TC03475

Appeal number: TC/2013/00717

VAT ON IMPORT – APPLICATION FOR SIMPLIFIED IMPORTS VAT ACCOUNTING – WHETHER REFUSAL REASONABLE – YES – VATA 1994, SECTION 16 (1), ARTICLE 225 OF COUNCIL REGULATION 2913/92/EEC, AND REGULATION 121B OF THE VAT REGULATIONS 1995 AS AMENDED – APPEAL REFUSED

FIRST-TIER TRIBUNAL
TAX CHAMBER

EXCIP LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE QC
MR JOHN ADRAIN FCA

Sitting in public at Bedford House, Belfast on 13th January 2014

For the Appellant – Mr Gareth Maguire, M.Eng, and Mr Paul Maguire, MBE, Directors of the Appellant Company

For the Respondents HMRC – Mr Simon Charles, of Counsel, with Mrs S Spence.

DECISION

In this Appeal the Appellant company was represented by its Managing Director, Mr Gareth Maguire, who also gave evidence. The respondents, HMRC, were represented by Mr Charles who was instructed by Mrs Spence. The respondents led no evidence.

Preliminary

1. The issue in this Appeal is whether HMRC were unreasonable in refusing after review the appellant's Application to be allowed to operate Simplified Imports VAT Accounting (SIVA). The Application for SIVA was dated 22nd October 2012 (page 21). It is significant in relation to HMRC's practice that the Appellant had not then been trading for three years. The Appellant sources from outside the EU raw materials for the Pharmaceutical Industry. It imports excipients which are bulk materials, or fillers, to which a drug is added in the production of various medicines in tablet form. While there is an exemption from import duties on excipients, liability to VAT arises on import. There is a delay in the recovery of import VAT which depends on the issuing of a C79 form, which in turn enables a repayment claim to be made in the Return for that quarter. The C79 form is issued usually about six weeks after import. Thus a cash flow problem over an average period of about three months results. A bank guarantee to secure the value of the import tax can ease the cash-flow difficulty, but it is not available at an economic rate. If the trader is admitted to SIVA, that difficulty is removed.

The Law

2. This was helpfully set out by Mr Charles. His account was not challenged by Mr Maguire. The thrust of his argument related to the interpretation of the law and consequent practice.

3. Liability to VAT arises on imports of goods outside the EU in terms of Section 16(1) VATA 1994. Article 225 of Council Regulation 2913/92/EEC permits the deferment of payment on the provision of security by a taxpayer. Regulation 121B of the VAT Regulations 1995 provides for the waiver of security if there is no financial risk to HMRC.

4. HMRC has a published policy (Public Notice 101) setting out its criteria for deferring the payment of duty. This sets out various trading and financial criteria: para 5.10. VAT registration for three years and a good tax compliance history are *inter alia* emphasised. No one factor is resolutive, and the decision is subject to a degree of discretion in each case.

5. The Tribunal's jurisdiction in any appeal against a refusal of permission to operate SIVA is in terms of Section 16(4) FA 1994. The nature of this jurisdiction in the context of such appeals as this was considered in *Forth Wines Limited* (TC/10/065760). Essentially the Tribunal has to decide whether HMRC's decision

was unreasonable or not, and if not, to remit the matter back for reconsideration, perhaps with some guidance.

The Evidence

6. Mr Gareth Maguire is Managing Director of the Appellant company. He is an experienced and well-qualified Chemical Engineer. The Application for SIVA was submitted by Mr Maguire in October 2012. The Appellant has no employees other than Gareth and Paul Maguire, but it does provide some limited sub-contracting work in its local area. Its operations started in August 2010 and it was trading by July 2011. Its turnover has increased from £250k to £400k per annum. The Appellant sources bulk materials globally, undertakes liability for quality assurance, and then exports almost entirely to the EU, so that sales are zero-rated to the extent of 90 to 95%. The Appellant does not manufacture drugs as such.

7. Mr Maguire explained the cash-flow delay noted *supra*. SIVA would reduce the level of financial guarantee required to defer VAT liability on import. As the Appellant exported almost entirely to the EU, it was a net reclaimer of VAT, with a resulting minimum risk to HMRC if its application for SIVA were approved.

8. Mr Maguire complained that he had not been given an adequate opportunity to discuss with HMRC his company's circumstances before the application was rejected. He referred to a small additional file of correspondence with his local MP produced at the start of the hearing (and to which no objection was taken) relating to his grievance and the delays in reviewing Government policy on the matter.

9. In cross-examination Mr Maguire acknowledged that he had signed the Application Form (tab 3). He appreciated then that his company had not been trading for three years. He conceded that two years' annual accounts (qn 6) had not been submitted: there had not been a pattern of two years trading. He agreed that there was no covering letter or other material with the Application confirming the Appellant's trading and financial position. In response to the suggestion that in those circumstances the Application was likely to be rejected, Mr Maguire replied that he considered that HMRC would have exercised its discretion.

10. On review Mr Maguire confirmed that he did not submit further information such as the first year accounts or recent management accounts.

11. Mr Maguire responded that as a start-up business his company should be able to join SIVA. He considered that it was discriminatory for a distinction to be drawn between start-ups and established businesses. In the case of his company the length of registration and trading required, he considered, was the issue. Such a "blanket" ban was manifestly unfair, he submitted. He relied on his letter dated 12th November 2012 (pages 27 – 28) as being sufficient for HMRC's purposes. Given the nature of his company's business, there was a minimal risk of loss to HMRC as virtually all import tax could ultimately be reclaimed.

12. Mr Maguire considered that as he had not been asked by HMRC for particular information about the Appellant company's finances, he should not be expected to volunteer it given its confidential nature.

13. Mr Maguire's evidence as to matters of fact was not challenged, and in relation to that we found him a credible and straightforward witness. Our narrative of that represents our Findings-in-Fact. Inevitably his opinions as to the stance of HMRC in relation to the relative regulations was opinionative and challenged.

Submissions

14. We heard in turn from Mr Charles and then from Mr Maguire.

15. On behalf of HMRC Mr Charles invited us to refuse the Appeal. Firstly, he addressed the matter of the Tribunal's jurisdiction. It was, he argued, in terms of Section 16(4) FA 1994. As interpreted in *Forth Wines Limited* it was confined to deciding whether the refusal was unfair and unreasonable, and, if so, to remit the matter to HMRC perhaps with guidance. The decision to refuse the application had to be viewed against the information available to HMRC at the material time. It should not be viewed against supervening information, in particular up-to-date evidence as to the Appellant's trading.

16. Mr Charles then referred to the law as set out in the Statement of Case. He noted the charge in terms of Section 16(1) VATA, and the provisions contained in Article 225 and Regulation 121B (pages 10 – 11). Deferment of payment of VAT was permitted on the provision of security, and further could be waived if there was no risk of a failure to pay. He noted the policy criteria set down in Public Notice 101. While VAT registration for three years was noted, there were other criteria relating to the financial status of the applicant. These, he explained, were not cumulative, and exceptions to the three year criterion could be granted in individual cases. So far as HMRC was concerned, no exceptional factors at the relevant time had been demonstrated. While the Appellant complained that it was discriminated against as a start-up company, the *onus* of establishing exceptional circumstances rested on it as the Applicant. While HMRC should assist, they should not be expected to act as a tax advisor. Mr Charles questioned the excuse that the relevant financial information was confidential. On the basis of the information presented to HMRC, it had taken a reasonable decision.

17. A three year period, Mr Charles submitted, was not unreasonable to assess a tax payer and the risk of its failure to pay. For example, if goods were sold on the "black" market by an unscrupulous trader, who failed to account for output VAT, HMRC would be exposed to loss if import VAT was not accounted for.

18. While Mr Charles urged us to dismiss this appeal, he seemed to suggest that a fresh application now, with up-to-date financial and trading information, might well be viewed more sympathetically by HMRC.

19. In reply Mr Maguire submitted that in the case of his company the risk of loss to HMRC was minimal. Its supplies were zero rated. Therefore, input task was repayable. HMRC had a discretion which it had not exercised fairly, he continued. Had HMRC particularised the relevant financial information it required from the Appellant, that could have been provided.

20. As it loomed in significance, we invited parties to address us further on the possible prejudice arising to HMRC in the event of SIVA approval. Mr Charles explained this risk by reference to two *scenarios*. If imported goods were then sold on the "black" market without accounting for VAT, an obvious loss of revenue would result. (see para 17 *supra*) Also, if a deferred payment were due, but became irrecoverable, say in the event of liquidation of a company or disappearance of the trader, a loss would then result too.

Decision

21. We consider that HMRC were justified in refusing the Application. In doing so we find that they acted fairly and reasonably. We agree that the Tribunal's role does not extend to substituting its own decision, but in any event that does not arise here.

22. HMRC's decision falls to be viewed in the context of such information as was available at the time of the application. Supervening factors fall to be disregarded, although they may justify a subsequent successful application.

23. The statutory test is whether there is a risk to the payment of deferred liability to import VAT. There is a logical force in the argument that HMRC must consider the economic circumstances of the applicant generally, including its pattern of trading and tax compliance. Public Notice 101 contains a list of criteria. None of these bears to be a pre-condition or paramount. Rather they should be considered collectively. This seems to be what was done in the present case. We note two items of correspondence in particular. In its response dated 28th October 2012 (pages 16 – 17) HMRC does note that the Appellant was not then registered and trading for three years. However it also records that "As no accounts or details of the companies fixed tangible assets were produced, a liquidity risk assessment was not carried out". Further, it invited the Appellant to "Send new information or arguments …".

24. In our view that does not suggest that HMRC considered a short length of trading necessarily precluded approval. In the reply dated 12th November 2012 (pages 27 – 28) Messrs Maguire addressed the matter of the three year period. However, they do not present, say by way of a profit and loss account, balance sheet, bank statements, or management accounts, any verification of the Appellant company's financial circumstances. There is a reference to its exporting, but there is no developed argument as to its being and continuing to be regularly a net reclaimer of VAT.

25. In our view the information before HMRC when the application was considered, was insufficient for it to form a view of the financial and trading

circumstances of the Appellant to enable it to consider a SIVA application sympathetically.

26. Accordingly for these reasons we refuse the appeal. However, in light of the up-to-date information which is now available (and, of course, the Appellant has now been trading for two and a half years) and (operating for about three and a half years) this may be an opportune time for a further application. Mr Maguire was an impressive witness with considerable relevant expertise. The business has links with local investment institutions and with Belfast Metropolitan College. From its returns to date the Respondents may now be better able to form a view as to whether it should be admitted to SIVA.

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

KENNETH MURE QC
TRIBUNAL JUDGE

RELEASE DATE: 10 April 2014