



TC03313

Appeal number: LON/2005/00095

Value Added Tax – whether the goods allegedly acquired by and then sold and despatched abroad by Lightcare Ltd (in liquidation) had existed and whether they had corresponded to the goods described in the respective invoices – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**JONA ADALI-MORTTY
(substituted for LIGHTCARE LTD (in liquidation))**

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE HOWARD M. NOWLAN
AMANDA DARLEY**

Sitting in public at 45 Bedford Square in London on 20 to 22 January 2014

Robert Holland of Dass Solicitors on behalf of the Appellant

Amy Mannion, counsel, on behalf of the Respondents

DECISION

Introduction

1. This VAT Appeal was formerly an Appeal by Lightcare Limited (in liquidation). It was assigned to the principal shareholder and former director of the company, Mr. Jona Adali-Mortty, and progressed by him. In this decision, we will refer to Lightcare Limited as “Lightcare”, and to Mr. Jona Adali-Mortty as “the Appellant”.
2. The Appeal related to the denial of a deduction for input tax in respect of a claimed back-to-back purchase by Lightcare of 650 Sony DCR – IP7 camcorders (“the camcorders”), and the claimed delivery of those camcorders to a Paris freight forwarder acting for Lightcare’s Spanish customer. The amount of input tax in dispute was £69,958.25. Both transactions occurred on 15 September 2003. Without at this point expanding on the very limited significance in this Appeal of this point, it is fair to say (in quickly describing the essence of the facts) that the transactions looked very much like typical missing trader, or MTIC, transactions. We assume that HMRC did not seek to challenge the transactions on *Kittel* grounds either because the goods could not be traced to a fraudulent loss of VAT or because HMRC had no or insufficient ground for suspecting that Lightcare would have had the requisite knowledge or means of knowledge on which to advance a *Kittel*-type challenge.
3. The challenges that were made were accordingly that the camcorders had not been supplied to Lightcare; that Lightcare had not delivered them abroad to a foreign purchaser, and finally that if some goods had been acquired and delivered abroad, the invoice was defective in that the goods described on the invoice (i.e. the 650 camcorders) did not correspond to whatever goods had been acquired and delivered abroad. For reasons that we will mention below, we conclude that there was sufficient evidence and indication that some goods had been both acquired and delivered to the Paris freight forwarder. The essential point in this Appeal was accordingly whether the Appellant could demonstrate, on the balance of probability, that the goods dealt in did in fact correspond to those described on the invoice.
4. We have not found the case to be particularly easy to decide. There were certainly a number of distinct oddities in the facts and the evidence that led to genuine doubt as to whether the camcorders were in fact the goods dealt in. We also found that most of the particular arguments advanced on behalf of the Appellant for supporting its claim that the camcorders had indeed been acquired and delivered abroad, were largely irrelevant. There was, however, one factor (to which, strangely, little attention had been given) that caused us some hesitation in reaching our conclusion. Our ultimate conclusion, however, is that this Appeal is dismissed. This is because the Appellant has the burden of proof in establishing that the goods dealt in were the described camcorders and that burden of proof, and the failure to explain away the clear oddities addressed by the Respondents, has not been satisfied. Furthermore there was no verification of the one point that did trouble us in rejecting the claim that the goods dealt in had indeed been the relevant camcorders.

The evidence

5. Evidence was given on behalf of the Appellant by Mr. Ken Ballard (“Mr. Ballard”), the now retired but former managing director of the freight forwarder, Worldspan Freight Services Limited (“Worldspan”) that had held the goods ostensibly traded by Lightcare. Evidence was also given by the Appellant himself.

6. Evidence was given on behalf of the Respondents by two HMRC officers, Mr. Andy Monk and Ms. Smita Parikh. A Witness Statement had been provided by Marilyn Stone, formerly the Sony employee who had been the contact point between HMRC and Sony in relation to the effort to secure information about the particular camcorders. Marilyn Stone, having now left Sony, was not prepared to give evidence in person, and since the Appellant had wished to cross-examine her, we were left in the position that we might have to treat her evidence with some caution. Since all the evidence given by the HMRC officers, and in particular by Ms. Smita Parikh, and by Marilyn Stone was either irrelevant or it largely involved passing on documents that we were able to read and evaluate, we considered their evidence, and the fact that Marilyn Stone could not be cross-examined, to be of little significance.

7. We might say that we found Mr. Ballard to be a reliable witness and apparently to be honest. There were many points on which he could provide no evidence simply because of his own limited involvement, but that was entirely natural. Most of the Appellant’s own evidence was largely irrelevant because most of it consisted of arguing about the weights and contents of retail camcorder boxes, all based on information later extracted from the Sony website. The Appellant himself had never seen the goods traded and so, since the case revolved around the identity of those goods, his relevant evidence related principally to the nature of the inspection of the goods that he had requested, his limited involvement with the fact that Worldspan had apparently delivered the goods by mistake to the wrong Paris freight-forwarder, the payment details and the date when the goods were finally released to Lightcare’s customer.

The facts

8. Lightcare was a company operated from a one-room office in the Appellant’s rented council flat in Islington. It had been formed to undertake some activity in relation to a car park but by 2002 it was certainly trading in vast quantities of MTIC-style goods. We were given no details of the irrelevant past transactions, but it appears that while they were challenged by HMRC, the challenge was dropped and the claimed VAT was paid, on a without prejudice basis, to Lightcare. Whether this resulted from the ECJ challenge of the original “no commercial activity” argument advanced by HMRC, we do not know. We do however know that the Appellant was arrested in November 2003, and then convicted of Cheating the Public Revenue and Conspiracy in relation to Lightcare’s deals in June and July 2002, relating to almost exactly £150 million worth of turnover. He was given a 6-year prison sentence.

9. Lightcare’s transactions on 15 September 2003 consisted of the alleged purchase of 650 Sony camcorders from a company called The Accessory People plc (“TAP”) at a VAT inclusive price of £469,706.25 and the sale of those items to a Spanish company called Dolmen Management SL (“Dolmen”) for a VAT-exclusive price of £415,025. At this time the goods in question were held in Worldspan’s Southend

warehouse. We were shown release notes passing the goods from some former owner to TAP, and from TAP to Lightcare (both on 15 September and the latter in a fax with a fax date of 1.59 p.m. on that day), and we were shown Dolmen's purchase order, faxed to Lightcare at what was assumed to be 3.30 p.m. on the same day. The purchase order from Dolmen had indicated that the goods had to arrive at Exel Logistique's warehouse in Paris on 16 September, so there was obviously some time pressure to prepare the goods for despatch. The van that collected the goods was said to have left the warehouse, carrying the goods en route to Paris, at around 6.00 p.m.

10. The events that occurred in the intervening two and a half hours between 3.30 p.m. and 6.00 p.m. (all somewhat vague and not in themselves apparently that significant) are actually highly relevant to the questions that we must answer in this Appeal. They involved some sort of inspection of the goods; almost certainly the fact that one box, presumed to be holding a camcorder, had been weighed, and the whole business that we will have to explain of moving the goods from the pallets on which they had been stacked when they arrived at the warehouse onto other and larger pallets.

The inspection

11. It appears that after receipt of Dolmen's purchase order, Lightcare faxed Worldspan, instructing Worldspan to inspect the goods, doing "an IMEI label scan only" check, and then to despatch the goods to the Paris warehouse of Exel Logistique on behalf of Dolmen. It transpired that the inspection that was done was the fairly cursory type of inspection that was provided automatically within the general charge rendered for the overall warehouse service. It was said to involve a 100% count and a 10% inspection. Whatever that 10% inspection involved, it certainly did not involve opening any retail boxes. It sounded as if it just involved looking at a limited quantity of the retail boxes, removed one imagines (unless it was no sort of inspection at all) from any outer wrappers or black cling-film that would have prevented anyone even seeing the exterior of the retail boxes. It also seems that as the goods were removed from the pallets on which they had been stacked when they arrived at the warehouse, and were re-stacked on larger pallets, the inspection would almost have occurred automatically in the very act of removing and re-stacking the boxes. We were not told who did that re-stacking exercise, save that it was certainly not Mr. Ballard himself because he was in the office attending to paperwork. We were not told that the re-stacking was done by Lee Wilson, one named assistant, but he certainly had some later involvement with the consignment. We should also mention, though we deal with this more fully in paragraph 21 below (in the context of the point about muddled references to the products dealt in that we cover in paragraphs 19 to 21), that the letter from Worldspan to Lightcare, following and reporting on the inspection, referred confusingly to the inspection being of mobile phones, but then recorded to the correct camcorder product description.

12. We were told that there was a phone call between the Appellant and Mr. Ballard (presumably this had to have been made after 6.00 p.m.) during which the Appellant claims to have said that Lightcare had wanted the serial numbers on the boxes to be scanned with an electric scanning machine. The reason we assume that the phone call must have been made after 6.00 p.m. was that Mr. Ballard had to tell

the Appellant that Worldspan did not have such a scanner and that because the goods had actually left the warehouse at 6.00 p.m. it was too late to check the box numbers manually. We were also told (though there was no contemporaneous written confirmation of these conversations) that Mr. Ballard's assistant, Lee Wilson asked TAP whether it could furnish the relevant serial numbers. TAP then e-mailed a list of serial numbers to Worldspan on the next day, which we assume Worldspan provided to Dolmen or perhaps the intended destination warehouse. Worldspan may or may not have also provided them at this time to Lightcare.

The weight

13. The CMR that accompanied the goods to Paris revealed the weight of the entire consignment to be 312 kilos. We were told that when goods were to be transported by air, it was vital to disclose the exact weight because the cost of the air transport was based naturally on weight. It was less significant when, as here, goods were to be transported by van, but a weight was still inserted on the CMR. It was possible that the declared weight might have been carried over from the documents accompanying the goods on their arrival in the warehouse, but Mr. Ballard said that the normal practice at Worldspan would have been to weigh one box and then multiply the weight of that by the number of boxes. Mr. Ballard said that his supposition was that the weight of the pallets would have been ignored in arriving at the 312 kilos but that that figure would most likely have been calculated by multiplying the weight of one retail box by 650. Working backwards this suggested that each box weighed approximately 0.48 kilos. Again we have no certain knowledge as to how the total weight figure was arrived at and who, if anyone, weighed the one box, but it seems likely that if, as supposed, a box was weighed it would have been done by whoever was re-stacking the boxes onto the different pallets.

The re-stacking exercise

14. The one exercise that appears clearly to have been done in the two and a half hour time gap before the goods left the warehouse was that they were re-stacked onto different pallets. We were told that pallets were of different sizes. Some were of 80 by 80 centimetres, and some of 80 by 120 centimetres, and these (or at least certainly the smaller of those two) were used for air freight because they would pass through aircraft doors. Other pallets were larger, at 120 by 120 centimetres, and the largest were of 120 by 240 centimetres.

15. We were told that it was the warehouse practice to use the larger pallets whenever possible, in order to retain a stock of pallets suitable for air freight, since Worldspan dealt largely with air freight. Mr. Ballard did not know the size of the pallets on which the goods had arrived, or indeed how many pallets were involved, but since later calculations illustrate that the total consignment would not have fitted onto two pallets of the size 120 by 120, it seems obvious that if the consignment arrived on smaller pallets that Worldspan wished to retain in stock, then three or four or more of the air freight pallets would clearly have been involved when the goods arrived.

16. Mr. Ballard's evidence was slightly confused in relation to the pallets that he assumed would have been used for the removal of the consignment. He or the warehouse staff would almost certainly have known that a Mr. Bullen of M. B. Express, driving a Renault Traffic van, registration no. FB02EOG was going to be dealing with the transport of the goods to Paris, and they would also have known that Mr. Bullen sometimes used a trailer when using his van.

17. In his Witness Statement, Mr. Ballard had said that he thought that the goods had probably been re-stacked onto two 240 by 240 pallets. In cross-examination he appeared to say that it was more likely that two 120 by 120 pallets had been used. That latter assumption at least appeared consistent with the fact that the Renault Traffic van would take only one, rather than two, of the 240 by 240 pallets. Whether the trailer was used, and whether that was itself large enough to take a second of the largest pallets, we did not know. The van on its own would however clearly take two of the 120 by 120 pallets, and Mr. Ballard said that from recollection he thought that the trailer had probably not been used. This is important, and we quote the relevant exchange:

HMRC's counsel: Whatever they came in on, they would have left on a 120 by 120 or 120 by 80?

Mr. Ballard: I think so, yes.

HMRC's counsel: You say they would fit on two of those pallets?

Mr. Ballard: Yes.

HMRC's counsel: And would two of those have fitted in the Renault van?

Mr. Ballard: Yes.

HMRC's counsel: So he wouldn't have needed to use the trailer in this particular case, the driver?

Mr. Ballard: He may have done if he was using two of the large pallets, 120 by 120. From memory, I don't think it was necessary. I think he would have got two on the actual vehicle itself, rather than use the trailer.

18. This evidence was not absolutely certain, but if the oral evidence is to be preferred, and if the recollection that the trailer was probably not used is correct, then it is clear that the goods would have been re-stacked onto two 120 by 120 pallets.

The description of the products on the various documents

19. There was considerable confusion in relation to the description of the goods on the various documents.

20. Dolmen's Purchase Order and Lightcare's invoice referred simply to camcorders, giving the appropriate product numbers, and brief specification. Lightcare's instruction to Worldspan had referred to the camcorders in a similar fashion in one box on the printed form, but further down, under a heading "Consignment Description", the instruction to Worldspan had included the words "Sony DCR -IP7 # 650 units - GSM Mobile Phone, Central Europe Spec, SIM Free". It was suggested by the Appellant that this resulted simply from an error in not removing standard text (i.e. about the phones) from the template, but this seemed odd since the entire line that we have just quoted seemed to have been typed in one continuous line.

21. Worldspan's CMR simply described the goods as "*Two pallets containing 650 pieces Sony DCR – IP7 Cameras*". Confusingly, however, Worldspan's letter to Lightcare on 15 September confirming the inspection said:

"We can confirm that the two pallets of mobile phones released to you today have been inspected and counted, and that they contain the following:-

650 pieces of Sony DCR IP7 Digital Camcorders."

Rather more oddly, the very well prepared, and typed Certificate of Shipment provided by Worldspan contained two boxes, one containing the words "*Type: 650 x Sony DCR-IP7*" and the other the words "*Description: Mobile Phones*".

The events on 16 and 17 September

22. As we have already indicated in paragraph 12 above, on 16 September Lee Wilson obtained the e-mail from TAP providing the serial numbers of the camcorders. We are not clear whether that was forwarded to Lightcare until somewhat later, but HMRC certainly asked for the serial numbers from Lightcare in November, and the list of serial numbers was passed onto HMRC at that point.

23. Either on 16 or 17 September it emerged that Worldspan had made a mistake on the CMR and had directed that the goods be delivered to the wrong Paris freight forwarder. 11 other pallets were being delivered on the same day by different transport, and it seemed that all 13 pallets had mistakenly been delivered to a freight forwarder called AFI rather than to the apparently intended one (and certainly the one on Lightcare's instruction to Worldspan), namely Exel Logistique. Accordingly, at its cost, Worldspan arranged for Exel Logistique to obtain all 13 pallets from AFI. Rather strangely, the fax from Worldspan to Exel Logistique, signed by Lee Wilson, simply said "*As per our conversation please collect 13 pallets of Mobile phones from the following address:*" and then gave AFI's address. We note that there was a reference to what may have been a much more informative phone conversation, but it still seems strange that this fax, endeavouring to rectify one quite serious error, gave no detailed description of the goods, and even managed to describe them all simply as mobile phones. 11 pallets may well have carried mobile phones, but we were certainly told that the 13 included the two pallets with which we are concerned in this Appeal, and it is very odd that the fax that gave no other identification description of product that had been sent to the wrong freight forwarder managed to mis-describe it, if Lightcare's goods had indeed been camcorders.

24. We were shown a warehouse receipt from AFI, stamped on the CMR numbered 39010 provided by Worldspan, which indicated that the two pallets with which we are concerned had arrived at AFI's warehouse, contents unchecked, on 16 September. We were also shown a transport document that indicated that all 13 pallets had been shifted to Exel Logistique's warehouse on 22 September. In the meantime, and of course before the alleged consignment of camcorders had even arrived at the intended freight forwarder, Dolmen had paid Lightcare the full price for the camcorders, and Lightcare paid TAP, both payments being made on 17 September by CHAPS payments. It was also noteworthy, by omission, that there was no barrage of

correspondence between Dolmen and Lightcare, when the goods failed to arrive at the intended freight forwarder. It was apparently not until 3 October that the goods were released to Dolmen.

The enquiries by HMRC

The serial numbers

25. In November 2003, HMRC obtained the list of serial numbers that had been obtained by Worldspan from TAP. It is not clear how these serial numbers had initially been obtained, though it seemed that they had been furnished by an internet company called Joker.com. In any event, the serial numbers provided were in one continuous sequence, in other words as if they had been from 1 to 650, with no number omitted, and none added from any other range.

26. When HMRC sought to ascertain from Sony whether the numbers were genuine serial numbers for the type of camcorder, they were initially told that they were not because Sony had only checked the camcorder serial numbers for those despatched to the UK. Since, however, the camcorders were all said to have been provided with continental European plugs, and thus to be intended for the continental market, serial numbers for European destinations were then checked and it was established that 601 of the camcorders with the relevant serial numbers had been delivered to the Sony company in Germany and those with the remaining 49 serial numbers to the Sony company in France. Sony also gave the sales statistics (for a period spanning from March 2002 to December 2003) which indicated both that the sales in Germany and France were at fairly modest levels (making the sale of 650 camcorders constitute a very high proportion of the total sales in any of Germany, France and Spain). More relevantly, the Sony information revealed that the 601 camcorders delivered to Germany had been sold to numerous retailers and that even if somebody had procured that several separate purchases had been made, they would have had to amalgamate at least five of the purchases made from the German distributors in order to obtain 601 cameras. The prospect then that the serial numbers of those, then amalgamated with the purchase of 49 from France, could have enabled the serial numbers (all necessarily in an uninterrupted sequence) genuinely to match the 650 camcorders ostensibly sold by Lightcare, seemed to be inconceivable. Seemingly therefore somebody had managed to obtain a list of genuine Sony serial numbers applicable to the particular camcorders, but the serial numbers could not in fact have been those illustrated on the boxes of any that Lightcare purportedly sold.

27. We speculated at one point that the only way in which the serial numbers could have been re-amalgamated out of the German consignment was for some MTIC mastermind to have arranged for five separate purchases to have been made from the German supplier, in which context our suspicion that the present transaction was indeed an MTIC transaction would have actually assisted in verifying the serial numbers and sustaining the Appellant's present case. Since, however, the chance of amalgamating several purchases and then retaining an uninterrupted sequence of serial numbers was extremely far-fetched, and the German sales statistics revealed that some of the German cameras might not have been sold until after the 15 September 2003 date in any event, we concluded that the list of serial numbers had to have been irrelevant to those allegedly supplied in this case. Lightcare itself had of

course never relied on the serial numbers, and may well not have been sent the list even when Worldspan acquired it from TAP on 16 September. Not surprisingly, therefore, the Appellant himself accepted in cross-examination that the list of numbers could not have related to the camcorders ostensibly sold by Lightcare.

The weight

28. HMRC also sought to obtain from Sony the weight of the retail box in which the relevant camcorders would have been boxed. It was clear from a number of sources that the camcorder and battery themselves weighed only something like 370 grams. Ascertaining the weight of the retail box and all its contents was more difficult because the particular camcorder was obsolete by the time the weight was being called for by HMRC. Following several internal enquiries by Sony, Sony indicated that of various possible weights, 1.4 kilos was the lightest and almost certainly the correct weight. We were shown lists of the contents of the standard retail boxes and by the time one aggregated the weight of the camera and battery with the charger, the weight was already about 700 grams (i.e. considerably more than the implicit figure of 480 grams recorded on the CMR). It seemed odd that the remaining contents of the boxes would have doubled the weight of 700 grams just mentioned to 1.4 kilos, but the boxes were very substantially larger than the cameras, there were various cables, a controller and A4 batteries and other odds and end, and the box itself would have weighed a few grams. HMRC claimed that the boxes had also contained instructions. We were shown an A4 print-out of 240 odd pages of instructions, printed from the internet, and if a more condensed version of this (if only in one language) had been provided within the box, it became entirely credible that the weight of the retail box plus contents would have been the 1.4 kilos indicated by Sony. We were shown the index to the instructions just referred to and although it may seem depressing that a customer might have had to wade through 240 pages of instructions, we confirm, from looking at the list of topics mentioned in the index that the instructions did all relate to how the customer might wish to operate the camcorder and utilise its many functions. The instructions were not in other words technical information or print-outs of part numbers of no relevance to an average purchaser.

29. Although there was very slight doubt about the accuracy of the Sony information about the weight of the relevant retail boxed camcorder, we are clear that by far the most reliable figure is that it weighed 1.4 kilos. This was approximately three times the implicit weight recorded by Worldspan on the CMR.

The size of the retail boxes

30. Although the Appellant initially sought to dispute this, the information from Sony was that the size of the retail boxes was 21 centimetres by 23 by 17. Whilst, as we have already said, this was vastly bigger than the camcorder, the box contained various other items, presumably the instruction manual and considerable protective packing and we conclude that the size of the box was as described.

31. The relevance of the size of the box was that Mr. Ballard had said that the pallets would not have been loaded with more than four layers, so that two 120 x 120 pallets would not have carried anything approaching 650 retail boxes. On our

calculations, there would have had to be 10 or 11 layers, measuring approximately 9 feet in height to accommodate 650 boxes. Whether that height of stack would have passed through the doors of a Renault Traffic was never explored because nobody disputed that the stacks would never have consisted of more than four layers. Accordingly, unless Mr. Ballard's oral evidence had all been wrong, and the boxes had been packed onto two 120 by 240 pallets, unless Mr. Bullen had in fact been using his trailer, and unless the stacked pallet measuring 120 by 240 could have been carried in the trailer (about which there was no information) it was quite impossible for the 650 boxes to have been stacked as suggested, unless the boxes had been far smaller boxes, containing then presumably something other than the camcorders.

The ferry information

32. We should mention that HMRC also claimed that the evidence that the Renault Traffic had crossed the Channel on a SeaFrance ferry was doubtful. This was on the ground that, although a reservation document and invoice recorded a booking for the relevant van and Mr. Bullen at 1.00 a.m. on 16 September, nobody had produced an actual ticket. We might say immediately that we found this claim to be unrealistic. Even if the document that we were shown was not some form of e-ticket, it was clear that once that document was obtained, a ticket would obviously have been available. If the ticket had been lost, this in no way indicated that the actual transit had not taken place. Indeed, once the transit had been booked and paid for, it actually seemed more likely that if the journey had been a fabrication and no van had crossed the Channel, it might then have been more likely that the ticket would have been carefully retained and produced.

33. Perversely the more relevant feature to our mind about the reservation document and the invoice was that it did include the line:

“VEHICLE: M/Home, M/Bus, Van REG No: FB02EOG”

We obviously accept that we have no knowledge as to whether or not a ferry booking would record whether or not a van was pulling a trailer, and nobody had mentioned this point during the hearing, but it does seem distinctly possible that a reservation document would mention a booking for a van plus trailer if a trailer was being used. It would be odd if a booking for a car and caravan, for instance, merely referred to the car. We attach little significance to the tentative suggestion that Mr. Ballard's recollection that no trailer was used may be marginally confirmed by the absence of a reference to “van and trailer” on the booking form, but we certainly attach as much significance to this thought as to HMRC's claim that there was any significance at all to the absence of some sort of ticket. Indeed we are far from clear that the reservation document and invoice would not anyway have served as the ticket.

The contentions on behalf of the Appellant

34. The reasons that the Appellant's representative gave in support of the proposition that the camcorders described on Lightcare's invoice had been purchased and delivered abroad were that:

- the transaction documentation supported this analysis;

- the feature that payment had been made and received rendered it improbable that there would have been no goods;
- Mr. Ballard had explained the anomalies concerning the wrong destination of the goods, and the pallet sizes used;
- HMRC had treated TAP as having made supplies for VAT purposes which is inconsistent with the same being denied in relation to Lightcare’s claim for an input deduction; and
- insofar as HMRC relied on any “upstream irregularities” in the supply chain, it was for HMRC to prove these points, or failing that to accept Lightcare’s expectation that its input VAT credits should be repaid.

The contentions on behalf of the Respondents

35. It was contended on behalf of the Respondents that the Appellant’s claim was defective in one of the three respects mentioned in paragraph 3 above, and that, as regards the claim that the goods did not correspond to the invoice description, this was evidenced by:

- the wrong declaration of the weight of the consignment, at approximately one third of the correct weight;
- the feature that 650 boxes could not have been stacked onto the pallets that Mr. Ballard suggested had most likely been used, and that certainly without a trailer two larger pallets could not have been transported in a Renault Traffic;
- the fact that no support for the Appellant’s case could be derived from the obviously irrelevant list of serial numbers; and
- the numerous slips in documentation, where reference was made on six or seven occasions to mobile phones rather than camcorders.

36. We might add that the Respondents had not particularly contended that the quantity of items sold made the genuineness of the transaction suspect, though the Appellant’s counsel did seek to undermine any such supposition.

The law

37. Neither party disputed the fact that the burden of proof fell on the Appellant to establish that goods had been acquired and sold to a foreign purchaser and delivered abroad, and that those goods had corresponded to the description of the goods on the VAT invoice. HMRC conceded that they had some initial requirement to demonstrate that there was certainly doubt about these matters, but once that had been shown then, as the Appellant conceded, the burden of proof fell on the Appellant. There was essentially no other legal issue in this Appeal.

Our decision

38. As we said in paragraph 3 above, this Appeal was advanced by the Respondents on three grounds, two disputing the acquisition and the sale of the relevant stock. It was admittedly confusing that the goods were apparently transported initially to the wrong French freight forwarder, and also confusing that when they were moved to the intended freight forwarder, Lightcare’s goods (being 2 pallets) were transported along with 11 other pallets of goods from one to the other warehouse, all with rather unclear

documentation. However, we considered Mr. Ballard to have been an honest witness, and his evidence, coupled with the CMR document, the ferry reservation, the acceptance of the goods at the wrong warehouse, and their transportation to the correct warehouse, all support the proposition that some goods certainly existed and were purchased and sold as claimed. Accordingly, as we said at the outset, everything in this Appeal revolves around whether the Appellant has satisfied us, on the balance of probability, that the goods were indeed the claimed camcorders.

39. The Appellant's representative was very keen to emphasise that this case was not an MTIC appeal, where at least Lightcare's claim for an input deduction was being disputed on traditional *Kittel* grounds. This attitude extended to the suggestion that the present facts were remote from those in a typical MTIC case, and as we have already said, we do not accept this contention.

40. The affinity of the transaction in this case with typical MTIC transactions is highly relevant for a number of reasons. First, we explored the possibility and rejected it that some mastermind in MTIC transactions might have arranged for five purchases to be made of 601 camcorders delivered to the German Sony company. Had that been credible, it might have rendered it possible that the camcorders ostensibly traded in this case had indeed had the claimed serial numbers. This factor would of course have supported the Appellant's case. We had raised this issue because we were otherwise unclear how anybody had obtained the list of serial numbers, not least because HMRC had themselves found it quite difficult to do this.

41. A more obvious factor that renders any MTIC context to the case highly relevant is that unless that context is sustained, the Respondents' case would immediately be untenable. For if we had to conclude that the Spanish buyer of the goods was a bona fide grey market trader in camcorders, then it would inevitably have followed that if the goods purchased by that Spanish company had turned out not to be as described, then there would have been an immediate, and a very evident dispute between Dolmen and Lightcare, and an immediate claim that the money paid be refunded.

42. While we accept that the following conclusion is irrelevant to the issue that we must decide, we have no doubt in saying that Lightcare's transaction looked very much like an MTIC transaction. The Appellant, as Lightcare's only material director, may have been entirely innocent in relation to this transaction but the following factors are those that support our conclusion that somebody in this transaction was engineering an MTIC fraud. Those factors are that:

- the deal was back-to-back, with TAP itself acquiring the goods moments before Lightcare acquired them in a similar manner;
- the documentation was typically sloppy;
- the feature that both payments were made many days before the goods had arrived at the correct warehouse and before anyone had inspected them was inconceivable in the context of a bona fide transaction but perfectly consistent with the standard pattern of MTIC deals;
- the quantity of goods allegedly sold, the feature that there appears to have been little communication between Dolmen and Lightcare when the goods went astray, and critically the feature that neither Lightcare nor the Appellant

have apparently even thought it worth enquiring of Dolmen whether they genuinely acquired 650 camcorders in September 2003 all support the MTIC analysis. It might now be much too late to check that sort of point with Dolmen, but when HMRC commenced their enquiries in late 2003, the absolutely obvious course, had the transaction been a bona fide grey market transaction, would have been for Lightcare to ask Dolmen whether it had acquired 650 camcorders, and to ask Dolmen to provide evidence in support of a reply that it had done. That was never done.

43. The present significance of the conclusion just reached is not that it has much bearing on the key issue, but rather that it makes it possible that the goods traded were something other than camcorders. Had Dolmen been a bona fide grey market purchaser of camcorders and had it received something other than camcorders when it expected to receive, and had paid for, camcorders, it is inconceivable that there would have been anything but a major dispute. As it is, we accept, from reviewing the reported cases, that in most MTIC transactions the goods exported did generally exist, but they did not always exist. There have been examples of goods being traded that exceeded the total number in existence, and of fake CPUs being traded instead of genuine and valuable CPUs. Accordingly it is possible, though we accept still not to be too readily assumed, that goods other than camcorders, or some lesser quantity of camcorders, could theoretically have been traded in this case, in conflict with the documentation that 650 camcorders had been bought and supplied.

44. We now turn to our suggestion that the contentions advanced by the Appellant (recorded in paragraph 34 above) in support of the proposition that the sale was genuinely of camcorders were not particularly compelling. The feature that the transaction documentation referred to a sale of camcorders is of little relevance when the very question is whether the actual identity of the product sold corresponds to that description. The feature that payment had been made and received before the goods had been received, and indeed at the point when they had gone adrift, does not confirm the existence or identity of the goods, and is entirely consistent with the common arrangement in MTIC-type transactions. The claim that Mr. Ballard had explained away the anomalies in relation to the pallet sizes was made before the evidence had been given, and is not now tenable. The fact that TAP has been charged VAT on the supply when Lightcare's input deduction has been denied is irrelevant, not least because the law governing the liability to account for VAT on a sale of some goods (whatever their identity) for a consideration, and the claim for input tax if the invoice description and the goods do not correspond is manifestly different. Finally, there was no respect in which the Respondents claimed that "upstream irregularities" proved the point presently in contention. The only relevance of the wider context in this case is that that wider context makes it possible that the goods traded would not have been as described. But for the wider context, such a contention would have been untenable for the reason given in paragraph 43 above.

45. We turn to the critical issue of whether the Appellant has established that 650 camcorders were in fact purchased and exported on 15 September by Lightcare.

46. The first observation in relation to that question is that, while the serial numbers provided by TAP or joker.com, and provided in November 2003 to HMRC were

obviously serial numbers that had nothing to do with the goods allegedly sold, the evidence thereafter in relation to the serial numbers becomes irrelevant. Lightcare itself had not relied on or known of such numbers. Certainly the fake numbers suggest that some sort of fraud had been perpetrated by somebody, but that is entirely irrelevant to the identity question that we are now addressing.

47. The serious doubt in this case is occasioned, however, by everything that occurred between 3.30 p.m. and 6.00 p.m. on 15 September 2003. The Appellant certainly never saw the goods and Mr. Ballard never saw the goods. We have no idea who did see them. On the reasonable assumption that they were shifted from some original pallets to new pallets, we are left with the fact that if the person responsible for that operation weighed one box, he got the weight wrong by two-thirds. The weight discrepancy is rendered more significant by the fact that Mr. Ballard did say that it was Worldspan's usual practice to weight the one item, and multiply up its weight by the number of items, and there was thus less likelihood that Worldspan would have just taken the figures from incoming documentation (had there been any) or just guessed the weight.

48. It is then odd that whoever did the inspection (possibly along with the re-stacking) managed to replicate Lightcare's initial mistake in mixing the description between camcorders and mobile phones by repeating that confusion in the transportation certificate provided by Worldspan, and in the letter to Lightcare reporting on the inspection. Equally it seems decidedly odd that when Worldspan was trying to correct its one rather material mistake of having sent the two pallets, along it seems with 11 others, to the wrong freight forwarder, its instruction to reverse this error is both vague and worryingly wrong, in referring on this occasion **only** to mobile phones.

49. The more critical point, however, all relates to the size of the boxes. This is critical, not because there is just some inaccuracy, but because 650 of the correct size boxes could simply not have been transported, had they been stacked on 120 by 120 size pallets as Mr. Ballard said he thought was likely on at least two occasions; larger pallets could not have been used unless Mr. Ballard's recollection was wrong and Mr. Bullen was using his trailer, and then we have to assume that the trailer was sufficiently large to carry the 120 by 240 size pallet. There was no evidence that it was used, or that it was of the requisite size. It is fairly unusual to see vans of the familiar size of the Renault Traffic hauling trailers of equivalent size to the vans themselves, but quite common to see somewhat smaller trailers being so hauled. We have no idea whether the larger 120 by 240 size pallets had been used, and whether thus Mr. Ballard's recollection had been wrong, and we also have no evidence that the trailer was anyway large enough to accommodate, as required, a 120 by 240 pallet. All those points are, however, points that the Appellant needed to establish on the balance of probability, and our decision is that the Appellant has failed to do that. That means, of course, that it has simply not been established that the actual quantity of camcorders could have been transported to Paris in the manner that the balance of the evidence suggests was adopted. Either the pallet and transportation facts must be amended materially or else the items transported cannot have been the claimed camcorders.

50. There is, however, a factor that troubles us in this case. We find it difficult to see how any cursory inspection could have been done that would not have revealed whether the unopened boxes were anything but camcorder boxes. We assume, we think entirely realistically, that the actual retail boxes would have had large text, and very likely pictures on the boxes, illustrating that the contents were camcorders. We find it difficult to believe that any fraudster would have mocked up realistic-looking boxes and inserted some fake equipment inside the boxes. We equally find it difficult to understand how, even if any sort of inspection had been altogether ignored, the person re-stacking the boxes from the original pallets to new pallets, could have failed to notice whether the boxes had pictures and text indicating camcorders, or alternatively something quite different. Conceivably several retail boxes might have been packaged collectively into outer wrappers that concealed the retail boxes. That would certainly have made moving the goods easier and it would have made the stacks more stable on the pallets. Nevertheless unless anyone doing the inspection was so slack that they never removed one outer wrapper, any inspection that had revealed one retail box would have revealed whether the contents had been camcorders or something quite different.

51. While this point has troubled us, and while it was never particularly mentioned during the hearing, other than implicitly in the suggestion that some sort of inspection had been undertaken, we conclude that this doubt does not dispel all the doubts occasioned by the difficulties that the Respondents have raised. The reason we now ignore the doubt that has troubled us is that there has been absolutely no evidence as to who actually ever saw the retail boxes. We know who didn't see them but we do not know who did. There was in fact no evidence that an actual inspection of any sort had been done. We know that the letter from Worldspan to Lightcare, confirming the inspection, referred both to mobile phones and to the correct product description. The reference to mobile phones might have been made out of habit, making the assumption that much trade (regrettably generally in MTIC goods) related to mobile phones. On the other hand, the reference to phones may have been right, and the product description might just have been copied out from the text on Lightcare's instruction to Worldspan. Even more oddly, one would have thought that Lee Wilson would have been careful on the following day in faxing Exel Logistique, to give the right description of the products that had got to be removed from one warehouse to another, yet he referred to 13 pallets all containing mobile phones. We do not know that it was Lee Wilson who actually dealt with the re-stacking on 15 September, but one might have hoped that he would have spoken to whoever did that exercise. And if Lee Wilson on the later date had simply referred to Lightcare's instruction or to Worldspan's confirmation of the inspection, both of which had confusingly referred to both phones and camcorders, he might have spotted that both did refer to camcorders and their model numbers. So quite why the fax to Exel Logistique contained a very material reference just to mobile phones is difficult to understand.

52. Accordingly our conclusion is that the Appellant has failed to deal with the doubtful issues raised by the Respondents. The remaining doubts in relation to the seriously wrong recorded weight, the impossibility that the quantity of camcorders could in fact have been transported to Paris in the manner claimed to be the most likely, and the general confusion in the documentation with confused references to

both mobile phones and camcorders leave us with serious doubts about the nature of the goods actually dealt in which the Appellant has failed to dispel.

53. We accordingly dismiss the Appeal.

Right of Appeal

54. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 10 February 2014