[2022] UKFTT 00044 (TC)

TC 08396/V

VALUE ADDED TAX – zero-rating – whether evidence of export – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/08681 & TC/2019/09029

BETWEEN

JUNJIE LIU AND ZHE LI **Appellants**

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

The hearing took place on 15 November 2021. With the consent of the parties, the form of the hearing was video. A face to face hearing was not held because of the Covid pandemic.

The documents to which I was referred are the Appellants' bundle of 1011 pages, the Respondent's bundles, the witness statements of the Appellants and the Respondent's officers, the Authorities bundle, the Appellants' skeleton argument dated 1 November 2021 and the Respondent's skeleton argument dated 10 November 2021.

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.

Laurent Sykes QC, instructed by Buzzacott chartered accountants, for the Appellants

Oladapo Sanusi, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the issue of whether the Appellants hold the evidence required to zero-rate their supplies of clothes and accessories to their purchaser in China. Their appeal is made under section 83 VATA 1994 against two assessments made by the Respondents ("HMRC") under section 73 VATA.

PRELIMINARY ISSUE

2. HMRC's witness, Mrs Neeru Kumar, is the officer who made the decisions the subject of this appeal. Her witness evidence about her actions throughout the enquiry and in making the assessments is set out in her witness statement dated 29 November 2018. Shortly before the hearing, it was established that Mrs Kumar would not be available to give evidence at the hearing. An earlier hearing listed in 2021 had been vacated as Mrs Kumar was not available. The Appellants challenge evidence in Mrs Kumar's witness statement and had wished to cross examine the witness.

3. On 1 November 2021 HMRC officer Mr Steve Williams, who was not the decision maker but is now the case officer for the appeal, submitted a witness statement that he is agreement with the decision maker. The Appellants objected to Mr Williams giving evidence on the basis that it is opinion evidence as he was not involved in the decision making. It is for the Tribunal to decide on the evidence whether the exports satisfy the requirements to be zero-rated.

4. I considered the submissions with regard to Mr Williams' evidence, and rules 2, 5 and 15 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, and concluded that his evidence should not be admitted.

BACKGROUND

5. The Appellants carry on business in the export of designer / fashion clothes and clothing accessories ("the goods"). In the relevant period, the goods were predominantly purchased to order, and were primarily sold to a single customer in China ("Zhao Chun Ming"). The Appellants mostly used Parcelforce to deliver the goods to Zhao Chun Ming. Zhao Chun Ming sold the goods onto customers in China at a marked-up price.

6. Mr Dave Reynolds carried out two assurance inspections of the Appellants' business in January 2011 and November 2011. Mr Reynolds recorded that it was possible to trace export and movement of goods using the Parcelforce tracking number online, and that consignments could be "satisfactorily proven to arrive in China". Mr Reynolds checked selected purchase invoices to ensure that they did not relate to zero-rated children's clothes or shoes. The note of the visit confirms that Mr Reynolds was able to confirm the transactions "by tracing payments by reference to bank account".

7. Mrs Kumar visited the Appellants on 21 November 2016 to inspect their books and records for VAT. The Appellants visited Mrs Kumar at HMRC's offices in December 2016 to provide their business records. Mrs Kumar decided that the Appellants did not hold satisfactory evidence of export as described in VAT Notice 703.

8. On 24 March 2017 Mrs Kumar issued a VAT assessment for a total amount of VAT due of £442,873 in respect of the periods ending 31 March 2013 to 31 December 2016 inclusive. The Appellants' representative then provided further evidence to Mrs Kumar, but she informed them that it was not satisfactory evidence to zero-rate the supplies.

9. The Appellants requested a statutory review of Mrs Kumar's decision. The independent review concluded on 3 November 2017 that the evidence of export was unsatisfactory. However, the assessment was reduced to £362,481 to reflect the 3 month time limit for

obtaining export evidence, and that the appropriate period for assessment was the period 3 months after the export. As a result, an additional VAT assessment in the sum of £16,799 was issued on 7 December 2017 for the periods ending 31 March 2014, 31 March 2015 and the three periods from 1 January 2016 to 30 September 2016. The total VAT liability the subject of this appeal under the two assessments is £379,280.

10. The Appellant filed appeals against HMRC's two decisions with the Tribunal on 1 December 2017 and 27 November 2019. Judge Poole decided to permit the late admission of the second appeal under reference TC/2019/09029 on 29 September 2020.

11. Mrs Kumar issued penalty assessments on the basis that she considered that the Appellants had completed documentation which included an incorrect description and value of the items to be shipped, and that this was deliberate behaviour. The conclusion of the statutory review was that the behaviour was careless and, as the Appellants accepted the suspension conditions, the penalty assessment was suspended for a period of 12 months and that period has since expired.

12. The parties took part in alternative dispute resolution (ADR). The ADR exit document dated 25 June 2018 confirms that both parties agree with the facts of the side set out in Buzzacott ADT Outline Statement.

RELEVANT LAW

13. The relevant law relied upon by the parties is as follows:

14. VATA 1994 s30(1), (6) and (8) provide:

> "Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section— (a) no VAT shall be charged on the supply; but (b) it shall in all other respects be treated as a taxable supply; and accordingly the rate at which VAT is treated as charged on the supply shall be nil."
>
> "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
>
> … if such other conditions, if any, as may be specified in regulations or the Commissioners may impose are fulfilled."
>
> "Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where— (a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both—
>
> (i) the removal of the goods from the United Kingdom; and
>
> (ii) (ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and (b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled."

15. Regulation 129 of the VAT Regulations 1995 provides:

> "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;

…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. VAT Notice 703 para 3.3 sets out the conditions for zero-rating direct exports outside the EU, and has the force of law. It requires that the supplier:

(1) make sure that the goods are exported from the EC within three months

(2) obtain official (produced by Customs systems) or commercial evidence (such as a waybill or CMR) of export as appropriate within the specified time limits

(3) keep supplementary evidence of the export transaction.

17. Paragraph 6.1 of VAT Notice 703 sets out the evidence that is required for a supply of exported goods to be zero-rated for VAT:

> "For VAT zero rating purposes you must produce official evidence as described in paragraph 6.2 and/or commercial evidence as described in paragraph 6.3 (both have equal weight). These must be supported by supplementary evidence to show that a transaction has taken place, and that the transaction relates to the goods physically exported. If the evidence of export provided is found to be unsatisfactory, VAT zero rating will not be allowed and the supplier of the goods will be liable to account for the VAT due (see paragraph 11.2)."

18. Paragraph 6.4 of VAT Notice 703 sets out what supplementary evidence is available to support the claim, stating that the trader is "likely to hold, within your accounting system some or all of the following":

- customer's order
- sales contract
- inter-company correspondence
- copy of export sales invoice
- advice note
- consignment note
- packing list
- insurance and freight charges documentation
- evidence of payment or evidence of the receipt of the goods abroad

You must hold sufficient evidence to prove that a transaction has taken place, though it will probably not be necessary for you to hold all of the items listed.

19. Paragraph 6.5 of VAT Notice 703 sets out what must be shown on export evidence in the following terms:

> "An accurate description of goods, quantities are required, for example '2000 mobile phones (Make ABC and Model Number XYZ2000)'.
>
> Vague descriptions of goods, quantities or values are not acceptable. For instance, 'phones' or 'various electrical goods'.
>
> An accurate value must be given and not excluded or replaced by a lower or higher amount.
>
> If the evidence is found to be unsatisfactory you as the supplier will become liable for the VAT due.
>
> The rest of this paragraph has the force of law.
>
> The evidence you obtain as proof of export, whether official or commercial, or supporting must clearly identify:
>
> (1) the supplier
>
> (2) the consignor (where different from the supplier)
>
> (3) the customer
>
> (4) the goods
>
> (5) an accurate value
>
> (6) the export destination, and
>
> (7) the mode of transport and route of the export movement"

20. The parties' submissions at the hearing referred to the cases of *The Commissioners for Her Majesty's Revenue and Customs v Arkeley Limited (in liquidation)* [2013] UKUT 393 ("*Arkeley*"), *KSM Henryk Zeman SP z oo v Revenue and Customs Commissioners* [2021] UKUT 182 (TCC) ("*Zeman*"), *Aruna Rani VG T/A ONE BY ONE FASHIONS* (MAN/96/137) ("*Aruna Rani*"), *Transpase Limited* [2017]UKFTT 63, *Christopher Gibbs Limited* (LON/91/2419Y), *A&S Import and Export Trading Ltd* TC/2018/04113 and *G McKenzie & Co* (LON/92/2015).

21. The burden of proof is on the Appellants to show that they have satisfied the conditions to zero-rate their supplies. The standard of proof is the civil standard of the balance of probabilities.

SUBMISSIONS

22. The Appellants submit that they were entitled to zero-rate the goods that they exported to China. The goods and their value were clearly identified in official, commercial and supplementary evidence as required by VAT Notice 703.

23. The Appellants' second ground of appeal is that a legitimate expectation tat their record keeping was sufficient was created by the representations made by Mr Reynolds. The Appellants submit that as the appeal is under section 83(1)(p) VATA 1994, and following the decision of the Upper Tribunal in *Zeman*, the Tribunal has jurisdiction to consider whether HMRC reneging on the representation is so unfair as to amount to abuse of power.

24. HMRC submit that the Appellants have not provided sufficient evidence to allow zero-rating of the export of goods. HMRC maintain that the commercial evidence consists of Parcelforce receipts and that they do not contain correct details of the goods and the accurate value of the goods exported. The assessments are correct as they assess the VAT which should have been applied to the goods which were exported in the relevant periods.

25. HMRC submit that Mr Reynolds did not give a ruling or write to the Appellants to confirm that their evidence of export was accepted. The Appellants cannot rely on legitimate

expectation in the absence of a representation. HMRC refer to the case of *Aruna Rani* in which it was not accepted that the Customs Officer had made any concession that could be implied from his conduct as to the requirements.

FINDINGS OF FACT

26. I considered the parties' submissions on the evidence and all of the evidence provided to me in making my findings of fact below.

27. Mrs Kumar's decision letter dated 24 March 2017 states that the evidence that she considered in her review was comprised of the Parcelforce receipts, excel spreadsheets in lieu of sale invoices, retail till receipts for goods purchased and bank statements. Mrs Kumar's note of her visit on 21 November 2016 records that the Appellants did not issue sales invoices, but instead listed the items packed per box on a spreadsheet that is put in each box for the customer's reference. This was referred to as the "packing list" at the hearing, but the Buzzacott Outline Statement that was agreed in the ADR exit agreement refers to it as a "sales invoice listing the Chinese customer's name Parcelforce tracking number, goods and their itemised value, total value of goods sent and the Appellants' bank account details". It is referred to below as the "packing list" or invoice where appropriate.

28. Mrs Kumar's decision letter accepts that "the data in the spreadsheet and that in the bank statements do concur".

29. The Appellants provided clear and credible witness evidence about their business procedures, from taking the orders for goods, their purchase of the goods, the packing of the goods in parcels, the collection of the parcels by Parcelforce and the issue of the Parcelforce export receipt, the entries in the Appellants' cashflow spreadsheet, and the payment for the goods by the client. The relevant evidence that was accepted and relied upon by the Tribunal is referred to below.

30. Ms Li's witness evidence demonstrated that Zhao Chun Ming messages the Appellants on social media to order specific items of clothing or accessories. The Appellants buy the goods in the size, colour and design requested from retail shops. Receipts for these purchases are retained by the Appellants.

31. The Appellants used Parcelforce for their deliveries in the relevant period. The only exception was that they used Royal Mail if the export was to be direct to a named customer of Zhao Chun Ming's. Mr Liu books the Parcelforce collections online. The online booking contract shows the Appellants' address for collection and the client's name and delivery address. The online booking system also required Mr Liu to complete an online form for the parcels to be collected. The online form requires a description and the value of the items to be provided. During the relevant accounting periods Mr Liu entered 'personal effects' as the category of item, 'clothes' as the description of the goods, and '£100' as the value of the goods on every parcel, regardless of its contents. He explained that he did this to avoid theft of the goods in transit and I accept this to be the reason for these entries.

32. The goods are packed for delivery by Mr Liu. As there is a limit on how much weight can be included in each parcel (10 – 40 items depending on their weight), the goods prepared for export on any day will be split between a numbers of parcels.

33. The goods to be collected by Parcelforce for export on any day are listed on a single packing list for that export that is prepared by Ms Li, in conjunction with information from Mr Liu who advises her which goods are in each parcel and the Parcelforce/Royal Mail tracking number for that parcel. Each parcel includes a full copy of the packing list for that day's export. The packing list identifies the Appellants as the supplier, the client, and under a heading for each parcel that includes that parcel's tracking number, a description of the items in the parcel

and their individual price, with a total at the end of the list. The Appellants retained a copy of each packing list. Their records are kept on computer.

34. The Appellants' packing lists do not include their VAT number and are not VAT invoices, but they describe each item to be exported in the parcel (for example, 'YSL women dress, black with guns around, size 36' and 'Givenchy women tote handbag, dark red'), the value per item and the Parcelforce or Royal Mail tracking code for the parcel in which they are exported. Ms Li was also able to cross refer each item on a sample packing list to the print of the client's order on WeChat and the retail sales receipt for the goods ordered.

35. The export of the goods in each parcel can be tracked using the Parcelforce/Royal Mail tracking number. The Parcelforce receipt for each parcel shows the exact volumetric weight. As the packing list shows the items contained in each parcel and the tracking number for each parcel, the Appellants held evidence of the export of the goods. HMRC accept that the goods were exported by the Appellants to export destinations in China specified by the customer, Zhao Chun Ming.

36. In addition to the evidence held at the time of the exports, the Appellants have since prepared an excel spreadsheet for 2016 that shows that the Appellants hold consistent evidence of the following items for all goods exported in the period:

(1) Date of export

(2) Parcelforce/Royal Mail tracking number of the parcel

(3) Packing list of the goods in the parcel

(4) The total amount due for the goods in the parcel (invoice)

(5) The total amount for all the parcels exported on each day as recorded on a cashflow spreadsheet)

(6) The total amount due from the client

(7) The total amount received from the client

(8) The bank account page number that shows the client's payment

(9) The Parcelforce/Royal Mail invoice

DISCUSSION

37. I have applied the relevant law and guidance to the findings of fact in order to decide whether the Appellants' evidence is sufficient for the export of the goods to be zero-rated.

38. Paragraph 6.1 of Notice 703 sets the parameters of the evidence required for a supply of exported goods to be zero-rated. This is described as either "official evidence as described in paragraph 6.2 and/or commercial evidence as described in paragraph 6.3 (both have equal weight). These must be supported by supplementary evidence to show that a transaction has taken place, and that the transaction relates to the goods physically exported." Official evidence is not relevant to the facts of this case, and the parties therefore addressed the commercial and supplementary evidence available.

39. Paragraph 6.4 sets out the supporting evidence that is likely to be held in an accounting system, but it does not require every item to be available. The list in paragraph 6.4 includes the customer's order, inter-company correspondence, packing lists and evidence of payment that were provided by the Appellants in this case.

40. Paragraph 6.5 has the force of law and sets out that the evidence must clearly identify all of the matters listed. As HMRC have accepted that all of the matters required by paragraph 6.5

have been satisfied other than the requirements to clearly identify the goods and an accurate value, I will only address the evidence concerning these two matters.

41. I have found the following guidance provided by the Upper Tribunal in *Arkeley* (at para 39) of particular assistance in considering the evidence for the matters required by paragraph 6.5:

> "[There] is no requirement that the matters required by para 6.5 to be clearly identified should be in any particular document or should all be in the official or commercial documentation. All the documentation obtained within the relevant time limit, including supporting documentation, should be considered in determining whether, taken as a whole, those matters have been so identified."

42. HMRC's position is that the references to the goods as 'personal effects' and 'clothes' on the Parcelforce documentation is vague and not sufficient evidence to meet the requirements to zero-rate the supplies as paragraph 6.5 of VAT Notice 703 makes clear that vague descriptions of goods are not acceptable. HMRC's position is also that the inclusion of £100 as the value of the goods on all of the Parcelforce forms precluded acceptance of other evidence of the accurate value of the goods.

43. I have considered all the documentary evidence provided by the Appellants in light of the circumstances to determine whether the discrepancy between the description and value of goods in the Parcelforce forms, and the description and value of the goods in the remaining documents, precludes the evidence in the documents, taken together, clearly identifying the necessary matters. As the Upper Tribunal confirmed in *Arkeley* [at para 22], in the event of dispute, the question of whether the evidence is sufficient to zero-rate a supply is a matter for the Tribunal.

44. Looking first at whether the evidence of export describes the goods, I am satisfied that it clearly identifies the goods, and that the description is not vague. Each item of clothing and each accessory is accurately described in the packing list for export, citing the brand, colour and size where relevant.

45. The packing list is also the invoice to the client. Paragraph 6.4 of VAT Notice 703 does not refer to the export sales invoice being a VAT invoice, and I do not consider that the fact that the packing lists are not VAT invoices affects their weight as supplementary evidence.

46. The descriptions of the goods in the packing lists can be cross-referenced to the customer's orders made in social media correspondence and with the retail receipts for the goods. The description of the goods on the Parcelforce form is not incorrect and the detailed description is provided in the other documents that evidence the exports.

47. I conclude that the Appellants have established that they held sufficient supplementary evidence of export that clearly identifies the goods as required by VAT Notice 703.

48. With regard to the value of the goods, the Appellants have explained why they entered £100 on every Parcelforce form, and there is no suggestion by either party that it was entered with the intention that it should be treated as the value of the supply for commercial or VAT purposes. I note that the introductory paragraph to paragraph 6.5 make clear that an accurate value must be given and not excluded or replaced by a lower or higher amount, and I consider that the value of the goods exported by the Appellants is the value clearly set out in the packing lists. As the accurate value entered in the packing lists is the invoice to the client, it can be cross-referenced to the receipts in the Appellants' bank account from the client. These values were used in the preparation of the Appellants' VAT returns, and in Mrs Kumar's section 73 assessments.

49. I conclude that the Appellant have established that they held sufficient supplementary evidence of export that clearly identifies an accurate value as required by VAT Notice 703.

50. The Appellants have satisfied me that they held sufficient evidence to prove that the exports of goods to China that are the subject of this appeal took place, and that the evidence clearly identifies the goods and an accurate value, such that the conditions for the zero-rating the exports have been met.

51. The Appellants' second ground of appeal seeks to rely on the (obiter) decision of the Upper Tribunal in *Zeman* concerning the jurisdiction of the Tribunal to consider the ground of appeal based on the public law principle of legitimate expectation. The conclusion that I have reached above in relation to the evidence of export makes it unnecessary for me to consider this second ground of appeal of legitimate expectation. I have reached my conclusion based on the evidence put before me in this appeal, and I make no findings on whether a representation was made that forms the basis of a legitimate expectation.

DECISION

52. The appeal is allowed. The assessments are cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

53. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

Release date: 08 FEBRUARY 2022