



TC 04954

Appeal no: TC/2015/03465

Value Added Tax on importation - importation of diamond intended to be re-exported to New York - diamond seized when carrier went through the Green Channel - Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

GEORGE AKAY

Appellant

-and-

THE DIRECTOR OF BORDER REVENUE

Tribunal: JUDGE HOWARD NOWLAN

JOHN ADRAIN FCA

Sitting in public in the Royal Courts of Justice, London on 9 February 2016

Rayan Imam, counsel, on behalf of the Appellant

Michael Newbold, counsel, on behalf of the Respondents

DECISION

Introduction

1. This was an Appeal in which the Appellant sought the restoration of an un-cut, but certified, diamond, that was apparently valued at approximately \$35,000, that had been unlawfully imported into the UK from Sierra Leone. While we were satisfied that the intention was for the diamond to be re-exported to the USA, very shortly after importation into the UK, the diamond was brought into the UK in his luggage by an individual carrier, a Sierra Leone resident, Mr. Bah, and taken by Mr. Bah into the Green Channel at Heathrow. A Customs officer took Mr. Bah aside in the Green Channel and questioned him and searched his luggage, the search revealing not only the non-disclosure of the diamond that was intended to be re-exported but two other un-cut, and in their case, un-certified diamonds. All three were seized though the application for restoration, and therefore this Appeal, was concerned only with the certified diamond destined for re-export.

2. We were informed that there was no Customs Duty on the importation of diamonds, or at least uncut diamonds. There was, however, a liability to VAT at 20%. Two methods of dealing with the VAT, where the intention was for the item to be re-exported, were explained to us. One was simply to pay the VAT at the point of importation and then subsequently to file various forms at the point of re-exporting the diamond, thereby recovering the VAT. The other involved deferring the VAT on importation by declaring the intention to re-export. In this case, security equal to the full liability to VAT had to be paid, with the security then being released and refunded on exportation.

Background facts

3. The diamond to which this Appeal related had been purchased in Sierra Leone by the Appellant, who we understood was in New York at all relevant times, and there was no dispute that he was the owner. The Appellant was a member of a family that operated a jewellery business in New York. Difficult trading conditions had apparently led to the closure of one shop but another shop was still operating. The Appellant decided, however, that he would commence a slightly different jewellery business, no longer directly with other members of his family, though some family members lent him \$10,000 to help fund the purchase of the diamond with which we are concerned. This purchase appeared to be the first transaction in the new business.

4. Three other individuals were involved in some way with the Appellant's new business. The second was Mr. Williams who gave evidence personally in the hearing. He said that he was not contributing any of the finance for the business but that he had useful contacts in Sierra Leone. The third was a Mr. Walker, a resident of Sierra Leone who would presumably also be useful in locating suitable purchases. The fourth was a US citizen, a Mr. Azam, who was said to be ready in at least some circumstances to contribute money to the venture. We were not given any indication of whether there was any form of partnership

between the four individuals or whether the other three were simply prepared, possibly for occasional payments, to assist the Appellant in various ways.

5. When the diamond was purchased in the present case, the original plan was that Mr. Williams would act as the courier to transport the diamond from Sierra Leone to New York. If that proposal had been implemented we were not told whether he could have obtained a direct flight to New York or whether perhaps he would have travelled via Heathrow, but if he had had to travel via Heathrow, he might have remained as a transit passenger (never entering any goods for Customs or tax purposes at all).

6. The original plans had to be changed, however, because of the Ebola crisis. The triple relevance of this was that Mr. Williams might have been reluctant to visit Sierra Leone in any event; secondly most international flights had been cancelled and it seemed that the only way, or the best way, of getting to New York from Sierra Leone would be via Brussels, and then London, and thirdly Mr. Williams realised that if he undertook the entire journey from Sierra Leone to New York, US restrictions might result in his being held in quarantine for 21 days in the USA.

7. As a result of these difficulties, Mr. Williams arranged that Mr. Bah, who was involved in an electrical business in Sierra Leone and who Mr. Williams had known since 2008, would bring the diamond to London on his next visit to the UK, ostensibly to buy electrical products. Mr. Williams' evidence was that he had given oral instructions to Mr. Bah for Mr. Bah to go through the Red Channel at Heathrow. Mr. Williams had done some research on the internet and he claimed to have understood that no customs duty would be owing and that no VAT would be owing if the diamond was to be re-exported. He said that he assumed that when Mr. Bah went through the Red Channel there would be some system under which the diamond would be retained by Customs officials at Heathrow, and that he would be able to pick it up once he, Mr. Williams, had gone through Customs, ready to take his own onward flight to New York a few days later. He did intend to be at Heathrow, and indeed was at Heathrow, in order to meet Mr. Bah, and it seems that after the initial questioning of Mr. Bah, Mr. Williams was able to join Mr. Bah and the Customs officials in an interview room, and able to explain his plan and the fact that by then he had acquired a return Virgin ticket to New York to effect the re-exportation.

8. The Respondents' counsel asked Mr. Williams why he had decided to ask Mr. Bah to bring the diamond from Sierra Leone to London when the problems with the Ebola crisis were at their height, and why he had not simply used one of the courier firms that would have not only secured transit insurance but would also have been very familiar with customs requirements as well. The Respondents' counsel then criticised Mr. Williams for giving conflicting answers to this question, one being that Mr. Bah was cheaper than the courier firms (apparently he did not charge at all for his service), and the other being that when he had made a couple of enquiries the courier firms were not very keen to undertake the job.

Facts in relation to the importation and arrival at Heathrow

9. On 1 January 2015, Mr. Bah arrived at Heathrow, having flown via Brussels, though in Brussels he never "entered" Belgium because he remained "air-side" as a transit passenger.

10. On arriving at Heathrow, Mr. Bah went into the Green Channel and was taken aside by a Customs officer. Having initially said that he had arrived from Brussels, he disclosed that

he had in fact started his journey in Sierra Leone. He was asked whether there was anything in his baggage that he didn't declare, to which he said "No". He was then asked whether he was "bringing anything for anyone or [whether anyone had given him] anything to bring", to which he said "Yes, some biscuits for my friend and toothbrushes. Look, I am only here to buy electronics and other cash and carry stuff." In response to a further question as to whether anyone had given him anything to bring, he replied "My friends give me presents – foodstuff."

11. When the Customs officer examined his two small bags, the officer found the diamond that was duly certified, along with relevant documentation, and when asked why he had not declared it, he said that "He didn't have to declare it". When asked whether it was his, he said "Yes, it's mine. It's not staying here my friend Ken (Mr. Williams) will take it to the USA". When asked whether he had any other diamonds he said that he did have and that he had two smaller diamonds. These were not certified and so might apparently have been subject to seizure as possibly being blood diamonds. He said that these smaller diamonds were "Only gifts". All three diamonds were then seized because Mr. Bah had entered through the Green Channel, not disclosed the diamonds and lied in response to a number of the questions.

12. When Mr. Williams met Mr. Bah and the Customs officer in the interview room that we have mentioned and had explained his proposal to re-export the principal diamond to New York on a Virgin flight on 5 January, Mr. Williams apparently asked Mr. Bah why he had brought the other two uncut and un-certified diamonds into the UK (there being no intention it seems that these diamonds were also to be carried to New York). Mr. Bah apparently said to Mr. Williams not that they were to be given away as gifts, but that he wished to show them to Mr. Williams, on some sale or return basis.

13. Mr. Bah gave no evidence, and we were not told the basis on which Mr. Bah had initially obtained the other two diamonds. It seemed unlikely that they would have been supplied without payment or security if the seller knew that they were to be taken to London, but we obtained no information in relation to their acquisition.

14. We were satisfied by Mr. Williams that the genuine intention was to re-export the principal diamond, albeit that this intention was not even suggested to apply to the other two diamonds. Both the purchase of the return Virgin ticket to and from New York and other evidence that arrangements had been made with an import firm in New York to deal with the importation formalities, and possibly payments, in New York, made the intention to re-export the principal diamond clear.

The seizure of the diamond and the requests for its restoration

15. There was little doubt that the seizure of all three diamonds was legal because the carrier had sought to go through the Green Channel, failed then to admit to having the diamonds in his possession when questioned and had then lied on several occasions. In any event since the seizure was not challenged in the one month period before the Magistrates' Court, it would have been deemed to be a legal seizure that could not thereafter be challenged as illegal.

16. The Appellant did however apply for restoration of the principal diamond. That was refused both in the Border Revenue's initial decision on the restoration request and in the

review of that decision. Accordingly, the Appellant appealed to us. Our jurisdiction is confined to the point that if we consider that the refusal to restore was unreasonable, either as being a decision that no officers could reasonably have arrived at, or that the decision had been based on irrelevant factors or had ignored relevant factors, then we can send the case back for reconsideration. We can then of course indicate the points that we consider should have been taken into account, or that should have been ignored, but we cannot as such change the refusal to restore.

The parties' contentions

17. It was contended on behalf of the Appellant that:

- Insufficient regard had been paid to the fact that the diamond was owned by the Appellant and that the Appellant and Mr. Williams had had no knowledge that Mr. Bah would ignore Mr. Williams' claimed instruction and enter Customs through the Green Channel, then lie, and fail to disclose other diamonds in relation to which it was not asserted that they were to be re-exported.
- The original decision was certainly taken (contrary to our own conclusions) on the basis that the short witness statement from the Appellant and Mr. Williams' evidence did not absolutely establish that it was indeed the intention to re-export the principal diamond. Now that the return Virgin ticket, and the arrangements with the New York import specialists make it reasonably clear that re-exportation was intended, it was claimed that disputing or doubting this intention was not something that should have been relied upon in making the decision.
- The officer's record of the answers given by Mr. Bah, on being questioned at Heathrow, had not been counter-signed by Mr. Bah and may therefore not have been reliable.
- Neither the Appellant nor Mr. Williams had any involvement with or pre-knowledge about the other two diamonds.
- A human rights point was advanced along the lines that there should be no interference with the individual's peaceful enjoyment of his possessions unless justified by state interest, for instance in relation to the enforcement of tax law.
- Reliance had been placed on Mr. Bah's statement that he was travelling for the purpose of his electrical business, which was claimed to be either a lie or at least misleading. It was suggested that Mr. Bah might indeed have been coming to London to make purchases for that business, so that even if he thus had two purposes for his visit, the reference to the purchase of electrical products was not a lie.
- Finally it was contended that when the diamond was anyway destined for export, the refusal to restore it was disproportionate and that no regard had been paid to the feature that the Appellant remained liable to repay the \$10,000 borrowing, notwithstanding the forfeiture of the diamond.

18. It was contended on behalf of the Respondents that:

- The Appellant was ultimately liable for the safe and legal method of transporting his goods, and as a businessman who anyway arranged the import formalities in New York it was not permissible to abdicate responsibility for the way in which the goods were brought into the UK.

- Mr. Williams had plainly done only cursory research into the formalities for dealing with VAT in relation to temporary imports, and he was wrong just to assume (incorrectly as it turns out) that HMRC and the Border Revenue operated some sort of holding facility at airports for product intended to be re-exported so as to avoid any need for duty and/or VAT to be paid or secured.
- Mr. Bah had committed a criminal offence by entering via the Green Channel, and his subsequent conduct involved a number of highly material lies.
- It was odd that Mr. Williams had asked Mr. Bah to bring the diamond with him, and it would have been far more obvious to use a professional courier firm.
- Mr. Williams' evidence about having orally instructed Mr. Bah to enter via the Red Channel was not confirmed by anything in writing.
- Mr. Bah's inconsistent answers in relation to the circumstances in which he had brought two other diamonds to the UK (i.e. as gifts or for examination by Mr. Williams) were not convincing, particularly because the two versions were quite different.

Our Decision

19. We accept that we are more convinced than the officers who made the original decisions that it was the genuine intention that the principal diamond should be carried to New York and thus be re-exported. There is no need for us to remit a case back to the officers for a new decision if we consider that some particular issue on which we have formed a different opinion than the officers would not in fact have made any difference to the ultimate decision. We consider, in this context, that it was the complete disregard for the proper formalities for dealing with even a temporary importation that led to the original decisions, rather than the level of conviction that the diamond was indeed to be re-exported. Accordingly we will not remit the case back to the officers for this difference of approach on our part.

20. The same certainly applies to a one time unease that there was a disparity between the serial numbers of the diamond recorded in the officer's notes and on the bag in which the diamond was protected. Insofar as the officers making the original decisions might have had a lingering suspicion that this disparity was significant, we accept that it was not, and that the great probability is that the officer had just reversed a couple of numbers. Again we regard this as being of no significance. We also disregard the far-fetched claim that the officer's record of the conversation in his note book might have been inaccurate because the note was not counter-signed by Mr. Bah.

21. We base our own decision not to allow this Appeal, and not therefore to remit this case back for further review, on the following factors.

- We are not absolutely convinced that Mr. Williams did indicate orally to Mr. Bah that he should enter Customs via the Red Channel. We certainly agree with the Respondents that when someone would be bringing a \$35,000 diamond through UK customs, one would expect responsible people to work out precisely how temporary importation should be arranged, rather than to rely on assumptions.
- Mr. Bah's own statement that he thought that there was nothing to declare was wholly unconvincing. If Mr. Bah based this on the proposition that the diamond was to be

re-exported, he should have worked out that unless there was some machinery for ensuring that the re-export actually took place, his own approach of seeking to walk through the Green Channel would mean that, if not challenged, the diamond would have entered the UK without payment of VAT, where it could have remained.

- The officers were bound to be heavily influenced by the facts, as we are, that Mr. Bah entered through the Green Channel illegally and then told several material lies.
- We are very influenced by the fact that Mr. Bah brought two other diamonds to the UK through the Green Channel, without even the claim that they were to be re-exported. We understand that as they were uncertified diamonds they may well have been liable to forfeiture for that reason alone. It is also relatively obvious that Mr. Bah would have considered that it was unduly risky to enter through the Red Channel, declaring the main diamond as allegedly suggested and required by Mr. Williams because if the officers then searched his baggage and found the other two diamonds he would have been virtually bound to lose them immediately.
- We are also distinctly troubled as to why Mr. Bah was importing these other two diamonds. We do not believe that they were to be given away, as he suggested to the Customs officer. He said to Mr. Williams that he intended to show them to Mr. Williams, for inspection. This suggested, or was intended to suggest, that there was no prior arrangement for these diamonds to be produced to Mr. Williams, though it is far from clear that this is true. The following appear to be the possible rationalisations for the importation of the other two diamonds. The first is that Mr. Bah may have been on a frolic of his own, intending to try to take the illegally imported diamonds to some dealer prepared to buy illegally imported uncut and un-certified diamonds. We regard this possibility as far-fetched for an individual with an electrical business and one simultaneously importing the principal diamond for the Appellant and Mr. Williams. The next possibility is that Mr. Bah entered into a different frolic of his own, and presumably took the risk of buying the two other diamonds with a view, without pre-arrangement, to seeing whether Mr. Williams might be ready to buy them either on his own account or for the Appellant. When he was simultaneously carrying a \$35,000 diamond for Mr. Williams, we find it fairly incredible to suppose that Mr. Bah might have purchased the other two diamonds himself with a view to hoping, in an entirely unsolicited manner, to persuade Mr. Williams or the Appellant to buy them. This leaves as the third possibility, and seemingly one that most certainly cannot be rejected out of hand, the possibility that there was indeed some pre-arrangement between either the Appellant or Mr. Williams and Mr. Bah in relation to the other two diamonds. This would obviously have had to be concealed, which may account for why Mr. Bah gave two conflicting answers to the question of why these other two diamonds had been brought to the UK.
- The most charitable explanation of the three choices examined in the previous bullet-point is that the Appellant and Mr. Williams were in no way involved in any pre-arranged plan that the other two diamonds were to be brought to the UK. Quite what Mr. Bah might have had in mind on that scenario we do not know, but it is a possibility. The conclusion that we then draw is that because the importation of the other two diamonds would almost inevitably have meant that Mr. Bah would have had to hope to pass through the Green Channel without being taken aside, Mr. Williams would have selected as his courier a person who was ready to combine his principal

role (of carrying the \$35,000 diamond) with a role that made it essential to go through the Green Channel, and someone who then failed to declare any of the diamonds and lied on a number of occasions. Furthermore Mr. Bah would have put greatly at risk the safe carriage of the principal diamond by combining its carriage with whatever other plan explained the importation of the other two diamonds. At the very best, it would seem that Mr. Williams would have chosen either a fraudster or a rather foolish person to undertake the role (apparently for no payment) of carrying the principal diamond. This seems unlikely but in any event it is most certainly not an explanation that is to the credit of the Appellant or Mr. Williams.

- The point just made, coupling the entry through the Green Channel, the lies and the critical feature that there was simultaneously an illegal importation of un-certified diamonds appears to us to justify the non-restoration. It is obviously the case that many illegal importations will go undetected, so that when illegal importers are in fact caught the treatment must be reasonably rigorous in order to deter illegal activity. That deals with the human rights point. But it must also be the case that if someone makes an illegal importation of three diamonds, when there is no conceivable basis for claiming that two should have been restored, the case for saying that that the illegal importer should be able to recover the one diamond for which there was some reasonable case for requesting restoration (at least when viewed in isolation) must be jeopardised or undermined by the importation of the un-certified diamonds. You simply cannot advance the case by saying “Well I accept that my importation of two diamonds was wholly illegal, and without any saving grace, but please can I have the other one back when the only offence was that I completely disregarded the proper treatment for temporary importation, and when I had to seek to take the principal diamond through the Green Channel because otherwise I would have been highly likely to have lost the other two diamonds.” That is effectively Mr. Bah’s implicit claim in this case, and whether the Appellant or Mr. Williams had more involvement with him than was disclosed or whether they simply and ignorantly engaged a startlingly unreliable carrier to carry their diamond from Sierra Leone, neither analysis justifies restoration or remitting this case to the officers for a further review.
- We also reject the suggestion that the refusal to restore was disproportionate, or that the liability to repay the \$10,000 borrowing rendered the non-restoration disproportionate. The non-restoration was amply justified and whether the owner had then simply lost the illegally imported item or had residual borrowing liabilities in relation to its acquisition has no bearing on the financial significance of the non-restoration. On either analysis, the owner has lost a \$35,000 diamond.

22. We accordingly dismiss this Appeal.

Right of Appeal

23. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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: 08 MARCH 2016