[2020] UKFTT 0062 (TC)

TC07558

Strike-out application–whether evidence wholly defective – zero-rated removal of goods to another member State –application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00536

BETWEEN

H RIPLEY & Co LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE RACHEL SHORT

Sitting in public at Taylor House 88 Rosebery Avenue, London, on 16 January 2020

Mr David Southern QC of Temple Tax Chambers for the Appellant

Mr Tarlochan Lall counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. This is an application by HMRC to strike out the Appellant's appeal under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules") because the Appellant's case has "no reasonable prospect of success".

2. HMRC made this application on 18 March 2019 because they contend that the Appellant's claim for repayment of an amount representing disallowed credit on zero-rated supplies has no reasonable prospect of success.

BACKGROUND FACTS

3. The Appellant, H Ripley & Co Limited ("Ripley") is a UK VAT registered trader which exports scrap metal to EU member states, including in the case of the supplies to which this appeal relates, scrap copper to Belgium.

4. On 27 March 2017 HMRC requested details from Ripley of its sales of scrap copper to a company in Belgium called Recylink between February and July 2016. Having received Ripley's response, on 12 May 2017 HMRC notified Ripley that the details provided were insufficient to support zero-rating of those sales of scrap copper. On 24 May 2017 HMRC informed Ripley that input tax of £1,279,050 for the April 2017 VAT period would be withheld, representing the output tax which should have been charged on the sales in 2016.

5. On 30 May 2018 Ripley provided additional evidence to HMRC to support the zero-rating of the supplies of 45 consignments of scrap copper which had been removed from the UK to Belgium and claimed repayment from HMRC of £778,451.37.

6. HMRC refused that application on 17 July 2018, and Ripley's later request for a review of that decision on 15 August 2018 because the time limits to making such a request had passed under s 83B(2) Value Added Tax Act 1994 ("VATA 1994").

7. Ripley requested a further review of HMRC's decision on 29 October 2018, which was again refused by HMRC, saying that Ripley was out of time because the relevant appealable decision had been made by HMRC on 24 May 2017.

8. Ripley applied to this Tribunal on 17 January 2019.

9. HMRC made an application to strike-out Ripley's appeal on 18 March 2019.

THE LAW

10. S 30(8) VATA 1994

> "Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where-
>
> (a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply involves both –
>
> (i) the removal of the goods from the United Kingdom; and
>
> (ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation that member State, to the provision of section 10; and

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

11. SI 1995/2518 the VAT Regulations, Regulation 134:

"134 Subject to Regulation 134A, where the Commissioners are satisfied that-

(a) a supply of goods by a taxable person involved their removal from the United Kingdom,

(b) the supply is to a person ("P") who is registered for VAT in another member State and has provided the supplier with the VAT identification number issued to P by that other member State,

(c) the goods have been removed to another member State, and

(d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to subsection 50A of the Act, for the VAT to be charged by reference to the profit margin on supply,

the supply shall be zero-rated."

12. VAT Notice 725 "The Single Market"

(1) "4.3 When can a supply of goods be zero-rated

A supply from the UK to a customer in another EC Member State is liable to the zero rate where:

(a) You obtain and show on your VAT sales invoice your customer's EC VAT registration number, including the 2-letter country prefix code, and

(b) The goods are sent or transported out of the UK to a destination in another EC Member State, and

(c) You obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out in paragraph 4.4."

(2) "4.4 .....For goods removed to another EC Member State the time limits are as follows:

(a) Three months (including supplies of goods involved in groupage or consolidation prior to removal)"

(3) "5.2 What evidence must be shown on documents used as proof of removal?

The documents you use as proof of removal must clearly identify the following:

The supplier

The consignor

The customer

The goods

An accurate value

The mode of transport and route of movement of the goods, and

The EC destination.

Vague descriptions of goods, quantities or values are not acceptable"

Authorities referred to:

13.

(1) Revenue & Customs Commissioners v Fairford Group Plc and anor [2015]STC 156

(2) Easyair Ltd v Opal Telecom Limited [2009] EWHC 339 (Ch)

(3) Cafe Brio(Liverpool) Limited & Ors v HMRC [2019] UKFTT 611 (TC)

(4) Three Rivers DC v Bank of England [2003] 2 AC 1

(5) *Twoh International BV v Staatssecretaris van Financien* Case C -184/05

(6) HMRC v N T Ada Ltd [2018] UKUT 0059(TCC)

(7) Vogtlandische Strassen- Tief- und Rohrleitungsbau GmbH Rodewisch v Finanzamt Plauen Case C-587/10

(8) HMRC v Arkeley Limited [2013] UKUT 0393 (TCC)

THE EVIDENCE SEEN AND HEARD

Documentary evidence

14. Evidence of the export of the scrap copper

(1) Spreadsheet provided by Ripley to HMRC on 30 May 2018, setting out on a consignment by consignment basis the chain of documentary evidence available; invoice date and number, weighbridge ticket date and time, shipping documentation and road transport documentation.

(2) We were taken by Mr Lall to the chain of documents for two sample transactions dated 18 and 21 March 2016 from the following documents provided by Ripley;

(a) "boarding cards" issued by P&O in relation to the scrap copper consignments dated from 2 March 2016 to 27 July 2016,

(b) invoices dated from 15 February 2016 to 1 September 2016,

(c) weighbridge tickets from 15 February 2016 to 1 September 2016,

(d) CMRs (International Consignment Note) dated from 15 February 2016 to 1 September 2016.

15. Correspondence between the parties from 27 March 2017 to 28 August 2019 including:

(1) HMRC letters to Ripley's agents of 24 and 31 May 2017 stating HMRC's intention to make an adjustment to Ripley's April 2017 VAT return, with no reference to appeal or review rights.

(2) Ripley letter to HMRC of 30 May 2018 attaching

(a) At Appendix 1-schedule listing invoices and related consignment documentation, and

(b) At Appendix 2 – copies of P&O boarding cards.

(3) HMRC letter of 17 July 2018 to Ripley's agents refusing claims for zero-rating, attaching VAT Notice 725 and including offer of review and appeal rights.

(4) HMRC letter refusing statutory review dated 15 October 2018 stating that "your request for a review in this matter has been rejected as it is not within the 30 days as

required by VATA s 83B(2)..... you may request and I will consider a late review if the conditions are met".

(5) Email from HMRC to Ripley's agents of 17 December 2018 saying "we seem to disagree over the date of the decision to deny. I have attached my letter to Ripley giving notice which is dated 24 May 2017. This is the date I consider the decision to have been made and the appeal is therefore out of time".

Oral evidence

16. No oral witness evidence was provided to the Tribunal.

17. At the hearing Ripley referred to a witness statement provided by Mr Thursfield, accountant of Plummer Parsons, Ripley's accountant and auditor, dated 17 January 2019 and suggested that Mr Thursfield would give witness evidence.

18. It had not been made clear to HMRC or the Tribunal that it was intended that Mr Thursfield given oral evidence at the strike-out hearing. HMRC objected to this evidence being admitted.

19. Having reviewed the contents of Mr Thursfield's witness statement I concluded that in view of the late notification of this witness evidence, its contents were not sufficiently significant for it to be admitted at this stage.

HMRC'S ARGUMENTS IN FAVOUR OF THE STRIKE OUT

20. HMRCs strike-out application of 18 March 2019 argues that Ripley's appeal has no prospect of success, by reference to the criteria established in the *Fairford* decision, Ripley's case has "no realistic prospect of succeeding on the issue at a full hearing" because Ripley's case has five fatal flaws:

(1) Ripley has admitted that it has not complied with the formal requirements of Notice 725.

(2) The evidence which Ripley has provided is defective.

(3) Ripley has not offered to provide any additional or new evidence.

(4) Ripley's appeal notice is defective, not clearly stating its grounds of appeal.

(5) Ripley's arguments about the consequences of HMRC failing to undertake a statutory review are incorrect.

Defective evidence

21. Ripley has failed, and has accepted that is has failed, to provide the evidence required in order to support its claim for zero-rating, as set out in Notice 725 (at 5.2). That Notice sets out the conditions which the UK has properly laid down under EU law (SI 1995/2518 Regulation 134). The evidence which has been provided is "wholly defective".

22. Ripley should have collected evidence to support its claim for zero-rating within three months of the supplies being made, as set out in Notice 725 at 4.4. No information was actually provided to HMRC until May 2018, two years after the supplies were made.

23. In order to rely on EU law to override the UK's domestic rules represented by Notice 725, Ripley needs to rely on the principle of "effectiveness" and show that the UK's rules

about the evidence required make it "impossible or difficult" to comply. Ripley has not demonstrated that.

24. Even accepting that on the basis of EU law (the *Vogtlandische Strassen* case) there is some flexibility in the form in which the evidence required by Notice 725 can be provided, Ripley has not supplied alternative substantive evidence that the goods in question have been transported or dispatched from one member state to another

25. Mr Lall took us to some sample boarding cards and other documents set out in the spreadsheet provided by Ripley with their letter of 30 May 2018, pointing out various flaws in that documentation, meaning that it was not possible in practice to identify on a consignment by consignment basis when, where and how much scrap copper was removed from the UK to Belgium.

26. Mr Lall pointed out some apparent contradictions and gaps in the evidence provided by Ripley;

(1) there are chronological discrepancies between the time given for certain consignments being at the weighbridge in Ashford, Kent and the time when they were loaded onto the P&O ferry at Dover,

(2) the P&O "boarding cards" supplied by Ripley do not provide sufficient detail of the weight of the goods in question,

(3) incorrect assumptions have been made about the weight of the vehicles on which the consignments of copper were loaded,

(4) it is not made clear whether or not there was a change of carrier for each consignment,

(5) some vehicle registration numbers do not match,

(6) there are only CMRs in relation to some consignments,

(7) the scrap copper loads are described in "vague" terms.

27. Despite requests by HMRC for further evidence more than two years ago, no further evidence has been provided by Ripley. Ripley appeared to be "just hoping that more evidence will turn up", which, as made clear by the cases such as *Easyair* is not sufficient to demonstrate an arguable case;

> "It is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction" [15]

Preliminary payment

28. Ripley has appealed against HMRC's refusal to make a preliminary payment of the disputed VAT. HMRC say that VAT law does not allow for an appeal against a refusal to make a provisional payment. Such payments are within HMRC's discretion, which can only be challenged by way of judicial review.

Procedural issues

29. HMRC accept that no statutory review was carried out by them despite Ripley's request for one, but say that HMRC's failure to carry out a statutory review does not invalidate the whole appeal. The Upper Tribunal in *N T Ada* said that the mere failure to carry out a

statutory review did not invalidate the decision to impose a penalty and was not integral to the assessment procedure:

> "A failure to offer a review in accordance with s 83A VATA does not invalidate either the decision or its notification or render it unappealable" [48]

Ripley has not explained why the consequences of HMRC's failure to carry out a review were significant. Ripley is merely playing for time.

30. HMRC do now accept that their letter of 17 July 2018 constituted an appealable decision and do not object to Ripley being given extra time to appeal against that decision.

31. Mr Lall also accepted that HMRC had not given reasons why they considered the evidence provided by Ripley to be defective.

32. HMRC's skeleton argument referred to problems with Ripley's appeal notice of 17 January 2019, describing it as defective, because it does not set out detailed grounds of appeal, but merely refers to six points referred to as "questions for the Tribunal". Before the Tribunal Mr Lall said that HMRC were no longer pursuing the question of whether Ripley's appeal notice was valid.

RIPLEY'S ARGUMENTS

33. On behalf of Ripley Mr Southern says that:

34. Ripley is appealing under s 83(1)(b) and (c) VATA 1994 against a refusal to give credit for input tax amounting to £1,176,161. That relates to the disputed zero-rating of a large number of individual consignments of scrap metal which were exported to Belgium between February and July 2016. 45 of these 74 consignment claims are currently being dealt with on the basis that Ripley has sufficient evidence to substantiate these claims, amounting to an input tax reclaim of £778,451.37.

35. The remaining 29 will be dealt with separately, when sufficient evidence has been obtained.

Procedural issues

Appeal and statutory review

36. HMRC say that the appealable decision is that of 24 May 2017 and that requests for a review in respect of the decision were out of time. Ripley says that HMRC's letter of 24 May 2017 did not contain an appealable decision. HMRC have not provided any evidence to support their contentions about what is and is not an appealable decision.

37. Ripley's view is that HMRC's appealable decision is contained in its letter of 17 July 2018.

38. HMRC seem now to have accepted that this is the appealable decision.

39. HMRC refused to carry out a statutory review on 15 October 2018. Ripley now requests a statutory review in order to ensure that HMRC carries out a proper consideration of the evidence. The *N T Ada* case referred to by HMRC does not help them here; in that case no review had been offered. In Ripley's case a review had been requested but then refused by HMRC.

40. Counter to HMRC's references. Ripley's grounds of appeal were set out in their letter of 15 August 2018 which was attached to their notice of appeal. HMRC's strike-out

application refers not to this but to the "questions for the Tribunal", which were not intended to be treated as grounds of appeal.

Provisional repayment

41. It is agreed that the question of whether HMRC should make a provisional repayment of the disputed input tax is not appealable, but the cash flow impact of the failure to pay this to Ripley is a matter which the Tribunal should consider in setting a timetable for the appeal.

Defective evidence

42. On the substantive grounds, HMRC are attempting to use a strike-out application inappropriately. As set out in *Fairford* the intended subject of strike-out applications is either a "knock out" point of law, or because the evidence which is available, or which might reasonably be expected to be available, does not make the appeal fit for a full tribunal hearing. As was said in *Easyair*:

> "The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to the evidence available to the trial judge and so affect the outcome of the case" [15]

43. HMRC's application rests on a misunderstanding and a failure to understand the purpose of strike-out applications. Mr Lall's arguments at the Tribunal have not referred to the grounds set out in HMRC's strike-out application at all.

44. Ripley accepts that there are some gaps in the documentary evidence provided to HMRC for the 45 consignments and that it cannot fulfil the specific requirements of Notice 725 for each consignment specifically.

45. Under EU law the UK must comply with its treaty obligations, in this case Article 138.1 of the Principal VAT Directive concerning the evidence required to show that goods have been dispatched to another Member state and have left their state of origin.

46. Ripley can provide sufficient evidence in an alternative format (through a combination of chains of documents and oral evidence to explain how these documents fit together) to satisfy the requirement of EU and UK law for at least 45 of the consignments. This should be treated as sufficient to satisfy the evidential requirements imposed by EU law. The court in *Twoh International* held that:

> "As for the evidence which taxpayers are required to provide, there is no provision of the Sixth Directive which deals directly with the question. That directive merely provides..... that it is for the member states to determine the conditions in which they will exempt intra-community supplies of goods. However, when they exercise their powers, member states must comply with the general principles of community law, which include in particular, the principles of legal certainty and proportionality" [25]

47. Similarly in the *Vogtlandische Strassen* case, which made clear that the evidence which can be asked for in order to exempt intra-community supplies falls within the competence of the member states:

> "the measures which the member states may adopt under Article 28c(A) of the Sixth Directive, for the purpose of ensuring the correct and straightforward application of the intra-community supply exemption and preventing any evasion, avoidance or abuse, must not go further than is necessary to attain such objectives or be used in such a way as to have the effect of undermining the neutrality of VAT" [59]

48. As for the time when documents must be provided, the requirements of 4.4 of Notice 725 mean that the documents provided must be dated within three months of the zero-rating. In this case Ripley did have the evidence which was required at the time, but it was challenged later.

49. Mr Southern listed the seven types of documentary evidence which was available for the 45 consignments of scrap copper:

(1) Weighbridge tickets

(2) AADs

(3) CMRs

(4) Bank records

(5) Emails

(6) Shipping documents (P&O boarding cards)

(7) Invoices

50. He stressed that the discrepancies in the documents could be explained and that it was only by looking at all of the available documents and matching them for each consignment that evidence of the removal of the copper from the UK to Recylink in Belgium could be demonstrated. The *Arkeley* decision supported an approach which made it possible to rely on different evidence for different consignments. In that case the Upper Tribunal looked at three different transactions by the same supplier applying the approach set out in [22] of their decision;

> "In a case where bad faith is not alleged, and where it is not argued that the taxable person was a participant in fraud.....the only question is whether the documents received by the supplier are sufficient evidence of the export"

51. The only forum in which this could be done would be at a full hearing of Ripley's appeal. It was not possible or appropriate to make a decision on this evidence at a strike-out hearing.

52. HMRC had made their strike-out application without considering all of the evidence, including oral evidence which would be provided at a full hearing.

53. Mr Southern also referred to:

(1) The back-up schedules (workbooks) available which relates to the spreadsheets provided to HMRC with Ripley's letter of 30 May 2018. It became apparent at the Tribunal that these had not been sent to HMRC.

(2) Ripley's offer to discuss and provide any further evidence to HMRC made in their letter of 15 August 2018 which HMRC had not taken up.

(3) The lack of any evidence that HMRC had properly considered the evidence which had been provided, especially in the face of the lack of a statutory review by HMRC.

54. The legal issue at point is the obligation of EU Member states to accept alternative evidence for the recovery of VAT. The UK's own legislation and Notices must conform to EU law, including Notice 725.

55. There was no suggestion of any fraudulent activities in this case and Ripley was not "buying time". On the contrary, given the significant sum of VAT being re-claimed, it was in Ripley's interest to have the matter dealt with speedily.

56. Mr Southern made an application for Ripley's costs of this strike-out hearing because many of HMRC's original grounds for making a strike-out application had fallen away since March 2019 and HMRC should have withdrawn their original application.

FINDINGS OF FACT

57. On the basis of the evidence seen and heard I find as a fact that:

(1) Ripley has not provided the documents required by VAT Notice 725 for each of the 74 consignments of scrap copper for which it is claiming zero-rating.

(2) Ripley has provided, in the form of the schedule provided to HMRC on 30 May 2018, details of documents available to demonstrate for at least 45 of these consignments of scrap copper, the process under which each consignment of scrap copper was exported to Belgium.

(3) Ripley has in its possession further detailed evidence to support the information referred to at (2) which has not yet been sent to HMRC.

DECISION AND DISCUSSION

58. I have decided that Ripley's appeal should not be struck out under Rule 8(3)(c) of the Tribunal Rules.

59. Having heard the parties' arguments I have decided to reject HMRC's application of 18 March 2019 to strike out Ripley's appeal. I have decided this because in my view Ripley's appeal has a reasonable prospect of success, both by reference to the evidence already provided to HMRC and additional evidence which has yet to be considered by them.

POINTS NOW AGREED

60. HMRC's strike-out application covered several grounds which have subsequently been agreed or dropped by HMRC:

HMRC's appealable decision

61. HMRC now agree, despite what was stated in earlier correspondence and at paragraphs 4 and 9 of their strike-out application that their letter of 17 July 2018 is the decision letter against which Ripley should be appealing (not their letter of 24 May 2018).

62. HMRC confirmed at the Tribunal that they would not object to Ripley being given additional time to make its appeal against this decision.

63. Given the confusion surrounding which of HMRC's letters constituted an appealable decision and therefore the date from which the 30 day time limit for making an appeal to the Tribunal should run, I give permission under s 83G(6) VATA 1994 that Ripley's late appeal should be accepted.

64. HMRC have now also dropped any arguments amount the validity of Ripley's appeal notice of 17 January 2019.

Input tax or output tax appeal

65. HMRC were keen to stress that this was not an appeal about a re-claim of input tax and many of Ripley's references to fraud and lack of knowledge of fraud were not relevant. My understanding of this appeal is that it relates to the output tax which HMRC say should have

been paid on Ripley's supplies of scrap copper to Belgium from February to July 2016. However, the way in which that output tax has been recovered by HMRC is through a deduction (set-off) from the input tax which would otherwise have been paid to Ripley for the April 2017 VAT period. The tax under appeal here is output tax, even if the manner in which it has been collected has impacted Ripley's input tax reclaims.

Provisional repayment

66. The parties agreed at the Tribunal that the question of whether or not HMRC were obliged to make a provisional repayment to Ripley of the input tax withheld was a question of the exercise of HMRC's discretion which is outside the scope of this Tribunal's jurisdiction.

Time limit for providing information under Notice 725

67. HMRC accepted that the three month time limit for providing the information required under paragraph 5.2 of Notice 725 to support a claim for zero-rating on the removal of goods from the UK is three months from the time when the information is required, but that it is not acceptable to say to HMRC that documents exist to support a claim without being able to produce those documents.

68. The question of whether Ripley has complied with these time limits is dependent on decisions about the adequacy of the information provided to HMRC and so can only be properly considered when detailed evidence is produced at a full hearing.

Points at issue

69. The critical questions for me are whether,

(1) the information provided to date by Ripley to HMRC is so defective as to give Ripley's appeal no reasonable prospect of success; and

(2) there is no reasonable expectation of any further evidence being provided to support their case.

The information provided to date

70. This amounts to the schedule (spreadsheet) which was annexed to Ripley's letter of 30 May 2018 and the related invoices, weighbridge tickets, CMRs and P&O boarding cards, samples of which I was taken to by Mr Lall.

71. Mr Lall suggested that there were serious discrepancies in this chain of documents and it did not support Ripley's claims that their scrap copper had been exported.

72. Mr Southern was candid in accepting that Ripley had not fulfilled the formal requirements of Notice 725, but this is not a case in which no evidence has been provided to support Ripley's claim. It is a case in which the Appellant has not been able to provide, on a consignment by consignment basis, the specific documents set out in Notice 725.

73. Mr Lall accepted that the requirements of that notice were "flexible" so that the failure to provide each of the documents formally requested was not necessarily fatal. Given the flexibility afforded to taxpayers in this case as explained in cases such as *Arkeley*:

> "the only question is whether the documents received by the supplier are sufficient evidence of export. That is the case whether or not the tax authority has itself accepted the evidence. If that evidence is sufficient, and that it a matter for the Tribunal in the case of dispute, the application of zero-rating will not be precluded even if it is later discovered that the goods have not been exported"[22]

the fact that each of the specific documents demanded by Notice 725 has not been provided for every one of these 74 consignments does not seem to be so defective a flaw as to make me conclude that Ripley has no prospect of producing evidence which will remedy those flaws.

74. The evidence considered so far by HMRC has been limited in two ways;

(1) not all of the detailed back up information to demonstrate how the documents provided link together to demonstrate 74 consignments of scrap copper being exported to Belgium have been seen by HMRC,

(2) HMRC have not had the benefit of any oral evidence from those involved in the transactions to explain how the documents fit together, including their chronology, which was one of Mr Lall's main points of concern with the documents.

75. Even if no further documentary evidence was available from Ripley, my view, on the basis of the sample documentation to which Mr Lall referred me, is that there is a reasonable prospect that any perceived discrepancies could be explained by those involved in the transactions.

Information yet to be provided

76. Mr Southern made much of the fact that HMRC had not demonstrated, in part because they had not undertaken a statutory review, that they had properly examined the information which had been provided to them.

77. It became clear at the Tribunal that there was some confusion about what had been provided to HMRC and what they had actually looked at. In particular it became clear that the spreadsheet and related documents provided to HMRC (and to which Mr Lall referred me) was only part of the evidence which had been amassed to date; back up workbooks with additional detailed information had been prepared by Ripley but not yet provided to HMRC.

78. It was clear to me that this additional information could readily be provided by Ripley to HMRC and that this was not Ripley simply "hoping that more information would turn up".

79. I also accept that it is possible that there are witnesses who were involved in these transactions who could give helpful additional information about the processes involved in transporting the scrap copper to Belgium.

The 45 and the 29 consignments

80. Ripley was clear that of the 74 total consignments, good information was available for 45 of them; a document flow which, if not complete, was in their view sufficient to demonstrate that a particular consignment of copper had been sent via a P&O ferry to Belgium on a particular date.

81. Ripley accepted that there remained a further 29 consignments for which this was not yet the case, but that they were continuing their forensic exercise to attempt to provide more documents for these consignments.

82. It is not the case that no documents exist at all for these remaining 29 consignments, but only that there are potentially larger gaps in the documentary chains.

83. For that reason, and despite the clear division made by Ripley between those consignments for which they say they have adequate evidence and those for which they say they do not, I do not consider that it is appropriate at this stage, without having done any kind of forensic analysis of the evidence, to treat these 29 consignments any differently than the 45 "good consignments".

Approach to summary judgment

84. In coming to these conclusions I have taken account of the correct approach to considering summary judgments such as this strike-out application set out in *Easyair* at [15];

(1) I have concluded that Ripley's appeal has a realistic prospect of success,

(2) Ripley's claim is more than merely arguable,

(3) I have not conducted a mini-trial, but have interrogated the assertions made by the parties by reference to sample transactions derived from the evidence provided,

(4) I have taken account of the additional evidence, both in the form of documents and oral evidence which Ripley has said can reasonably be expected to be available at the full hearing,

(5) it is my view it is reasonable to believe that a fuller investigation of the facts and evidence may add to or alter the evidence available and the outcome of the full hearing,

(6) HMRC's strike-out application does not arise from a short point of law or construction; if any point of law is relevant it is the question of the application of EU law to the UK's domestic rules in Notice 725, which cannot be described as a short point of law.

Conclusion

85. In my view the evidence so far provided by Ripley is not "wholly defective" and there is a reasonable expectation that more evidence can be made available to support the existing evidence. I do not believe that a further forensic investigation of the available evidence and a consideration of additional evidence would be likely to lead to a wild goose chase, or that Ripley is simply playing for time.

86. At the substantive hearing, the onus will be on the Appellant to demonstrate, on a consignment by consignment basis, whether there is sufficient evidence to demonstrate that goods have been removed from the UK to Belgium.

87. In view of that, I have decided that the parties should now agree some detailed Directions to ensure that Ripley's appeal proceeds to a full hearing with all relevant evidence being provided and with both parties being given the opportunity to set out the full details of their case.

No statutory review

88. Mr Southern made much of the failure of HMRC to carry out a statutory review and the impact which this had had on Ripley's ability to deal with its appeal. HMRC accept that no statutory review was carried out but suggest that this is not a fatal procedural flaw. I agree with this on the basis of the binding authority of *N T Ada*. Ripley has not demonstrated that the effect of HMRC's failure to provide a statutory review has fundamentally hindered its ability to bring this appeal and *N T Ada* is authority for the proposition that the obligation to provide a statutory review is not fundamental to an assessment:

> "Whilst it is clear that Parliament did intend that a person receiving an appealable decision should be offered a review, we can see nothing in the terms of s 83A to

support the proposition that failure to do so renders an assessment invalid, invalidly notified, or not capable of appeal" [28]

89. I am satisfied that as this appeal proceeds to a full hearing, any perceived gaps in HMRC's arguments arising from HMRC's failure to provide a review will be resolved when HMRC serves its statement of case, which it will be obliged to do under normal procedural rules.

COSTS

90. Mr Southern made an application for indemnity costs under Rule 10 of the Tribunal Rules because he said that HMRC should have withdrawn their strike-out application when it became apparent that many of the grounds for that application had fallen away.

91. I am rejecting that application. It is apparent that there have been issues in the progress of this appeal from both parties. In my view both parties would have been better served by seeking a case management hearing rather than relying on a strike-out application to sort these issues out.

92. Nevertheless, I do not accept that HMRC's actions have been sufficiently unreasonable to justify a costs order being made against them.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

93. 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.

RACHEL SHORT

TRIBUNAL JUDGE

RELEASE DATE: 31 JANUARY 2020