



TC03781

Appeal number: TC/2012/05664

Value Added Tax – zero rated exports – lack of evidence of removal from UK – payment in cash in euros – cash used to settle sterling accounts – documentation supplied almost two years later – no witnesses on behalf of appellant

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ORBIS WINES & SPIRITS LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
 MR JOHN ADRAIN**

Sitting in public at Tribunals Unit, 3rd floor, Bedford House, 16-22 Bedford Street, Belfast, BT2 7DS on 19 June 2014

Mr Keith Gibson BL instructed by Tiernans Solicitors for the Appellant

Mrs Sharon Spence of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Orbis Wines and Spirits Limited (Orbis) against:

5 1.1 an amended assessment calculated on 12 October 2012 of £58,799.00 for the VAT periods 10/09, 01/10, 01/11, 02/11 and 03/11

 1.2 an amended assessment calculated on 12 October 2012 of £63,752.00 for the VAT periods 04/10 and 07/10

10 1.3 an amended penalty issued under Schedule 24 of the Finance Act 2007 for £116,423.00 due to inaccuracies in the VAT returns.

2. Mr Gibson, at the commencement of the appeal handed in a medical report from Dr Patrick Fee, General Practitioner and advised the Tribunal that although Mr Paul Devlin was present, he would not be called as a witness nor would he be calling Ciaran Donaghy and Fiona McNally. All three people had made witness statements
15 which were included in the Bundle of Documents. Mr Gibson invited the Tribunal to draw its own conclusions in accordance with the Civil Evidence (Northern Ireland) Order 1997.

3. It was agreed by the parties that the Tribunal should hear any evidence concerning the validity of the amended assessments first. If the Tribunal decided that the assessments should not have been raised then the appeal would be successful and it
20 would not be necessary to consider the quantum of the assessments or the validity and quantum of the penalty. If the Tribunal decided that the amended assessments were valid then it would reconvene to hear arguments about the quantum of the amended assessments and the validity and quantum of the penalty.

25 The Facts

4. Orbis is in business trading as an off-licence and public house operating from premises at 124 Concession Road, Crossmaglen, County Armagh. Orbis has been registered for VAT since 1 May 1997.

30 5. Mr Malachy Laverty an Officer of Her Majesty's Revenue and Customs (HMRC) gave evidence on oath. He confirmed that the information in his Witness Statement dated 8 January 2014 was correct to the best of his knowledge, information and belief.

6. The Tribunal found Mr Laverty's evidence to be honest and clear. Mr Gibson in his cross-examination suggested that as HMRC had to amend the assessments on more than one occasion, there could be other material errors in Mr Laverty's evidence
35 which would show that the assessments had been issued in error.

7. However Mr Gibson failed to adduce any significant errors in Mr Laverty's evidence and as a result the Tribunal finds the following facts taken from Mr

Laverty's Witness Statement and from the documentation in the Bundle of Documents.

8. Mr Laverty visited Orbis on 26 May 2010 to review their 01/10 VAT return which had been submitted as a repayment due to Orbis of £41,230.29. Mr Laverty met with
5 Mr Ciaran Donaghy who introduced himself as general manager of the off-licence. Mr Laverty asked whether he could meet with either of the directors and was advised that neither of the directors, Mr Paul Devlkin and Mrs Kay Devlin were available to attend.

9. Mr Laverty asked for evidence to show that the goods declared as having been
10 dispatched to the Republic of Ireland had indeed been dispatched. He was shown purchase invoices, a copy of the EC sales list for the 4th quarter 2009, sales invoices to Republic of Ireland customers, bank statements and prints from the Europa website which showed validation of Republic of Ireland VAT numbers listed. No other
15 documentation was available for Mr Laverty to inspect. Mr Donaghy advised that the customers always organised the transportation of the goods to the Republic of Ireland.

10. Mr Donaghy advised that it would not be possible to trace payments made by customers from the Republic of Ireland as they all paid in euros and in cash. This cash was then used to pay the suppliers of Orbis.

11. Mr Laverty asked for details of the drivers who delivered the sales to three parties
20 all in the Republic of Ireland – Michael Holland, Belrairie Limited and Francis Hughes. After some thought Mr Donaghy advised that he would forward the details at a later date.

12. A meeting was arranged at the offices of Thomas Cooke and Co, the accountants for Orbis on 27 July 2010. Mr Ciaran Donaghy (General Manager), Mr Paul Devlin
25 (Director) and Mr Thomas Hughes (Accountant) were present together with Mr Laverty. At this meeting Mr Donaghy and Mr Devlin spoke over each other and made contradictory statements that they physically followed the delivery lorries by car to the Irish land boundary although one said that they drove a couple of miles up the Concession Road whereas the other said he drove all the way to the roundabout on the
30 outskirts of Dundalk. They both expressed surprise that they did not follow the same route.

13. Shortly after the meeting on 27 July Mr Laverty received by fax copies of two driving licences, one bearing the name Joe Caulfield who had purportedly transported the goods to Belrairie Limited and the other bearing the name Michael Holland who
35 had purportedly transported the good to Michael Holland. Both driving licences had the same number – D7763891. Copies of the driving licences were sent to the Irish Revenue Commissioners who responded by advising that the genuine owner of licence number D7763891 had reported to the Department of the Environment on 15 August 2007 that his licence was lost . The Commissioners confirmed that the driving
40 licence provided was fraudulent

14. Mr Laverty had raised three EC mutual assistance requests asking the Irish Revenue Commissioners to carry out visits to Michael Holland, Belrairie Limited and Francis Hughes. The Commissioners had replied by saying that Michael Holland and Belrairie Limited had no knowledge of Orbis and had never purchased any goods from it. The Commissioners having checked the business records of Belrairie Limited was satisfied that it had had no dealings with Orbis. As Michael Holland was in the construction industry the Commissioners stated he had never been involved in the sale or supply of soft drinks. The Commissioners advised that Francis Hughes had been conducting business with Orbis for some twenty months and that shipments arrive in a 40ft container and that delivery costs were met by Orbis. The deliveries were conducted by Sean Hearty Transport.

15. As a result of his enquiries and based on the documentation then available to him Mr Laverty wrote to Orbis on 13 May 2011 advising that the information seen by him was insufficient to support zero rating of the transactions with Michael Holland, Belrairie Limited and Francis Hughes. As a result all zero rated sales recorded in EC Sales 06/09, 09/09, 12/09, 10/10, 11/10 and 12/10 would now be treated as standard rated supplies and the VAT repayments adjusted accordingly.

16. By letter dated 1 May 2012, some two years after the initial visit, Tiernans Solicitors provided additional information including invoices, delivery notes, order confirmations, purchase orders and VAT validation responses.

17. As a result Mr Laverty sought confirmation from the Irish Revenue Commissioners concerning the goods purportedly sold to Michael Holland. The Commissioners responded that they met with Mr Holland who confirmed that he had never traded as CL Drinks (in whose name some of the orders had been made out), had never traded with Orbis, the signature on the documentation was not his, that he did not know John O'Neill (who had purported to deliver the goods), had never purchased soft drinks as he worked in the construction industry.

18. Mr Laverty noted that several of the delivery notes showed that Hearty Transport had made deliveries to Michael Holland whereas Orbis had previously stated that Michael Holland collected his own goods.

The Law

19. Section 24(2) VAT Act 1994 states:

Subject to the following provisions of this section, "output tax", in relation to a taxable person means VAT on supplies which he makes or on acquisition by him from another member state of goods.

20. Section 25(1) VAT Act 1994 states:

A taxable person shall –

- (a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member states of any goods,

5 account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting periods”) at such time and in such manner as may be determined by or under regulations and regulations may make different provisions for different circumstances.

21. Section 30(8) VAT Act 1994 states:

Regulations may provide for the zero rating of supplies of goods, or of such goods as may be specified in the regulations where –

10 (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 goods from the United Kingdom; and

15 (ii) their acquisition in another member state by a person who is liable for VAT on the acquisition in accordance with the provisions of the law of that member state corresponding, in relation to that member state, to the provisions of section 10; and

20 (b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled

22. Regulation 22 of Statutory Instrument 1995/2518 states:

(1) Every taxable person who makes a supply of goods –

25 (a) to a person who, at the time of the supply, was registered in another member state and those goods were dispatched or transported to that or another member state.....

shall submit a statement to the Commissioners.

(2) The statement shall -

(a) be made in the form specified in a notice published by the Commissioners

30 (b) contain, in respect of the EU supplies of goods which have been made within the period in respect of which the statement is made, such information as the Commissioners shall from time to time prescribe, and

35 (c) contain a declaration that the information provided in the statement is true and complete.

23. Regulation 134 of Statutory Instrument 1995/2518 states:

Where the Commissioners are satisfied that –

- (a) the supply of goods by a taxable person involves their removal from the United Kingdom,
- (b) the supply is to a person taxable in another member State,
- (c) the goods have been removed to another member State, and
- 5 (d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A of the Act, for VAT to be charged by reference to the profit margin on supply,

the supply, subject to conditions as they may impose, shall be zero rated.

24. Paragraph 4.1 of VAT Notice 725 says that Article 28C(A) of the EC Sixth
10 Directive (77/388/EEC) states that Member States shall exempt certain supplies subject to conditions laid down for the purpose of ensuring the correct and straightforward application of such exemptions (zero-rating) and preventing any evasion, avoidance or abuse.

25. Paragraph 4.3 says that a supply from the UK to a customer in another EC
15 Member State is liable to the zero rate where:

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

26. Paragraph 4.4 says that the time limit for removing the goods and obtaining valid evidence of removal will begin from the time of supply. For goods removed to another EC Member State the time limits are either three months or six months.

25 27. Paragraph 4.5 says that the records [of Orbis] must show:

- the name, address and VAT number of the customer in the EC;
- the invoice number and date;
- the description, quantity and value of the goods;
- the name and address of the third person in the UK to whom the goods were
30 delivered;
- the date by which the goods must be delivered;
- proof of removal obtained from the person responsible for transporting the goods out of the UK; and

- the date the goods were actually removed from the UK.

Further Evidence

28. The Tribunal examined at some length the further evidence submitted by Tiernans which was contained in the Supplementary Bundle of Documents at section B.
- 5 29. The copy of Invoice Number 0001 is of poor quality but is apparently addressed to Michael Holland as there is a Delivery Note dated 24 April 2009 referring to an order dated 22 April. The quantities of the goods on the Delivery Note agree with the quantities on the Invoice. The Delivery Note states the goods were delivered to Michael Holland t/a CL Drinks at an address in County Laois, were carried by
10 Hearty's Transport on vehicle YLZ 5901 and signed for by Seamus Harvey. There is then an Order Confirmation which includes Michael Holland's VAT number and a Purchases Order dated 22 April from Michael Holland which purports to be signed by M Holland though this signature appears to have been typed. There is also a VAT Validation Response.
- 15 30. Invoice Number 0002 is dated 25 April 2009 and is again addressed to Michael Holland. The Delivery Note states the date of order as 24 April and the date of delivery as 25 April to Michael Holland t/a CL Drinks. The carrier is again Hearty's Transport on vehicle YLZ 5901 and signed for by Seamus Harvey. Again there is an Order Confirmation and a Purchases Order dated 24 April with a typed signature and
20 a VAT Validation Response.
31. Invoice Number 0003 is dated 25 April 2009 and is again addressed to Michael Holland. The Delivery Note states the date of the order as 23 April and the date of delivery as 25 April to Michael Holland t/a CL Drinks. The carrier is Hearty's Transport on vehicle YLZ 5901 and signed by Seamus Harvey. Again there is an
25 Order Confirmation and a Purchases order dated 23 April with a typed signature and a VAT Validation Response.
32. The Bundle of Documents contains several Invoices all addressed to Michael Holland. The Invoices are numbers 0001 to 0005, 0007, 0008 and 0011 and span the period from 22 April to 15 May. The invoices range from orders worth £1,505.00 for
30 100 Red Bull to £43,146.00 for 2,860 Coca Cola 330ml and 1,800 Coke 500ml.
33. Invoice Number 0057 for 1,728 Coke 500ml and 2,880 Coke cans is apparently addressed to Michael Holland and appears to be dated 5 June 2009. While there is a Purchases Order from Michael Holland dated 3 June and a VAT Validation Response dated 6 June there is no Order Confirmation or Delivery Note. Invoice Number 0058
35 is for 1,728 Contour Coke and 2,880 Coke Cans is dated 12 June.
34. Invoice Number 0055 is apparently dated 3 June addressed to Francis Hughes. On 4 June Hearty's Transport purported to deliver 91 Lucozade 380ml to Francis Hughes at an address in County Meath. Although a Delivery Note signed by Seamus Harvey and an Order Confirmation were furnished no Purchase order or VAT Validation
40 Response were furnished.

35. On 4 July Hearty's Transport purported to deliver an order dated 2 Jul7 to Belrairie Limited at Cork Airport. The registration number of the lorry was YLZ 5901 and the Delivery Note is signed by John O'Neill. A Purchase Order from Belrairie Ltd dated 2 July and a VAT Validation Response were furnished but no Invoice.

- 5 36. The Tribunal notes that several subsequent deliveries were purportedly made by either Seamus Harvey or John O'Neill to Michael Holland, Belrairie Ltd and Francis Hughes.

Reasoning

- 10 37. The Tribunal notes that nobody was called to give evidence on oath by Orbis though three witness statements from Ciaran Donaghy, General Manager, Paul Devlin, Director and Fiona McNally, Accounts Administrator were all included in the Bundle of Documents. Mrs Spence on behalf of HMRC indicated she wished to have an opportunity of questioning the witnesses on their statements. As stated in Paragraph 2 Mr Gibson invited the Tribunal to consider the weight to be given to these statements in accordance with the 1997 Order. The Tribunal decided that no
15 weight should be given to these statements in arriving at its decision.

38. Section 5(3) of the 1997 Order states that regard may also be had, in particular, to the following - (d) whether any person involved had any motive to conceal or misrepresent matters.

- 20 39. The Tribunal notes that all the purchases were paid for in cash but nowhere in any evidence does it appear that Michael Holland or Francis Hughes or any person on behalf of Belrairie Limited attended in person. Several of the purchases were for significant amounts of money. The Tribunal is unable to find a plausible explanation as to how the money was sent from Counties Laois, Meath and Cork to Orbis.

- 25 40. The Tribunal finds it difficult to accept that reputable suppliers in the United Kingdom would accept payment of sterling invoices by cash in euros.

41. The Tribunal notes that all the Purchases Orders from Michael Holland were signed *M Holland* which appears to have been typed rather than written.

- 30 42. The Tribunal notes that copy driving licences were submitted for Jo Caulfield and Michael Holland but both copies contained the same identification number.

43. The Tribunal also notes that most of the evidence produced by Orbis to HMRC in support of its claim to zero rate the invoices was not produced until 1 May 2012, almost two years after the initial visit by Officer Laverty. No explanation for this delay was forthcoming at the hearing.

- 35 44. The Tribunal further finds that the apparently valid evidence, even if produced by Orbis at the time of, or shortly after, the visit of Officer Laverty, was insufficient to satisfy all the requirements of VAT Notice 725. The various Delivery Notes and Order Confirmations are too similar to have been produced and signed over a lengthy period.

45. Mr Gibson referred the Tribunal to the decision of the Upper Tribunal in *MacMahon v Revenue and Customs Commissioners* [2012] UKUT 106 TCC where Judge Colin Bishopp referred to the case of *R (Teleos plc) v Revenue and Customs Commissioners* (Case C-0409/04) [2008] STC 706 (Teleos).

5 46. In *Teleos* the European Court of Justice stated:

10 “It is for the member states to lay down the conditions for the application of the exemption of intra-Community supplies of goods. It is important to note, however, that when they exercise their powers, member states must comply with the general principles of law which form part of the Community legal order, which include, in particular, the principles of legal certainty and proportionality.”

47. The Court continued:

15 “Accordingly, it would be contrary to the principle of legal certainty if a member state which has laid down the conditions for the application of the exemption of intra-Community supplies by prescribing, among other things, a list of the documents to be presented to the competent authorities, and which has accepted, initially, the documents presented by the supplier as evidence establishing entitlement to the exemption, could subsequently require that
20 supplier to account for the VAT on that supply, where it transpires that, because of the purchaser’s fraud, of which the supplier had and could have had no knowledge, the goods concerned did not actually leave the territory of the member state of supply.”

25 48. Judge Bishopp stated at paragraph 36 that “legal certainty demands that a trader acting in good faith and taking adequate and appropriate precautions to avoid his participation (even unwitting participation) in tax evasion is protected if he produces apparently valid evidence of export which is accepted by the tax authority.”

Decision

30 49. The Tribunal distinguishes the present case from that of *MacMahon* as it is not satisfied that *Orbis* acted in good faith, did not take adequate and appropriate precautions and took almost two years to produce apparently valid evidence.

35 50. For the reasons set out in paragraphs 37 to 44 above, the Tribunal is unable to accept that the evidence submitted by *Orbis* in support of the removal of the goods from the United Kingdom is sufficient to meet the conditions of the legislation set out in paragraphs 4.3 to 4.5 of Public Notice 725 (Dec 09) published pursuant to section 30(8)(b) VAT Act 1994.

51. Accordingly the Tribunal finds that HMRC was entitled to raise the amended assessments referred to in paragraph 1.1 and 1.2.

52. If Orbis and HMRC are unable to agree the correct amounts of each assessment and whether the penalty referred to in paragraph 1.3 has been validly raised, the Tribunal will reconvene to hear arguments from both sides concerning the quantum of the assessment.

5 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
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

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ALASTAIR J RANKIN

TRIBUNAL JUDGE

RELEASE DATE: 7 July 2014

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