



[2021] UKFTT 0261 (TC)

TC08207

VAT- import VAT- Onward Supply Relief – acting as agent- effect of section 47 VATA – whether s47(2A) limited to domestic supplies – no.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/3294

BETWEEN

SCANWELL LOGISTICS (UK) LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE CHARLES HELLIER

The hearing took place on 8 & 9 June 2021. With the consent of the parties, the form of the hearing was through the Tribunal video platform. A face to face hearing was not held because of the Covid 19 pandemic

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Leslie Allen of Mishcon De Reya LLP for the Appellant

Joanna Vicary instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1. The Appellant (“Scanwell”) was appointed to act as “import agent” in relation to the import into the UK of a number of consignments of goods from China between 2014 and 2017. When the goods were released to it, it arranged their onward transport to other countries in the EU. Scanwell made import declarations in which it claimed exemption from import VAT under Onward Supply Relief (“OSR”). HMRC decided that OSR was not available on these imports and made a VAT assessment on Scanwell of some £5.7m in November 2017. Scanwell appeals against this assessment on the grounds that it was entitled to OSR.

The Legislative Framework

2. All the legislative references in this decision are to those applicable at the relevant time.

3. Section 1 VAT Act 1994 (“VATA”) provides that VAT shall be charged and payable on the import of goods from places outside the EU “as if it were a duty of customs”. When goods are imported into the UK the EU Customs Code provides that customs duty is payable by the person making the entry declaration on the customs form. That person in the case of the goods at issue was Scanwell; as a result it was, unless an exemption applied, Scanwell was liable to VAT on the imports.

4. A taxable person may deduct import VAT on the import of goods if the goods are to be used by him in making taxable supplies (which includes zero rate exports to EU countries) (Art 168 Principal Vat Directive (“PVD”) s 26 VATA). Thus if Scanwell used the imported goods to make zero rated exports it would have been entitled to recover the import VAT.

5. OSR provides a short cut to such recovery eliminating the potential need to pay VAT on import and then to recover it on the export. The relief originated in Art 143(1) PVD which provided that member states should exempt from VAT (which expression encompassed zero rating)-

“(d) the importation of goods despatched or transported from a third territory or a third country into a member state other than that in which the despatch or transport of such goods ends, where the supply of such goods by the importer designated or recognised under Art 201 as liable for the payment of VAT is exempt under Art 138”

6. Art 143 provides that the relief afforded by (d) is subject to the provision of information to the local VAT authorities. Art 131 permits further conditions to be imposed.

7. Art 201 provides for the designation by a member state of the person liable to import VAT, and that, by section 1 VATA, is the person making the customs declaration. Art 138 “exempts” (zero rates in this case) a “supply of goods” which is despatched to another EU country.

8. OSR is enacted in the UK’s domestic legislation by Regulation 138 of the 1995 VAT Regulations which relevantly provide:

(1) Subject to such conditions as the Commissioners may impose, the VAT chargeable on the importation of goods from a place outside the member States shall not be payable where

—
(a) a taxable person makes a supply of goods which is to be zero-rated in accordance with sub-paragraphs (a)(i) and (ii), and (b) of section 30(8) of the Act,

(b) the goods so imported are the subject of that supply, and

(c) the Commissioners are satisfied that –

(i) the importer intends to remove the goods to another member State, and

(ii) the importer is importing the goods in the course of a supply by him of those goods in accordance with the provisions of sub-paragraphs (a)(i) and(ii), and (b) of section 30(8) of the Act and any Regulations made thereunder.

9. Section 30(8) VATA is the domestic provision zero rating the supply of goods on their removal from the UK to another member state and their acquisition by a taxable person in that state.

10. The upshot of these provision was that no import VAT was payable by Scanwell if: (i) it used the goods in making a supply of goods, (ii) the supply was to a taxable person in the EU and (iii) it complied with the reporting and administrative conditions imposed by regulations and HMRC.

11. In this appeal the battleground in relation to these provisions was whether or not Scanwell had made, or was to be deemed to have made, a supply of the goods. If it had it was accepted that it had complied with the administrative provisions. If it had not made a supply of the goods OSR was not available and no credit deduction or repayment of the import VAT was due.

12. A supply of goods is defined by Art 14 PVD to mean

“the transfer of the right to dispose of tangible property as owner”

and that is reflected in the domestic provision in Sch 4 VATA which provides that a supply of goods is

“any transfer of the whole property in goods”

13. In outline Scanwell’s case was that, although it never acquired actual title to the goods and so never actually transferred it, it was acting as an agent for the final EU customers and, as a result of section 47 VATA, the goods fell to be treated as supplied to it and by it, so that the requirement in the conditions for OSR that the importer made “a supply of the goods” was met. HMRC say that, on the facts, section 47 did not have that effect.

The Evidence and my finding of fact

14. There was an agreed statement of facts, and witness statements from officers of HMRC which were not contested. I heard oral evidence from Mt Adrian Levett, a director of Scanwell. I find as follows.

15. Scanwell is a company which arranges for goods to be transported from abroad to countries within the EU. It has long standing customers in the UK for which it acts.

16. In the course of this work its actions will include:

- (1) receiving details of goods arriving in the UK and the places to which they should be despatched,
- (2) arranging the release and clearance of goods through customs,
- (3) arranging the release of the goods by the shipping company

- (4) picking up the container in which the goods arrived in the UK, inspecting the goods (and photographing them), and transferring them to other containers which are loaded onto lorries and despatched to their eventual destination, and
 - (5) completing the consequent documentation such as the EC Sales Lists.
17. In the customs declarations for the goods which are the subject of this appeal, Scanwell entered a code to declare that the goods qualified for OSR.
 18. In August 2012 Scanwell was approached by a Czech freight company, Calleva, which represented some Czech customers (and later on customers in other EU countries) with a proposal that Scanwell act as the agent of those customers (the “end customers”) as their import representative in relation to goods coming from China to undertake customs clearance and to arrange onward delivery into the EU. The number of end customers rose to 37 in the period relevant to this appeal.
 19. After taking professional advice and conducting due diligence Scanwell agreed to process imports on behalf of the end customers.
 20. Scanwell drafted a standard contract to govern its relationships with each of the end customers. The contract was in English and was sent to Calleva which dealt with the end customers. Once the contract was executed it was sent back to Scanwell so that Scanwell had a copy of each contract with each end customer.
 21. Scanwell’s contact was with Calleva alone: it had no contact with the end customers or with the persons in China from which the goods were bought. The negotiation of the purchases of the goods was not conducted by Scanwell and was probably conducted by the end customers or an agent on their behalf.
 22. Scanwell had no formal contract with Calleva, but it received from Calleva fees for the work it undertook.
 23. The terms of Scanwell’s contracts with the end suppliers did not provide for payment of the Chinese suppliers by or through Scanwell, and Scanwell was unaware of the arrangements for payment between the Chinese manufacturers, the end customers and Calleva.
 24. In a typical transaction involving the Calleva end customers, Calleva would give Scanwell notification of the arrival of the goods, the bill of lading, the invoice from the Chinese suppliers, a packing list and other documents and pay Scanwell the customs duty. Scanwell would then provide HMRC with these documents, the customs duty and a customs declaration. On customs clearance being given by HMRC the container would be removed from the quay, unloaded transhipped, photographed and put on a lorry. Scanwell would then send an invoice addressed to the end customer and an invoice to Calleva for the services it had performed.
 25. A typical invoice from a Chinese supplier would be addressed to ;
“Scanwell Logistics (UK) Limited (as import agent for)
[Name of end customer
Address of end customer]”
 26. Between October 2014 and November 2017 Scanwell received a number of enquiries from HMRC’s officers in relation to these transactions and provided information as requested by them. There were delays in HMRC’s responses, but for which, Scanwell may have ceased acting for the end customers earlier.

The Terms of the Contract with the End Customers

27. The contract, headed “Commercial Sales and Handling Agent Agreement”, in which the “Agent” is used to refer to Scanwell, and the “Principal” is used to refer to the end customer, contained the following terms relevant to the issues in this appeal:

1. Definitions

1.1 “OSR” Onward Supply Relief...

2. Appointment

The Principal appoints the Agent as Import agent to represent and process the Products through UK customs and onward delivery into Europe according to the rules and regulations relating to Onward Supply Relief (OSR)...

3.1 The Agent shall devote its best efforts to ensure the swift movement of the Product through the UK and onwards into Europe via the use of the “OSR” arrangement...

3.2 The Agent will ensure completion of all necessary documentation and procedures...

5. The Principal’s obligations

5.1 The Principal shall provide the Agent with all necessary original documents and other information...

5.2 The Principal shall notify the Agent within 30 days of any orders that have been despatched

6. Commission/payments

6.1 The Principal shall pay the Agent all fees associated with the handling and transshipment of the Products through the UK via “OSR” ...

6.3 The Agent agrees to receive invoices from the Principal’s appointed factories in China covering the Products shipped to the UK, however the Principal does not require that the Agent makes payment of the said invoices for the Products from the Principal’s appointed factories in China.

6.4 The Principal agrees to receive invoices from the Agent for the Products to offset invoices received by the Agent from the Principal’s appointed factories in China. The Agent does not require that the Principal makes payment of the said invoices for the Products from the Agent.

6.5 The Principal agrees to pay their appointed factories in China directly for the Products shipped to the UK.

28. **Section 47**

Section 47 VATA provides:

(1) Where—

(a) goods are acquired from another member State by a person who is not a taxable person and a taxable person acts in relation to the acquisition, and then supplies the goods as agent for the person by whom they are so acquired; or

(b) goods are imported from a place outside the member States by a taxable person who supplies them as agent for a person who is not a taxable person,

then, if the taxable person acts in relation to the supply in his own name, the goods shall be treated for the purposes of this Act as acquired and supplied or, as the case may be, imported and supplied by the taxable person as principal.

(2) For the purposes of subsection (1) above a person who is not resident in the United Kingdom and whose place or principal place of business is outside the United Kingdom may be treated as not being a taxable person if as a result he will not be required to be registered under this Act.

(2A) Where, in the case of any supply of goods to which subsection (1) above does not apply, goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and as a supply by the agent.

(3) Where services, other than electronically supplied services and telecommunication services, are supplied through an agent who acts in his own name the Commissioners may, if they think fit, treat the supply both as a supply to the agent and as a supply by the agent.

Scanwell's argument

29. Scanwell accepts that it did not acquire title to the goods and could not say that it had made an actual supply of them. But Mr Allen relies on section 47(2A). He argues that Scanwell acted as agent of the end customers and acted "in [its] own name" for the purpose of section 47(2A). Accordingly he says that it is to be treated as having made a supply of the goods for the purposes of OSR.

30. He says that the following facts indicated that Scanwell was an agent: (i) the contract expressly appointed Scanwell as agent, (ii) the contract referred to Scanwell as the Agent, (iii) the contract appointed Scanwell to "represent" the Principal (iv) the fact that the amounts invoiced to it were the same as those it invoiced was indicative of agency – he refers to [25] in *Radford Racing Ltd v HMRC* [2011] UKFTT 658 (TC), and (v) the intention of the parties to the contract was clearly to benefit from OSR and it was implicit therefore that they intended Scanwell to be an agent so as to take the benefit of section 47.

31. He says that the following circumstances showed that Scanwell was acting in its own name: (i) when undertaking its duties in transshipping it acted in its own name, (ii) the invoices were made out to Scanwell and Scanwell produced invoices to the end customers in its own name, (iii) it made customs declarations and VAT and other statutory returns in its own name.

32. Lastly he says that if Scanwell is not entitled to OSR there will have been double taxation of the supply of the goods because tax will have been paid on import into the UK and again in the member state of the end customer. That he says is contrary to Art 145 PVD, and the relevant statutory provisions should be construed to give effect to the fundamental EU principle of no double taxation.

HMRC's argument

33. Mrs Vicary says that section 47(1)(a) and (b) are concerned with cross border matters and section 47(2A) is limited to domestic matters. As a result the only limb of section 47 which could apply is that in section 47(1)(b) – dealing with imports from outside the EU. That limb she says does not apply because even if for some purposes Scanwell could be called an agent, it was not an agent for the Chinese manufacturer and so could not "suppl[y] the goods as agent" to anyone; and even if it was an agent it did not act in its own name. Further she says that if section 47(2A) were capable of applying to a cross border transaction, it cannot apply in this case because: (i) Scanwell was not an agent for the purposes of this provision, (ii) the goods were not "supplied through" Scanwell and (iii) Scanwell did not act in its own name.

34. Mrs Vicary notes that double taxation of the goods could have been avoided by taking advantage of the External Community Transit Procedure.

Section 47 – discussion

35. Where goods are obtained from outside the UK VATA differentiates between “acquisition” and “import”: the former being used to mean obtaining from other EU countries and the latter obtaining from outside the EU.

36. Section 47 deals in 47(1)(a) with acquisitions, and 47(1)(b) with imports. Although it might therefore be expected that 47(2A) deals with domestic transactions there is no express limitation in its words, being confined only to “supplies to which subsection (1) does not apply”.

37. I note that whilst an acquisition of goods is defined by section 11 VATA to mean an acquisition in pursuance of a transaction which is the supply of goods (and so must be in connection with the transfer of title to the goods), an import is defined by section 15 to be the removal of goods from outside the EU into the UK in circumstances where customs duty is payable. Thus an import may or may not involve a “supply” of goods but an acquisition must involve such a supply.

38. In *Radford Racing* the FTT found that appellant acted as agent for a German buyer of cars and acted in its own name. It then held [56] that section 47(2A) applied so that for the purposes of OSR the appellant should be treated as having been supplied and having supplied the cars, and so entitled to the relief.

39. In *Donald Salvage v HMRC* [2015] UKFTT 199 (TC) the FTT (at [32-35]) came to a similar conclusion.

40. In neither case did the FTT consider expressly whether 47(1)(a) or (b) could apply, but given that in each case it held that the appellant acted for the buyer that may not be surprising as (a) and (b) are limited to the situation where the agent supplies the goods as agent for the person for whom they were acquired and there was no such supply.

41. Mrs Vicary says that in both cases the FTT’s opinions as to the ambit of section 47(2A) were wrong.

42. Section 47(2) is needed to make subsection (1)(a) work. Without the treatment which it permits, a non UK person (a person without an establishment in the UK who does not otherwise trade in the UK) who acquired goods in the UK would, if the value of the goods exceeded the threshold, become registrable under Sch 3 VATA and thus not a “person who is not a taxable person” within the opening words of (a). The effect would be that no substantial acquirer of goods in the UK could take advantage of the deeming in the tailpiece of section 47(1) – which casts the acquisition on the agent. A similar dispensation is not required however in respect of imports since an importer is not made registrable by virtue solely of becoming liable to import VAT.

43. Mrs Vicary advances three reasons as to why section 47(2A) applies only to domestic transactions. First, she says that the structure of the section, dealing with cross border matters in 47(1) indicated that (2A) deals only with domestic matters; second she says that the absence of a provision equivalent to (2) in relation to (2A) shows that (2A) is not concerned with cross border matters, and third, that the use of the word “supply” in (2A) rather than “import” or “acquisition” indicate a concern only with domestic transactions.

44. So far as concerns the structure of the section it seems to me that the opening words of (2A) are sufficiently plain to indicate that that subsection is not directed wholly to domestic transactions: it applies to a supply of goods to which section (1) does not apply. The condition

for a supply to fall within (1) is not simply that there be an acquisition or import but that the goods are afterwards supplied as agent for the acquiror or importer. Thus the case where an agent buys and imports goods for his principal but does not then supply them does not fall within (1) and so must on the ordinary meaning of the words be capable of falling within (2A).

45. So far as concerns the absence in relation to (2A) of a provision equivalent to (2), it seems to me that no such provision is needed to make the subsection “work”. That is because (2A) is not couched in terms of supplies to (or imports by) a non taxable person. There is thus no need to treat a person who otherwise could not take advantage of the section as non taxable. The effect of (2A) will be that a non UK person who *receives* a supply through an agent (acting in his own name) remains, after the operation of the deeming required by the subsection, the recipient of a supply albeit from the agent rather than the original supplier; and a non UK person who *makes* a supply through an agent remains the maker of a supply after the operation of the deeming. There is no need to treat the non UK person as non taxable to make this work. But where a supply is being made by the non UK person through such an agent, the drafting of (2A) would not, unlike that of (1) and (2), prevent the non UK person from being registrable where the supply is made in the UK or is an acquisition (lying outside (1)).

46. As regards the use in (2A) of “supply” in contrast to “acquisition”, this does not to my mind, indicate that (2A) can never be concerned with an acquisition. As I have noted earlier, section 11 VATA defines acquisition to mean an acquisition of goods in pursuance of a transaction which is a supply of goods. Thus a supply of goods may encompass an acquisition.

47. So far as concerns “import”, that by section 15 may include a transaction which is not a supply of goods, but section¹ 7(6) specifically refers to a supply of goods which involves their import. I conclude that “supply of goods” for the purpose of VATA includes acquisitions but only such imports as involve transfer of title to the goods as part of the transaction. I see no reason to interpret the words differently in section (2A).

48. I conclude that, if its other conditions are satisfied, (2A) may apply to Scanwell’s imports if section 47(1) does not.

49. Section 47(1)(a) does not apply to Scanwell: there is no relevant acquisition from another member state. It seems to me that 47(1)(b) does not apply to Scanwell. That is because it did not actually supply the goods as agent for anyone. It made no actual supply of the goods to the end customer because it never had title and it was not given authority to transfer either the end customer’s or the Chinese factory’s title; title passed to the end customer according to its contract with the Chinese manufacturer.

50. As a result (2A) may potentially apply.

51. Section 47(2A) imposes a number of conditions:

- (1) There must be a supply of goods
- (2) The goods must be “supplied through” an “agent”
- (3) The agent must act in his own name.

(1) A Supply of goods

52. There was a supply of goods. The title in the goods was transferred from the Chinese manufacturer to the end customer.

(2) Supplied through an Agent

¹ Section 7 deals with the place of supply of goods.

53. In domestic law an agent is someone who has authority to act so as legally to affect his principal in his relations with third parties. It seems clear to me that Parliament, in enacting section 47, had that concept of agency in mind rather than anything more colloquial.

54. An agent with the requisite authority may bind his principal to sell or to buy and to transfer or receive property. The receipt by an agent of goods which a principal has contracted to buy (whether directly or as a result of the agent's action) may be in pursuance of the vesting of title to the goods in the principal.

55. But the extent of an agent's authority will vary and may be determined or affected by the arrangement between him and his principal. For example an agent may have authority to let out his principal's house but not to sell it. It is therefore necessary to consider what authority an agent must have to fall within section 47 (this exercise could also be addressed by considering whether a person with some agency powers had done those things described in the section).

56. Section 47(1)(a) speaks of an acquisition where another person acts in relation to the acquisition of goods and then supplies them "as agent". Section 47(1)(b) refers to a person who "supplies...as agent". These provisions limit the class of agents who may fall within the purview of the subsection to those who have the power to make the supply on behalf of the principal, that is to say to cause the principal's title to the goods to be transferred to a third party.

57. Section 47(2A) speaks of goods "supplied...through an agent". It is, I think, useful to contrast "supplied by an agent" with "supplied through an agent". The former requires the agent to transfer title to the goods; the latter requires the agent to act so that title is transferred to, or by, his principal, whether by contracting on behalf of the principal to transfer or by making or receiving the transfer on behalf of his principal. Furthermore, the phrase "supplied through an agent" cannot have been intended to be limited to the situations where there are actual supplies by the principal to the agent and then by the agent to a third party (or an actual supply to the agent and then an actual supply to the principal) because if it were the deeming (and thus the whole subsection) would be otiose. It must therefore refer to the situation where the agent acts, and has authority to act either (i) to agree to transfer or to transfer his principal's title to the goods to a third party, or (ii) to bind his principal to acquire the goods whose title is conveyed by a third party to his principal.

58. I conclude that a person is an agent for the purpose of (1) only if he has authority to cause title to his principal's goods to be conveyed to a third party, and an agent for the purposes of (2A) only if he has authority to give rise to a transfer of title to goods to his principal or to cause title to his principal's goods to be transferred to another.

(3) *In his own name.*

59. Given that the actions of an agent within his authority will bind his principal whether or not the agent declares his status or the name of his principal, the distinguishing feature of an agent "acting in his own name" must relate to the extent to which his actions as agent also affect his own legal relationships.

60. For that reason it seems to me that for a person to be an agent acting in his own name in relation to a third party, his actions in relation to that third party must create a legal relationship between him and the third party. As agent he may also create legal relations between the third party and his principal, but it is the creation of a legal relationship between him and the third party which will determine whether he is acting in his own name². An agent who does not

² See for example *Henfling, Davin & Tanghe* C-464/10 [33-39]

declare that he is acting as agent will thus be an agent acting in his own name, but so will one whose actions are such as to create privity of contract between the third party and the principal but also result in his becoming party to the contract (such as will often be the case where the agent discloses that he is an agent but does not disclose his principal).

61. In section 47 the words “acts in his own name” are combined with “in relation to the supply” in the tailpiece of 47(1) and with “supplied through the agent” in 47(2A). I conclude that the legal relationships (the agent’s and those of his principal) which must be effected by the agent must be in the supply (the transfer of title in the goods) at issue - so that it will not be enough if the agent’s actions and their effects are limited to collateral matters such as haulage, customs clearance and inspection for the agent to be said to be acting in his own name in relation to the supply, and that to be an agent acting in his own name within section 47, his actions must give rise to rights or obligations between him and the third party in relation to the transfer of title in the goods.

Did Scanwell act as an agent?

62. Having found that section 47(1) did not apply to Scanwell’s activity I now turn to whether it acted as agent for the purposes of section 47(2A).

63. The appointment of Scanwell as “Import agent” in clause 2 of the contract to represent and process the Products through UK Customs” clearly gives Scanwell authority to deal with the Products when they arrive. By giving Scanwell control over the goods this clause affected the nature of the end customer’s possession of the goods: it affected its legal position. In this way Scanwell was an agent for the end customer. But unless “Import agent” had a special meaning understood by the parties or of common usage, the clause conferred no authority to deal with a principal’s title in the goods. There was no evidence before me that the words had such a meaning.

64. The contract plainly intends that Scanwell should be in a position to obtain OSR. That required that either Scanwell make an actual supply of the goods or was an agent that satisfied section 47(2A). If the parties understood that this required that Scanwell should take part in the supply of the goods that understanding could mean that the contract should be construed as giving authority so to do. But there is nothing in the tasks assumed in the contract by Scanwell which involved its actually making, or using its authority to give rise to, a transfer of title. Thus even if authority was given to Scanwell by the contract to transfer or to agree to transfer title to someone, there was no time when that took place.

65. The provisions of clause 6 indicate that it was intended that Scanwell make a zero rated supply. That suggests that it was intended that Scanwell should either have title and convey it or be exercising authority to convey someone else’s title. But Scanwell had no authority from the Chinese to convey title and it was not required by the contract to convey title to anyone. Those provisions do not therefore indicate that Scanwell had or exercised the necessary authority.

66. The fact that invoices were addressed to Scanwell in accordance with clause 6 suggests that the Chinese suppliers had agreed to that procedure. But that is insufficient to conclude that the contracts for the goods were made through Scanwell.

67. I accept that the receipt and custody of the goods by Scanwell conferred on it a fiduciary role in which it had authority to deal with the goods in a manner which made it an agent, but it was not an agent with power to deal with title to the goods and so the goods cannot be said to have been supplied “through” Scanwell as agent.

Did Scanwell act in its own name?

68. If I am wrong and the relationship created by the contract and the surrounding circumstances meant that the goods were supplied through Scanwell as agent the question arises as to whether it acted in its own name. I have concluded that in order for an agent to be said to be acting in its own name it must create its own legal relations with the third party with whom it contracts on behalf of its principal in relation to the supply to or by the principal.

69. The invoicing procedure in clause 6 of the contract might suggest that Scanwell acquired a legal relationship with the supplier of the goods. The invoices were addressed to Scanwell as agent for the end customer but that does not rule out the possibility that there was some arrangement with the Chinese that Scanwell was also liable on the contract. But Scanwell had no contact with the Chinese suppliers and there was no evidence of any agreement with them under which Scanwell had acted. Further the terms of clause 6 indicated that Scanwell had no liability to pay and thus that any obligation which might have been created was nugatory.

70. When Scanwell paid customs duty or completed a customs declaration it did so in its own name. It was given authority so to act by the contract. The filling in of the customs forms created legal obligations for Scanwell. This activity therefore could be described as acting in its own name. But (2A) speaks of a “supply through an agent who acts in his own name” and that seems to me to require that it is in the supply – the transfer of title - that the agent must so act if it is to be said to act in its own name.

71. I conclude that if Scanwell were an agent and the supply made through it, there was nothing to suggest that in relation to that supply it acted in its own name.

Double Taxation.

72. Article 145 PVD (which appears the same Chapter as Art 143 which makes provision for OSR) provides that

“Member States may adapt their national provisions so as to minimise distortion of competition and in particular to prevent non-taxation or double taxation within the Community.”

73. Mr Allen argued that if OSR was not available there would be double taxation on the supply to the end customers – import tax in the UK and tax again in the end customer’s destination. That he said would be contrary to Art 239 of the Treaty Establishing the European Union (“TEEU”) and Art 59a PVD.

74. Art 293 of TEEU provides that:

“Member states shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals...the abolition of double taxation within the Community.”

75. Art 59a PVD states that:

“In order to prevent double taxation...member states may with regard to services the place of supply of which is governed by Art...consider the place of supply as being [outside or inside the Community depending on where they are used and enjoyed]”.

76. I accept that Art 59a, whilst it deals with services, and Art 145 are within the spirit of Art 239 TEEU that double taxation is to be avoided and that that purpose may suffuse the interpretation of specific provisions. But the provisions quoted above confer a discretion on the member states as to whether, and if so how, to adapt national provisions. As a result where statutory rules exist which, albeit subject to proportionate conditions, enable the avoidance of double taxation, the presence of double taxation where the procedure in those rules is not adopted, is not a reason to adopt a strained interpretation of other domestic provisions.

77. Mrs Vicary explained that the external community transit procedure (which has its basis in the Union Customs Code Reg 9523/2013 and Regulation 2015/2446 and 2015/2447) allows non-community goods on which customs duties and other charges have not been paid to move from one point in the UK or EU to another. Goods travelling under the procedure did not have to be duty paid and customs cleared on arrival, but were instead customs cleared in the country of destination. Once the goods arrive at their final destination, the community transit procedure would come to an end. Any duties and taxes become payable at this point.

78. Under the procedure a person acting as the principal of the transit movement can be required to give guarantees to ensure payment of the customs duties and other charges if community transit procedures were not fulfilled. Mr Levett told me that this procedure had not been used by Scanwell because of the requirement for a guarantee.

79. It seems to me that the availability of this procedure means that double taxation may be avoided, and the ability to avoid it means that there is no requirement to construe the domestic legislation with which this appeal is concerned differently.

Conclusion

80. I find that:

- (1) In order to qualify for OSR Scanwell had to make, or be deemed to make, supplies of goods.
- (2) A supply of goods required the transfer of title in goods. Scanwell did not make any actual supply of goods.
- (3) Scanwell could potentially be deemed to make a supply by section 47.
- (4) Scanwell's activities did not fall within section 47(1), therefore they could potentially fall within section 47(2A).
- (5) Its activities did not fall within section 47(2A) because it did not bring about the supply of goods and did not act in its own name in relation to any supply.
- (6) As a result it was not entitled to OSR.

81. I dismiss the appeal.

Rights to Appeal

82. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 12 JULY 2021