be stolen than if they were accurately identified. Secondly, the airline gave Transpase more favourable rates as personal effects than as commercial goods.

7. Once the customers received their respective Goods, they would pay for them. This would take place in Nigeria, as payment would be paid in Nigerian Naira to a Nigerian company known as Mutoni (Nigeria) Company Limited ("MNCL") of which he was a shareholder and his sister was a director. Sometimes this would be payment in full and sometimes only partial payment. MNCL would collect the payments and from time to time make transfers to Transpase, albeit that these were in varying sums which did not correlate exactly with any particular consignments or payments from customers.

8. Transpase treated these exports as zero-rated and so did not account for any output tax. In order to do so, they relied (and continue to do so in the context of this appeal) on the following documentary evidence:

(1) Transpase's purchase orders.

(2) Air waybills.

(3) Invoices from the International Air Transport Association ("IATA").

(4) Sales invoices issued by Transpase to its customers (although these are headed "receipts" they do not show any payments and so appear more properly to be invoices).

(5) MNCL bank statements.

(6) Transpase's accounts for 2013/2014.

9. HMRC refused to accept that these fulfilled the requirements for evidence of export. As a result, they notified Transpase of the Assessment on 29 December 2015, pursuant to section 73 of the Value Added Tax Act 1994 ("VATA 1994"). On 12 May 2016, Transpase sought a review of the Assessment. By a letter dated 28 June 2016, HMRC upheld the Assessment.

10. HMRC also issued a penalty assessment in the sum of £4,502.40 on 23 June 2016. The whole of the penalty was suspended and there is no appeal against it.

The Appeal

11. The notice of appeal is dated 18 August 2016 and is out of time. HMRC consented to the appeal continuing notwithstanding this and so, insofar as is necessary, I give permission to bring the appeal late.

12. The relevant parts of the grounds of appeal are as follows:

"Our client has provided sales invoices, social medium [sic] audit trails, purchase invoices and evidence of clients making payments into a company bank account in Nigeria. In addition, our client has also provided HMRC the opportunity to contact his customers directly to verify that the goods have been exported.

HMRC has acknowledged purchase invoices and the payments made [in] Nigeria in the clients' names. However due to the lack of detailed evidence on air waybills HMRC refused to grant zero VAT rating conditions. HMRC acknowledges the start and end of the transactions, but not the middle of the transaction, where the goods have been exported.

Our client has provided valid commercial evidence via the air waybills and has demonstrated the export destination, mode and route of destination as referenced by para 6.5 VAT Notice 703, which has the force of the law behind it. The alternate supporting documents provide the evidence of the itemised goods exported to Nigeria and fulfils the rest of the requirements outlined in para 6.5 VAT Notice 703."

The Legal Framework

13. There was no dispute as to the applicable legal framework.

14. Section 30(6) of VATA 1994 provides as follows in respect of zero-rating.

> "(6) A supply of goods is zero-rated by virtue of this subsection if the Commissioners are satisfied that the person supplying the goods –
>
> (a) has exported them to a place outside the member States; or
>
> (b) has shipped them for use as stores on a voyage or flight to an eventual destination outside the United Kingdom, or as merchandise for sale by retail to persons carried on such a voyage or flight in a ship or aircraft,
>
> and in either case if such other conditions, if any, as may be specified in regulations or the Commissioners may impose are fulfilled."

15. Regulation 129(1) of the Value Added Tax Regulations 1995 provides as follows:

> "(1) Where the Commissioners are satisfied that –
>
> (a) goods intended for export to a place outside the member States have been supplied to –
>
> (i) a person not resident in the United Kingdom,
>
> (ii) a trader who has no business establishment in the United Kingdom from which taxable supplies are made, or
>
> (iii) an overseas authority, and
>
> (b) the goods were exported to a place outside the member States,

> the supply, subject to such conditions as they may impose, shall be zero-rated."

16. Paragraph 6.5 of VAT Notice 703 has the force of law and provides for the relevant conditions as follows.

> "The evidence you obtain as proof of export, whether official or commercial, or supporting must clearly identify:
>
> - the supplier
> - the consignor (where different from the supplier)
> - the customer
> - the goods
> - an accurate value
> - the export destination, and
> - the mode of transport and route of the export movement."

17. The reasonableness and binding nature of these conditions was confirmed by *Customs and Excise Commissioners v Henry Moss of London Ltd* (1980) 1 BVC 373.

18. The parties agreed (and I accept) that the First-tier Tribunal has a full appellate jurisdiction in the circumstances of a case such as the present. Despite the reference in section 30(6) of VATA 1994 to HMRC being "satisfied", HMRC is not in fact exercising a discretion. This is reinforced by the fact that "satisfied" relates to the export rather than to the freestanding requirement of the fulfilment of, "such other conditions, if any, as may be specified in regulations or the Commissioners may impose." This is to be contrasted with the position in *Scandico Ltd v Revenue and Customs Commissioners* [2017] UKUT 467 (TCC) which related to the First-tier Tribunal's supervisory jurisdiction over HMRC's exercise of its discretion to accept alternative evidence in support of an input tax claim.

Submissions

Transpase

19. The essence of Miss Rahman's submissions on behalf of Transpase can be summarised as follows: the totality of the evidence available satisfies the conditions of Notice 703. She places particular emphasis upon the invoices issued by Transpase to its customers showing the goods being sent to Nigeria with the customers' details. She also said that HMRC could use these details to contact customers.

20. Miss Rahman also referred me to the First-tier Tribunal decision of *Michael Cohen v HMRC* [2010] UKFTT 631 (TC) ("*Cohen*") (Judge John Walters QC and Mr Julian Stafford). In *Cohen*, the First-tier Tribunal considered, amongst other things, whether or not letters from customers taking delivery of goods were sufficient. In the context of *Cohen*, the letters were insufficient to satisfy Notice 703 as they did not provide sufficient details. However, Miss Rahman's point was that this highlights the

potential for letters from customers to constitute sufficient evidence of export if they do include the necessary information. In particular, Miss Rahman referred me to paragraphs 43 and 44 of *Cohen*:

> "[43] In relation to the other invoices, 1043, 1055, 1138, 1151 (supplies to P. De Rossignol of Jersey) and 1218, 1220 and 1227 (supplies to Stott & Willgrass of Jersey), the Appellant has provided letters from P. De Rossignol and Stott & Willgrass confirming that they respectively 'took delivery of the goods'. Officer Nunhuck would have regarded them as supplementary evidence to provide that the transactions had taken place if they had been produced at the time of his visit. Again, given that the *bona fides* of the Appellant is not in issue, we consider he should have regarded them as supplementary evidence in any event.
>
> [44] The difficulty for the Appellant, however, is that although these letters might be regarded as commercial evidence of export, with the invoices themselves being the necessary supplementary evidence, the letters do not go far enough to satisfy the requirements of paragraph 6.5. That paragraph, which has the 'force of law' lays down that commercial evidence must *clearly identify*, amongst other things, the export destination and the mode of transportation and route of the export movement. The letters do neither. It is a matter of inference that the goods were exported to Jersey. That fact is not clearly identified. All that is said is that the customers, with Jersey addresses, 'took delivery of the goods'. That language is quite consistent with their having taken delivery of the goods in the UK and not exported them. Even if we were prepared to overlook this point and conclude that the letters were evidence which clearly identified the export destination (Jersey), there is nothing in the letters (or any other evidence which we, or HMRC, have seen) which identifies the mode of transport and route of the export movement."

HMRC

21. Mr Qureshi accepted that the first five requirements of paragraph 6.5 of Notice 703 had been fulfilled (being the supplier, the consignor, the customer, the goods and the accurate value) but did not accept that there was sufficient evidence of the final two conditions (the export destination and the mode of transport and route of export movement).

22. Mr Qureshi said that *Cohen* detracted from rather than assisted Transpase's case as there is no evidence at all from customers.

Discussion

23. I find that Transpase has not complied with the requirements of paragraph 6.5 of Notice 703 with the effect that it was not entitled to zero-rate the Goods and HMRC was correct to issue the Assessment. This is for the following reasons.

24. First, I agree that the totality of the evidence must be considered and have done so in reaching my decision.

25. Secondly, HMRC accept that the first five conditions of paragraph 6.5 have been made out. They are correct to do so, as Transpase's invoices set out Transpase's name as supplier and consignor, the customers' names, the Goods, and their accurate value.

26. Thirdly, there are no documents which identify the export destination. Transpase's invoices simply say, "Transport of personal effect to Nigeria" when itemising the transport charges. However, no further detail is given as to where in Nigeria. It is correct that the invoices include an address, but this appears to be (and I find on the balance of probabilities) simply the contact address of the customer and does not state that this is the export destination. The air waybills are of no assistance in this regard as they do not name the customer and do not itemise the Goods and so cannot be (and have not been) reconciled with the invoices. The IATA invoices take the matter no further as they cannot be reconciled with the invoices either. MNCL's bank statements, Transpase's purchase orders and Transpase's accounts make no mention of the export destination and so cannot assist in this regard.

27. Fourthly, even if the invoices are treated as providing the export destination, they do not identify the mode of transport or route of export movement. For the same reasons as set out in paragraph 26 above, the other documents are of no assistance in this regard because the air waybills and IATA invoices cannot be reconciled with the invoices and the other documents make no mention of the mode of transport or route of export movement.

28. Fifthly, there is no evidence from the customers. It is for Transpase to provide the necessary evidence and so it is of no assistance to say that HMRC could contact the customers. The absence of any evidence from customers means that *Cohen* is not relevant.

29. Sixthly, the fact that payments have been made does not assist as this would not itself establish the export destination, the mode of transport or the route of export movement. In any event, there is no evidence of payments to Transpase; although there is some limited reconciliation between Transpase's invoices and payments to MNCL's bank in respect of one customer, I have not been directed to any evidence of payments from MNCL to Transpase or any reconciliation between such payments and the supplies.

Decision

30. It follows that I must dismiss the appeal.

31. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

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RELEASE DATE: 8 FEBRUARY 2018