[2016] UKFTT 0471 (TC)

TC05223

Appeal numbers: TC/2014/03243
TC/2014/05704
TC/2015/04498

VAT – whether HMRC had made a decision giving a right of appeal – import VAT – Appellants providing supply of warehousing, transporting and despatching goods – Appellants not owning the goods – whether entitled to recover import VAT – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DONSAW LIMITED **Appellants**
SAMUEL YEUNG
Y4 EXPRESS LIMITED

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
JANE SHILLAKER

Sitting in public at the Tribunal Centre, Fox Court, Brook Street, London on 26 April 2016

Timothy Brown of Counsel, instructed by SKS (GB) Ltd for the Appellants

Leslie Bingham of HM Revenue and Customs' Appeals and Reviews Unit for the Respondents

DECISION

1. The Appellants, Donsaw Limited ("Donsaw"), Y4 Express Limited ("Y4") and Mr Samuel Yeung, together "the Appellants" claimed import VAT totalling £503,964.16 from HM Revenue and Customs ("HMRC") for the periods set out later in this decision. HMRC decided that the Appellants were not entitled to recover the import VAT. We agreed with HMRC and dismissed the appeals.

2. The Appellants are connected, in that Mr Yeung is a shareholder and director of Y4 and his mother, Alice Yeung Wong, is the owner and director of Donsaw. Each Appellant carried out substantially the same trading activities, and the issue in dispute was identical. On 21 August 2014, the Tribunal directed that the Appellants' appeals should "proceed together and be heard together".

The appeals before the Tribunal

3. Donsaw's appeals were made earlier than those of the other Appellants. However, Donsaw's appeal raises three preliminary issues, as we explain below. We therefore first set out the appeals made by Mr Yeung and Y4, which were straightforward.

The appeals made by Mr Yeung

4. On 22 September 2014, HMRC wrote to Mr Yeung. The letter said that HMRC had decided he was not entitled to claim the import VAT he had included in the seven VAT returns set out in the table below.

Period	VAT return submitted	Sum in dispute
11/10	25/7/14	£9,244.96
2/11	25/7/14	£22,469.66
5/11	25/7/14	£32,934.11
8/11	25/7/14	£55,255.16
11/11	5/9/14	£67,111.20
2/12	5/9/14	£93,780.44
5/12	5/9/14	£82,957.96
Total		£363,753.49

5. HMRC's letter sets out, for each period, the import VAT which had been removed from Mr Yeung's submitted VAT returns. It also informed Mr Yeung that he could ask for a review of the decision or appeal to the Tribunal. On 17 October 2014, Mr Yeung appealed to the Tribunal.

The appeals made by Y4

6. On 22 October 2014, Y4 submitted three VAT returns, for periods 10/11, 1/12 and 4/12. The returns included import VAT of £13,108.87; £23,947.93 and £8,829.66 respectively; this totalled £45,886.46

7. On 17 July 2015, HMRC wrote to Y4, stating that it had adjusted its VAT returns to remove the import VAT, and explaining that the company could ask for a review or appeal to the Tribunal.

8. On 27 July 2015, Y4 filed three separate appeals with the Tribunal. On 21 August 2015, the Tribunal directed that these appeals be consolidated under reference TC/2015/04498.

The appeals made by Donsaw: facts

9. On 14 November 2013, HMRC received Donsaw's VAT returns for periods 9/12, 12/12, 3/13 and 6/13. The amounts reclaimed and the import VAT contained within those claims were as follows:

Period	Reclaim	Import VAT
9/12	£46,587.11	£46,250.31
12/12	£32,188.33	£32,169.88
3/13	£10,020.48	£9,939.62
6/13	£6,154.81	£5,964.71
Total	**£94,950.73**	**£94,324.21**

10. HMRC repaid the import VAT of £46,250 contained in the 9/12 return. On 9 December 2013, two HMRC Officers, Ms Donovan and Mr Gelder, visited Donsaw. On 19 December 2013 Ms Donovan wrote to Donsaw ("Ms Donovan's Letter"). It begins:

> "I write with reference to our visit at which we discussed the entitlement of Donsaw Ltd to the import VAT claimed in VAT return periods 09/12,12/12, 03/13 and 06/13."

11. She continues by summarising the points made by HMRC and by Donsaw's accountant, SKS (GB) Limited ("SKS") during their meeting, and then says:

> "I can confirm that the import VAT is not recoverable by Donsaw Ltd…I have received confirmation from our Policy Unit that the VAT paid by Donsaw Ltd is not recoverable by them. I will therefore proceed to raise an assessment to disallow import VAT in period 9/12 and to refuse any import VAT claimed in period, 03/13 and 06/13."

12. Ms Donovan's Letter does not specify the amounts of import VAT claimed in any period.

13. Also dated 19 December 2013 are two further letters from Ms Donovan, one for period 3/13 and the other for period 6/13. They are in the same format as those HMRC sent to Mr Yeung and Y4. They specified the amount of VAT which was not being repaid for the period in question and set out Donsaw's appeal rights. Ms Donovan did not send a similar letter in relation to period 12/12.

14. On 13 January 2014 HMRC issued an assessment to recover the import VAT of £46,250 already repaid to Donsaw for period 9/12.

15. On 14 January 2014, SKS asked for a statutory review on behalf of Donsaw. SKS first referred to the correspondence set out above, and then to the 12/12 repayment claim, saying that it "has not been paid but no notification has been received from HMRC of this denial". SKS then analysed the arguments put forward in Ms Donovan's Letter, and concluded by asking that "the decision is rescinded".

16. By a letter dated 8 May 2014, Mr Ian Hartley, an HMRC Review Officer, replied to SKS. He first refers to periods 9/12, 3/13 and 6/13, before going on to say:

> "SKS also refer to an amount not refunded in respect of VAT period 12/12. HMRC records show that the P12/12 claim was reduced by £32,169.88 from £32,188.33 to £18.45. However, I can find no correspondence in respect of these amounts. It is not clear to me why this claim has been reduced, nor by whom. There is certainly no formal notification of any decision made by HMRC therefore it is not clear to me that this reduction is appropriate for a statutory review. I have referred this matter back to the officer so that she can investigate further and formally notify you of a decision if appropriate. Any decision formally notified to you in respect of this VAT period will be separately reviewable/appealable. Be that as it may, matters concerned with P12/12 form no part of this review."

17. Mr Hartley went on to uphold HMRC's decisions in relation to periods 9/12, 3/13 and 6/13.

18. Although dated 8 May 2014, Mr Hartley's letter was not received by SKS or Donsaw until 17 May 2014. On 19 May 2014, SKS contacted Mr Hartley asking for an extension of time to consider an appeal to the Tribunal. Mr Hartley said he was not able to give that extension, but that HMRC would not object to a late appeal.

19. Donsaw's Notice of Appeal to the Tribunal gives the "date of decision" under appeal as being 8 May 2014, and the amount under appeal as £94,324.21. The date is therefore that of the Mr Hartley's review decision relating to periods 9/12, 3/13 and 6/13 but the amount under appeal includes the import VAT for all four periods.

20. The Grounds of Appeal includes the following text:

> "In the decision letter of 8 May 2014 the officer has disallowed the input VAT re-claimed on the VAT returns for periods 03/13 and 06/13…in relation to VAT period 12/12 HMRC reduced the Appellant's VAT repayment claim by £32,169.88 from £32,188.33 to £18.45. No reason has been given by HMRC for this action and it is

> our contention that this repayment claim is valid and should be repaid in full."

The appeals made by Donsaw: the issues

21. The first issue was whether an appealable decision had been made for period 12/12, given that:

(1) Ms Donovan's Letter does not refer to appeal rights or set out the amount of VAT for which repayment was refused; and

(2) no letter in the standard format, setting out the amount of VAT which was not being repaid for the period in question and the trader's appeal rights, had been sent to Donsaw in respect of the 12/12 period.

22. If an appealable decision had been made and appealed, the second issue was whether that appeal was late, and if so, whether permission should be given to appeal after the statutory time limit.

23. The third issue was whether permission should be given to make late appeals for periods 9/12, 3/13 and 6/13.

The appeals made by Donsaw: submissions

24. In the light of the correspondence set out above, the Tribunal asked the parties for submissions or any further information in relation to period 12/12. Mr Bingham said that the position remained as it was when the Review Officer wrote his letter of 8 May 2014, namely that the HMRC computer recorded that the amount claimed had been reduced, but there was no trace of any other or further correspondence.

25. Mr Brown said that the wording in the Grounds of Appeal showed that Donsaw had sought to appeal in relation to all four periods, and this was also reflected in the sum of £94,324.21, being the total of the import VAT for all four periods. However, he said that the 12/12 period "was not in issue" because no decision had been notified to Donsaw.

26. From Mr Brown's submissions we understand his position to be that:

(1) a valid appeal could not have been made for the 12/12 period because no decision had been notified to Donsaw; but

(2) if he was wrong in this, so that an appeal could be validly made, Donsaw's Grounds of Appeal was to be read as including an appeal in relation period 12/12, and the Tribunal was asked to determine that appeal.

The appeals made by Donsaw: discussion and decision on the first issue

27. We first considered whether a valid appeal had been made for period 12/12. As is clear from the submissions above, we did so without the benefit of any cited authority.

28. Section 83(1) of the VAT Act 1994 ("VATA) provides, so far as relevant to this issue:

> "Subject to section 84, an appeal shall lie to a tribunal with respect to any of the following matters–
>
> …
>
> (c) the amount of any input tax which may be credited to any person."

29. It can be seen that neither the opening words of VATA s 83, nor subsection (1)(c), refer to "a decision" of HMRC. However, the precursor provision in the VAT Act 1983 did include the word "decision". It read:

> "An appeal shall lie to a value added tax tribunal…against the decision of the Commissioners with respect to any of the following matters."

30. There are also references to "decision" in many other related parts of VATA. In particular, s 83(2) says:

> "In the following provisions of this Part, a reference to a decision with respect to which an appeal under this section lies, or has been made, includes any matter listed in subsection (1) whether or not described there as a decision."

31. There is also no reference to "decision" in subsections 83(1)(b), (n), (p), (q), (ra) or (zb), but VATA s 84(3) nevertheless provides:

> "Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)(b), (n), (p), (q), (ra) or (zb), it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them."

32. VATA s 84(10) reads:

> "Where an appeal is against an HMRC decision which depended upon a prior decision taken in relation to the appellant, the fact that the prior decision is not within section 83 shall not prevent the tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision."

33. In *Marks & Spencer Plc v CCE* [1997] VATTR 15302 at [10], the Tribunal Chairman, Mr Stephen Oliver QC, said:

> "The 1994 VAT Act is a consolidation Act and the presumption with such acts is that no change of the law is intended: see for example Lord Diplock in *Commissioners of Inland Revenue v Joiner* [1975] STC 657 at 666g,h. The presumption must therefore be that, as with section 40(1) of VAT Act 1983, a decision is a prerequisite to an appeal. The presumption is confirmed by related provisions elsewhere in the 1994 Act. For example, section 84(3) refers to a decision. And the same section retains the provisions of subsection (10) which enable the tribunal to entertain an appeal against 'a decision' of the Commissioners even when that decision depends upon 'a prior decision' of the Commissioners. Accordingly I interpret section 83 as

requiring that there be a decision of Commissioners as a mandatory prerequisite to our jurisdiction."

34. A similar conclusion was reached in *Olympia Technology Ltd v HMRC* [2006] VATTR 19984 ("*Olympia*"), where the Chairman, Mr Theodore Wallace, said at [11]:

> "I have no hesitation in holding that a decision is necessary before there can be an appeal. It is difficult to understand why the word decision which appeared in the opening words of section 40(1) of the VAT Act 1983 were omitted from the 1994 Act, however that does not in my view alter the need for some determination against which to appeal. The Tribunal is not in the position of an umpire in a game of cricket to whom a bowler appeals for a catch. The Tribunal exists to adjudicate on a dispute following a ruling or determination by Customs. This may take a variety of forms varying from assessments, directions and refusals of applications to a variety of other determinations. It is important to note that section 83 is subject to section 84. A whole series of subsections of section 84 refer to an appeal against a decision in respect of matters where the word decision does not appear in the relevant paragraph of section 83: section 84(3) refers to an appeal against a decision with respect to the VAT chargeable on a supply of goods or services under section 83(b); section 84(4)(a) refers to an appeal against a decision as to input tax on entertainment expenditure which can only come under section 84(c); section 84(5), (7), (7A) and (10) all refer to an appeal against a decision. Section 85(1) which provides for settling appeals by agreement refers to 'the decision under appeal'..."

35. We respectfully agree with both judgments, and find that the Tribunal only has jurisdiction if HMRC has made a decision.

36. The next question is: in a case such as this, how do we know whether HMRC has made a decision subject to appeal? In *Olympia,* the judgment continues at [12]:

> "…in order for the Tribunal to have jurisdiction there must be an issue between the parties which has been sufficiently crystallised to constitute a decision falling within one of the paragraphs of section 83. Such decision will normally be in writing and be clearly expressed as a decision subject to appeal whether or not the word decision is used. Where a determination is not expressed as an appealable decision it may nevertheless constitute such a decision in the light of its contents and the surrounding circumstances. There may on analysis be a clear determination although there is no mention of the right of appeal."

37. In *Colaingrove v C&E Commrs* [2000] VATTR 19681 ("*Colaingrove*"), the VAT Tribunal (also chaired by Mr Theodore Wallace) said at [10]:

> "I accept that a decision by the Commissioners is a pre-requisite for the right of appeal, see *Marks & Spencer plc v Commissioners of Customs and Excise* (No. 2) [1997] V&DR 344. What constitutes a decision is however inevitably a matter of fact and degree. Although almost inconceivable, total silence in response to a repayment claim must constitute a refusal. Equally, repeated refusals to give a straight

> answer will amount to a refusal. It would be surprising if a trader's only remedy was to obtain an order from the High Court directing a formal decision. In my view such a refusal would amount to an appealable decision."

38. In *John Martin Group v HMRC* [2005] VATTR 19257 ("*John Martin*"), the VAT Tribunal (chaired by T Gordon Coutts QC) held that an email dated 23 August 2004 was not an appealable decision. The judgment includes the following passage:

> "The Tribunal having considered the content and form of the document of 23 August are wholly unable to consider that as being a decision letter. It contains no reference to the matter of finality or of appeal and, worse, no letter from the Respondents in this case purported to be either final or to comply with the internal guidelines for officers of the Respondents in relation to decisions or reconsiderations. No finality would be deduced from any of the Respondents letters dealing with the merits of the claims as submitted, and that despite the terms of the Appellant's letter of 11 October. HMRC made invitations on all the correspondence to discuss further."

39. In *Iqbal t/a Platinum Executive Travel v HMRC* [2015] UKFTT 215(TC) ("*Iqbal*"), Judge McNall said at [11]:

> "The Oxford English Dictionary defines a decision as 'the final and definite result of examining a question; a conclusion; the making up of one's mind on any points or on a course of action; a resolution or determination'. All these definitions share a theme, which is one of finality."

40. We found all the cited extracts to be helpful.

41. In relation to period 12/12, it is clear that HMRC has not made a decision in writing "clearly expressed as a decision subject to appeal", as the Chairman put it in *Olympia*. The only possible source of a written decision is Ms Donovan's Letter, which does not refer to appeal rights.

42. We then considered the second possibility in *Olympia*, namely whether Ms Donovan's Letter was a determination which constituted a decision "in the light of its contents and the surrounding circumstances". In doing so, we also took into account the "matter of finality" relied upon in by the Tribunals in *John Martin* and *Iqbal*.

43. It is clear from the opening paragraph of Ms Donovan's Letter that she was explicitly considering whether to allow the import VAT claimed in all four periods, including 12/12. She then said "I can confirm that the import VAT is not recoverable by Donsaw Ltd…I have received confirmation from our Policy Unit that the VAT paid by Donsaw Ltd is not recoverable by them". We find that this is a decision in principle that the import VAT claimed by Donsaw is not recoverable. It is also a final decision: she is not inviting further discussions, unlike the HMRC Officers in *John Martin* and *Iqbal*.

44. Ms Donovan then goes on to say "I will therefore proceed to raise an assessment to disallow import VAT in period 9/12 and to refuse any import VAT claimed in period, 03/13 and 06/13". She makes no reference to period 12/12. Moreover, nowhere in her letter does she set out the import VAT claimed in any of the periods, including 12/12, so there is no specificity as to the amount of import VAT which HMRC is refusing to repay.

45. However, we agree with the Tribunal in *Olympia* that we should also consider the "surrounding circumstances". Ms Donovan blocked repayment of £32,169.88 out of the £32,188.33 reclaimed on Donsaw's 12/12 VAT return. We infer from this that she not only knew the amount of import VAT contained with that period's VAT return, but also decided to refuse repayment of that import VAT. We make the further inference that repayment was refused for the reasons given in Ms Donovan's letter.

46. With the exception of *Iqbal*, all the judgments cited above were published before the insertion of ss 83A-G into VATA; these sections deal with HMRC's statutory review of decisions and took effect from 1 April 2009.

47. Section 83A(2) says that "the offer of the review must be made by notice given to P [the person] at the same time as the decision is notified to P." Section 83G(1) begins:

> "An appeal under section 83 is to be made to the tribunal before–
>
> (a) the end of the period of 30 days beginning with–
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates..."

48. Section 83A(2) refers to the decision being notified to the person, and s. 83G(1)(a)(i) refers to the "document" notifying the decision. Both subsections make it clear that there is a difference between the decision itself, and the notification of that decision.

49. For all the above reasons we do not agree with Mr Brown that no valid appeal has been made, because no decision has been notified to Donsaw. Instead, we find that:

(1) Ms Donovan made a decision to refuse to repay Donsaw's import VAT for period 12/12;

(2) Donsaw has a right of appeal against that decision under VATA s 83(1)(c); and

(3) the Tribunal has the jurisdiction to hear Donsaw's appeal.

50. It seems to us, as it did to the Tribunal in *Colaingrove*, that were we to be wrong on (1) above, so that HMRC had not made an appealable decision, Donsaw's only remedy would be to seek an order from the High Court directing HMRC to make a

formal decision. In particular, it does not follow that the 12/12 claim "is valid and should be repaid in full", as SKS put it in Donsaw's Grounds of Appeal.

The appeals made by Donsaw: late appeal for period 12/12

51. Mr Brown said that, were we to disagree with his first submission, Donsaw's Grounds of Appeal should be read as an appeal against HMRC's decision, and we agree.

52. The 30 day time limit for an appeal then needs to be considered: this runs from "the date of the document notifying the decision to which the appeal relates", see s 83G(1)(a).

53. Here, the only "document" which could be read as notifying the decision is Ms Donovan's Letter. This was sent out on 13 December 2013; Donsaw's Notice of Appeal to the Tribunal was filed on 10 June 2014.

54. However, Ms Donovan did not follow HMRC's normal procedures: compare what happened in 12/12 with the position for all other periods under consideration. The decision has to be inferred from a combination of Ms Donovan's Letter and the blocking of the repayment.

55. Section 83(6) gives the Tribunal power to allow a late appeal. In a case such as this it is clearly in the interests of justice to give that permission, and we do so.

The appeals made by Donsaw: late appeal for periods other than 12/12

56. The Notice of Appeal was dated 10 June 2014, just over a month after the date on HMRC's review decision, so was slightly late. We considered the tests set out in by Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and in particular the questions posed at [34] of that judgment.

57. The period of delay was short; there was a good reason for the delay, because the letter was not received by SKS or Donsaw until 17 May 2014; HMRC did not object to the late appeal; and the prejudice to Donsaw in not being able to appeal was significant. We found that it was in the interests of justice to allow these appeals to be made.

The appeals made by Donsaw: decision

58. We gave our decision to accept a late appeal for periods other than 12/12 at the hearing, but reserved our decision in relation to period 12/12. The parties confirmed that their submissions on the substantive issues were the same for all four periods.

The evidence

59. The parties provided bundles of documents which included:

(1) the correspondence between the parties and between the parties and the Tribunal;

(2) various sample invoices and other documentation relating to the goods imported and the supplies made by the Appellants; and

(3) extracts from the records underlying the Appellants' VAT claims.

60. Mr Yeung provided two witness statements, gave oral evidence, was cross-examined by Mr Bingham and answered questions from the Tribunal. We found him to be an honest and credible witness.

The facts

61. Mr Yeung began operating as a sole proprietor in May 2009. He provided "fulfilment" services. It was common ground that "fulfilment services" means delivery and packing services provided to a retailer, most commonly following a customer order received electronically. The scope and organisation of fulfilment services varies as between providers.

62. Mr Yeung provided fulfilment services to a Hong Kong company ("HK Co") which was importing goods into the UK. When the goods arrived in the UK they had already been sold to UK customers. Mr Yeung's role was to make sure that the right goods reached the right customers. He liaised with freight agents (such as DHL) as to the timing and nature of deliveries into UK ports and airports; he warehoused the goods and arranged despatch to the purchasers.

63. The freight agents paid the import VAT on the goods, and invoiced Mr Yeung to recover that VAT, together with administrative and delivery charges. They provided him with C79s setting out the VAT on the goods. Mr Yeung paid the freight agents and recharged the full amount, including the import VAT, to HK Co.

64. In May 2010 Mr Yeung set up Y4, which carried out fulfilment services for a different HK company, called 4PX. In this decision, when we refer to HK Co and 4PX together, we have called them "the HK Companies".

65. When 4PX sent goods to the UK, those goods had not yet been sold to UK customers. They included mobile phone cases, CD players, computer parts, dresses, camera lenses and jewellery.

66. Like Mr Yeung, 4PX liaised with freight agents, such as DHL. Before goods were despatched from HK, 4PX informed Y4 and provided the relevant details. Y4 contacted the appropriate agent and provided the flight number or details of the ship or plane, its time of arrival in the UK, the number of boxes and details of their contents. When the goods arrived, the freight agent paid the import VAT on the goods, using its own VAT deferment account.

67. All but one of the freight agents invoiced Y4 to recover the import VAT and administrative charges and provided Y4 with a C79 setting out the VAT paid on the goods. The C79s included Y4's name and VAT number.

68. The exception was a company called Linehaul Express Limited ("Linex"). Linex had dealt with Mr Yeung when he was providing services as a sole proprietor. Although the goods were now being sent by 4PX to Y4, Linex continued to issue

invoices to Mr Yeung, and put Mr Yeung's name and VAT number on the C79s. However, Y4 paid the Linex invoices, not Mr Yeung personally.

69. The freight agents also invoiced Y4 for the costs of transporting the goods from the arrival point in the UK to a warehouse owned by Y4 in Southall. On arrival, the goods were unpacked and put on shelves. When 4PX sold an item to a UK customer, Y4 used software provided by 4PX to identify the item from the goods on the shelves. A member of Y4's staff then located the item and scanned its bar code into the computer; this generated the appropriate address label for the customer. The Y4 staff member stuck the label onto the package, sorted the packages according to the appropriate courier or mail service provider and placed them ready for collection. A courier or mail service provider delivered the goods to their final destination.

70. There was no written contract between 4PX and Y4, but we were provided with a sample invoice for the services supplied, which we accepted was representative. Y4 billed 4PX on a monthly basis for the costs of moving the goods from their UK arrival point to the warehouse, and for the costs of moving the goods from the warehouse to the UK customers. 4PX was also billed for the warehouse expenses incurred by Y4, for the costs of its staff and for the import VAT paid by Y4 on the goods. Y4 provided 4PX with detailed analyses of these charges.

71. Y4 made a profit by charging a mark-up on the postal/courier charges which were included in its monthly invoices.

72. Around July or August 2012, Donsaw was inserted into this supply chain. We were told that this was because of a trading difficulty which has since been resolved; HMRC accepted that it had no connection with the issue under appeal.

73. From then until the end of the period with which we are concerned, the majority of the goods were transferred from their point of arrival in the UK to a warehouse owned or rented by Donsaw, and then on to Y4's warehouse in Southall. Instead of the freight agents invoicing Y4, they invoiced Donsaw and Donsaw's VAT number was on the C79s.

74. The services carried out for Donsaw were otherwise the same as previously. Like Y4, Donsaw invoiced 4PX on a monthly basis, but instead of marking up the postage costs, Donsaw included an explicit commission.

75. None of the Appellants took title to the goods. All parties accepted that the supply of goods was from the HK Companies to their UK customers and that the Appellants imported and held the goods as consignees. Customers paid the HK Companies for the goods; none of the Appellants was in any way involved with those payments. All goods were supplied to individual consumers and not to businesses.

The legislation

76. The legislation is cited only so far as relevant to the issues raised by this appeal.

77. Article 169 of EC Regulation 2006/112/EC, the Principal VAT Directive ("PVD"), provides:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> …
>
> (e) the VAT due or paid in respect of the importation of goods into that Member State."

78. In the UK, that provision is implemented by VATA s 24, which reads:

> "**Input tax and output tax**
>
> (1) Subject to the following provisions of this section, 'input tax', in relation to a taxable person, means the following tax, that is to say–
>
> …
>
> (c) VAT paid or payable by him on the importation of any goods from a place outside the member States,
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

79. VATA s 25 is headed "Payment by reference to accounting periods and credit for input tax against output tax" and provides:

> "(1) ….
>
> (2) Subject to the provisions of this section, [the taxable person] is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.
>
> (3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a 'VAT credit'."

80. VATA s 26 reads:

> "**Input tax allowable under section 25**
>
> (1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business–
>
> (a) taxable supplies;

> (b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;…"

Submissions on behalf of the Appellants

81. Mr Brown said that the Appellants were the importers of the goods and had paid the import VAT. They were not shipping or forwarding agents; that role was filled by companies such as DHL.

82. He submitted that Article 168(e) of the PVD was satisfied, namely that the goods were imported for the purpose of the Appellants' taxed transactions. He accepted that, for input tax to be recoverable, there must be a "direct and immediate link" between the goods and the Appellants' economic activities. He said that there was such a "direct and immediate link" because the costs of importing the goods as consignee, including the VAT which the Appellants paid to DHL and other freight agents, formed part of their general costs; these were then incorporated into the invoices sent to the HK Companies.

83. He relied on *Skatteverket v AB SKF* [2010] STC 419 (C-29/08) ("*AB SKF*") where the Court of Justice of the European Union ("CJEU") said at [58]:

> "It is, however, also accepted that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole".

84. Mr Brown said that this was the Appellants' case "in a nutshell".

85. In the request for a review decision, SKS put the Appellants' case like this:

> "At no time did Donsaw take title to the goods. Donsaw was making a supply of services to 4PX in Hong Long. However, the goods were integral to that supply. The service was the physical importation, handling, transport, storage and despatch of the goods. Without the goods there would have been no service provided by Donsaw."

86. Mr Brown also relied on the Court of Appeal's decision in *Volkswagen Financial Services (UK) Ltd v HMRC* [2015] STC 417 ("*Volkswagen*") and the decisions there cited. Having considered *Midland Bank plc v HMRC* (Case C-98/98) [2000] STC 501 ("*Midland*"), which in turn had relied on *BLP Group plc v HMRC* (Case C-4/94) [1995] STC 424 ("*BLP*"), the Court set out at [51] the following three principles derived from CJEU case law:

> "(1) there is an established need to find a 'direct and immediate link' between the overheads and the taxable transactions. The existence of such a link is a matter of objective assessment and is not determined by the subjective aim of the taxable person: see *BLP* at para 19;

> (2) a direct and immediate link exists where the expenditure is 'part of the costs of the output transactions which utilise the goods and services acquired': see *Midland Bank* at para 30. This is why the costs must generally be incurred before the output supply is made; and
>
> (3) even where the costs are not directly linked to a particular supply in the sense described above they will be treated as having a direct and immediate link to the taxable person's business as a whole and will therefore be deductible under art 173 of the Principal Directive (formerly art 17(5) of the Sixth Directive) if they are 'part of the taxable person's general costs and are, as such, components of the price of an undertaking's products': see *Midland Bank* at para 31."

87. Mr Brown said that this supported the Appellants' analysis of the legal position: their "general costs" were those they incurred when importing the goods on behalf of the HK Companies; these then formed "components of the price" charged to the HK Companies.

88. He noted that at [54] of the *Volkswagen* judgment, the Court referred with approval to the Opinion of AG Kokott in *Sveda UAB v Valstybine mokesciu inspekeija prie Lietuvos Respublikos finansu ministerijos* [2015] (Case C-126/14) ("*Sveda*") as expressed at [33]-[35] and [42]-[44]. That Opinion was subsequently followed by the CJEU in its judgment published in October 2015.

89. In *Sveda* the Advocate General had first referred to *BLP* and then said (where references (14) through to (16) are to authorities including *Midland Bank* and *AB SKF*, and with emphases added):

> "[33] However, the Court has further developed its case-law since [*BLP*]. It still remains the case that for Article 168 of the VAT Directive to apply a direct and immediate link must have been found between a given input transaction under examination and a particular output transaction or transactions giving rise to the right of deduction. Such a link may nevertheless also exist with the economic activity of the taxable person as a whole <u>if the costs of the input transactions form part of the general costs of the taxable person</u> and are therefore cost components of all goods or services delivered or provided by him.
>
> [34] According to recent case-law, the decisive factor for a direct and immediate link is consistently that <u>the cost of the input transactions be incorporated in the cost of individual output transactions or of all goods and services supplied by the taxable person</u>. This applies irrespective of whether the use of goods or services by the taxable person is at issue…".

90. Mr Brown relied in particular on the underlined passages, which he said supported the Appellants' submissions.

91. Moving on, Mr Brown said it was irrelevant that the HK Companies were outside the UK, because VATA s 25(2)(b) provides that input tax is recoverable if it relates to "supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom". HMRC had not sought to argue that the Appellants'

supplies to the HK Companies would not be taxable supplies, were those companies based in the UK.

92. Mr Brown also said that, because it was the Appellants who held the C79s as evidence that they had paid the import VAT, no other person could recover that VAT. If the Appellants could not recover, HMRC would have retained the VAT, even though it was a cost incurred by the Appellants' business which had formed part of its onward supply to the HK Companies, and that would be unfair.

Submissions on behalf of HMRC

93. Mr Bingham said that the Appellants' role was to arrange the importation of the goods, store the goods, and despatch the goods. The goods themselves were not supplied by the Appellants, so they did not form a "cost component" of the Appellants' supplies.

94. He relied in particular on the CJEU's answer to the fourth question posed in *Skatteministeriet v DSV Road A/S* [2015] (C-187/14) ("*DSV Road*"). The question was set out at [19(4)] and repeated at [48] of that judgment:

> "…whether Article 168(e) of the VAT Directive must be interpreted as precluding national legislation which excludes the deduction of VAT on import which the carrier, who is neither the importer nor the owner of the goods in question and has merely carried out the transport and customs formalities as part of its activity as a transporter of freight subject to VAT, is required to pay."

95. The CJEU answered the question as follows:

> "[49] …it must be noted that, under the wording of Article 168(e) of the VAT Directive, a right to deduct exists only in so far as the goods imported are used for the purposes of the taxed transactions of a taxable person. In accordance with the settled case-law of the Court concerning the right to deduct VAT on the acquisition of goods or services, that condition is satisfied only where the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities.
>
> [50] Since the value of the goods transported does not form part of the costs making up the prices invoiced by a transporter whose activity is limited to transporting those goods for consideration, the conditions for application of Article 168(e) of the VAT Directive are not satisfied in the present case.
>
> [51] It follows from all the foregoing considerations that the answer to the fourth question is that Article 168(e) of the VAT Directive must be interpreted as not precluding national legislation which excludes the deduction of VAT on import which the carrier, who is neither the importer nor the owner of the goods in question and has merely carried out the transport and customs formalities as part of its activity as a transporter of freight subject to VAT, is required to pay."

96. Mr Bingham accepted that the Appellants were not "transporters" or freight forwarders, but said that their position was nevertheless similar because "the value of the goods transported does not form part of the costs making up the prices invoiced". As a result the VAT on those goods could not be recovered as input tax. The Appellants invoiced the HK Companies for the costs of transporting, storing and despatching the goods, plus the costs (including import VAT) charged to the Appellants by the freight agents. The cost of the goods was not invoiced to the HK Companies and the goods formed no part of its supplies.

97. He went on to say that there was no "direct and immediate link" between the imported goods and the supplies made by the Appellants. To the extent that there was any link it was "causal" – in other words, the importation of the goods was a necessary precondition for the services carried out by the Appellants. He relied on *Finanzamt Köln-Nord v Wolfram Becker* [2013] (C-104/12) ("*Becker*"). The issue in *Becker* was whether a business could recover VAT charged by lawyers engaged to defend its directors against a criminal charge relating to a construction contract entered into by the business. The CJEU said at [31]:

> "the referring court states that, since the supplies would not have been performed by the two lawyers at issue if [the business] had not exercised an activity which produced turnover and, consequently, which was taxable, there would be a causal link between the costs relating to those services and [the business]'s economic activity as a whole. It should, however, be noted that that causal link cannot be considered to constitute a direct and immediate link within the meaning of the Court's case-law."

98. In response to the wider point raised by Mr Brown, namely that as the C79s were issued to the Appellants, HMRC's refusal to repay that VAT meant that it would unfairly be retained, Mr Bingham said that this situation could have been avoided had the HK Companies registered for VAT in the UK. Those Companies would then have recovered the import VAT as part of the cost component of its supplies, but would also have charged VAT to its UK customers. As those customers were private individuals and not VAT registered businesses, they too would have been unable to recover the VAT.

99. Mr Bingham also drew Mr Yeung's attention to the fact that the Appellants had already been reimbursed by the HK Companies for the VAT they had paid on the goods. He asked Mr Yeung "if the VAT was now reimbursed to you by HMRC, you would get it twice, wouldn't you?" Mr Yeung said he had not thought of that, and did not know the answer.

Eurogate

100. After the conclusion of the hearing, the Tribunal became aware of the recent Opinion of AG Manuel Campos Sánchez-Bordona in *Eurogate Distribution GmbH v Hauptzollamt Hamburg-Stadt* (Case C-226/14) ("*Eurogate*"). This had not been brought to our attention by either party, possibly because it is at present not yet available in English.

101. In summary, Eurogate asked the CJEU three questions, the third of which was whether it had the right to deduct import VAT paid on goods held in its customs warehouse on behalf of its clients, when those goods were subsequently transferred to the customers. The AG said at [113]-[114] of his Opinion that the principles in *DSV Road* were also applicable to Eurogate.

102. We decided to delay making a decision until after the CJEU judgment in *Eurogate*, and issued Directions giving the parties the opportunity to make submissions on that judgment after publication.

103. On 2 June 2016, the CJEU decided the first of the three questions in Eurogate's favour, and said that it was therefore unnecessary to answer the second or third questions, see [72] of the judgment. Unsurprisingly, therefore, the parties responded to the Directions by saying that the CJEU's judgment was not relevant to the Appellants' appeals.

Discussion

104. We agree with HMRC essentially for the reasons put forward by Mr Bingham, which we do not repeat. In summary:

(1) title to the goods was with the UK customer (in the case of the services supplied by Mr Yeung) or with 4PX (in the case of Y4 and Donsaw);

(2) the supply carried out by the Appellants was that of managing the importation, transportation, storage, and despatch of goods;

(3) the import VAT reclaimed was attached to goods never acquired by the Appellants nor used as a cost component of the services they supplied;

(4) the fact that the Appellants reimbursed companies such as DHL for the import VAT, and recharged that VAT to the HK Companies, does not make the VAT a cost component of the supply. For the VAT on the goods to be deductible as input tax it is the *goods* which must be a cost component of the supply; and

(5) the fact that the Appellants' services would not exist without the goods also does not make the goods a cost component of the supply, see *Becker*.

105. We add that the AG's Opinion in *Eurogate* is entirely consistent with the submissions put forward by Mr Bingham.

106. The Tribunal finds that the cases cited on behalf of the Appellants do not in fact support their position, for the following reasons:

(1) In *AB SKF* the CJEU refers to the right to recover input tax where the costs "are part of his general costs and are, as such, components of the price of the goods or services which he supplies". Here, the costs of the *goods* are not part of the Appellants' general costs and so are not a component of the price of the services supplied to the HK Companies. As a result, the import VAT on those goods cannot be deductible.

(2) The third of the principles set out in *Volkswagen* at [51] is that a direct and immediate link exists where the expenditure is "part of the costs of the output transactions which utilise the goods and services acquired". To satisfy that requirement, the output transactions (the services supplied to the HK Companies) must utilise the *goods*, not merely recharge to the HK Companies the VAT paid on the goods. Y4 do not "utilise" *the goods*; instead they collect, warehouse, pack and despatch them.

(3) Similarly in *Sveda* the references to "the cost of the input transactions" means the cost of the *goods*, not the VAT on those goods.

Decision

107. We dismiss the Appellants' appeals in respect of all periods, including, for the avoidance of doubt, the appeal in relation to Donsaw's 12/12 period.

108. The result of our decision is that the import VAT cannot be recovered by the Appellants. It also cannot be recovered by the HK Companies, because they are not registered for VAT. But, as Mr Bingham says, were they to be registered they would need to charge VAT on their sale of goods to UK customers. As those customers are private individuals, they too would be unable to recover the VAT.

109. Given our decision, there was no need to consider whether Mr Yeung would, in any event, be able to recover the import VAT on C79s issued to him and using his VAT number, even though he was not in business at the time, but was effectively acting as an undisclosed agent for Y4.

Appeal rights

110. 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.

111. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 5 JULY 2016