[2012] UKUT 106 (TCC)

Appeal number: FTC/01/2011

VALUE ADDED TAX — evidence of export — whether First-tier Tribunal applied correct legal test — despite incorrect statement, yes — whether tribunal's findings of fact supported by evidence — yes — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BRENDAN MacMAHON
(trading as Irish Cottage Trading Co) **Appellant**

- and –

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

Tribunal: Judge Colin Bishopp
Judge Ian Huddleston

Sitting in public in Belfast on 19 December 2011

The Appellant appeared in person

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

DECISION

Introduction

1. This is an appeal against a decision ("the decision") of the First-tier Tribunal (Judge Tildesley OBE and Mr Hennessey) ("the tribunal") by which it dismissed the appeal of Mr Brendan MacMahon, who trades as "Irish Cottage Trading Co", against an assessment to VAT dated 18 December 2006 amounting to £73,398, and against an amendment to his VAT return for the period 09/06 by which the amount repayable to him was reduced by £32,722.88.

2. It was common ground before the tribunal that Mr MacMahon is a wholesale dealer in a variety of goods, that his business is established and carried on wholly within the United Kingdom (in Northern Ireland), and that at all material times he has been registered for VAT in the UK. The appeal relates to the supply by him of 47 consignments of goods—washing powder, soft drinks and confectionery—between June 2005 and September 2006. In each case the goods were sold to a Spanish company, Enkay Marketing SL ("Enkay"), of Malaga, and were (Mr MacMahon understood) to be removed by the purchaser from the United Kingdom to Spain. Mr MacMahon treated the supplies as zero-rated in his returns for the relevant periods; HMRC say that the conditions for zero-rating are not satisfied. The assessment is designed to recover the additional output tax for which they say Mr MacMahon should have accounted in his returns for the periods 06/05 to 06/06, and the amendment is to the output tax liability declared by Mr MacMahon in his 09/06 return.

3. Mr MacMahon's case, before the First-tier Tribunal and before us, was that the goods duly left the United Kingdom and the supplies were thus properly zero-rated; alternatively, and relying on what was said by the European Court of Justice in *R (Teleos plc) v Revenue and Customs Commissioners* (Case C-409/04) [2008] STC 706 ("*Teleos*"), he had taken every reasonable precaution to ensure that the supplies did not lead to his participation in tax evasion. On either basis, he says, he remained entitled to zero-rate the supplies, even if it later transpired that the documentation evidencing the removal of the goods was false. The Commissioners' position is and was that that the evidence of removal produced by Mr MacMahon would be inadequate even if it were not false, that Mr MacMahon failed to take the precautions which might afford him the *Teleos* protection, and that the tribunal's findings of fact relating to those issues are unassailable in this tribunal.

4. We should mention that Mr MacMahon was granted only conditional permission to appeal. His permission extends to four arguments:

(a) that the First-tier Tribunal incorrectly interpreted or applied art 28c(A)(a) of the Sixth VAT Directive, s 30(8) of the Value Added Tax Act 1994, reg 134 of the Value Added Tax Regulations 1995 and/or para 18.5 of Public Notice 725;

(b) that the First-tier Tribunal incorrectly interpreted or applied the judgment of the Court of Justice in *Teleos*;

(c) that the finding of fact at para 88(8) of the decision is perverse because it is contrary to the evidence or was reached after incorrectly imposing the burden of proof on the applicant; and

(d) that by (as Mr MacMahon contends) failing to take proper account of documents he says he produced to them, the respondents' officers reached an incorrect and unsustainable conclusion.

5. We shall deal with each of those arguments below, though we shall come to (c) before (b).

6. Although he had been represented before the tribunal, and until recently in his dealings with this tribunal, by solicitors, Mr MacMahon represented himself before us, he told us because he could no longer afford representation. The Commissioners were represented by Mr James Puzey of counsel.

The tribunal's findings of fact

7. The tribunal dealt at some length with the evidence it had heard over some four days. Most of that evidence was led by the Commissioners, since, as the tribunal recorded at [7], and despite directions about disclosure, Mr MacMahon produced much of the material on which he intended to rely only on the morning of the first day of the hearing. The tribunal agreed nevertheless to allow him to put in that evidence. Against that background it was only with considerable hesitation that Judge Bishopp included ground (d), set out above, in the permission to appeal, and (like the tribunal) did so only because of the importance in this case of the available documentation.

8. The tribunal's description of the evidence it heard extends to about 12 pages, and descends to considerable detail. Mr MacMahon does not (nor can he in this tribunal) challenge either that description or, with the exception mentioned as ground (c) above, any of the findings of fact set out at [88] of the decision, a paragraph divided into 22 detailed sub-paragraphs. In those circumstances we think it appropriate to summarise the evidence and findings more shortly.

9. There was no dispute that Mr MacMahon runs his business almost single-handedly, using only occasional casual labour. He makes deliveries of small consignments of goods within the area local to his business using his own van, but most purchasers are expected to collect their purchases from his warehouse, using their own, or an independent haulier's, transport. Enkay was in that category: it was expected to, and as the Commissioners accept did, arrange the collection of the goods it bought in this way. In most cases, the tribunal found, the haulier which collected the goods was a Dublin-based company known as Whelans which, Mr MacMahon understood, was to arrange the transport of the goods from Northern Ireland to Spain. The remaining consignments were collected by other hauliers but (as the tribunal recorded, though without making a specific finding) Mr MacMahon believed they were to take the goods to Whelans in Dublin, from where Whelans would transport them, either itself or by a sub-contractor, to Spain.

10. The decision records that the Commissioners became concerned about Mr MacMahon's supplies to Enkay by, if not before, October 2005, and that he was

reminded of his obligation to produce comprehensive documentation to support his claims that the goods in question had been removed to Spain. It then went on to record that the documentation Mr MacMahon did produce was often incomplete or, even on his own case, inaccurate; and that much of it was false, albeit the falsity was not discovered (or, we infer, discoverable) until some time after the goods had been sold. The tribunal makes several severe criticisms of Mr MacMahon's due diligence, in particular that he carried out no credit checks on Enkay, a precaution which Mr MacMahon claimed to be unnecessary because Enkay paid in advance. There was, however, evidence which the tribunal accepted that the payments, or at least some of them, were received from third parties whom Mr MacMahon did not know. The decision records too that Mr MacMahon did not check, before starting to trade with Enkay, that it was in fact registered for VAT in Spain. It is conspicuous that many of the criticisms of Mr MacMahon's due diligence relate to the period after he became aware of HMRC's concerns.

11. In due course the Commissioners learnt, from the Spanish authorities, that Enkay had failed to account in Spain for VAT on the goods and had effectively "disappeared". Further enquiries showed that many of the shipping documents—produced by Enkay to Mr MacMahon as evidence that the lorries carrying the goods had crossed to the continent—were false, and as the decision explains much of it was defective. The tribunal also made the point that evidence that a particular lorry had crossed to the continent was not, without more, evidence that the goods it was purportedly carrying had done so. It is quite obvious from its description of the steps he took, or more often did not take, that the tribunal considered Mr MacMahon's approach to record-keeping casual, at best.

12. At [88(1)] the tribunal set out its first, and in our view all-encompassing, finding of fact:

> "The Tribunal finds that Enkay did not account for VAT in Spain on the goods supplied by the Appellant. Further the documents provided by Enkay to demonstrate removal of the goods from United Kingdom were forgeries. In those circumstances the Tribunal was satisfied on balance that the Appellant's transactions with Enkay formed part of a scheme of tax avoidance most likely perpetrated by Mr Brown of Enkay [Mr Brown was Enkay's director, or assumed director], and that the goods never reached Spain."

13. At sub-para (3) it found that "There was no evidence that the Appellant was a willing party to the scheme of tax avoidance." However, at sub-para (4) it said "The Appellant did not carry out thorough checks on Enkay throughout his trading relationship. The Appellant placed too much reliance on his personal dealings with Mr Brown to assess the credibility of Enkay." At sub-para (7) it added that "The Appellant took no effective steps to substantiate the delivery of goods to Dublin by Whelans" and, at sub-para (11), that "At each visit the HMRC's Officers made the Appellant aware of the requirements of HMRC Notice 725. The Appellant did not act upon the advice given." Further sub-paragraphs also contain significant findings:

> "(16) The analysis of the documentation before the Tribunal showed that the majority of the disputed transactions did not have a complete suite of the evidence as recommended by Notice 725. Thirty four transactions were not

> evidenced with commercial transport documentation showing the route taken. Thirty one transactions did not incorporate a purchase order from Enkay.…
>
> (18) The documentation evidencing removal of goods from the United Kingdom, namely the P&O release note, the CMRs and the Whelan's fax received 2 November 2006 were forgeries.
>
> (19) The Appellant depended upon Mr Brown to provide the necessary commercial documentation. He made no independent enquiries of the persons involved in the transport of goods.
>
> (20) The Appellant was sloppy with the compilation of his own records and prone to errors. A substantial number of sales invoices did not contain details for the collection of goods or the details were inaccurate.…"

14. Mr MacMahon does not, and cannot, challenge those findings but, as we have indicated, he does (and has permission to) challenge sub-para (8):

> "There was no persuasive evidence that the goods left the United Kingdom. The Tribunal accepts the Appellant's evidence that he loaded the goods on lorries displaying the livery of Whelans. The act of loading, however, did not in itself prove that the goods were taken to Dublin. The Tribunal was persuaded by Ms Tracey's [an Irish Revenue officer] evidence which showed that the goods never reached Whelans. The Appellant placed weight on Mrs Laverty's [an HMRC officer] disclosure that his supplies to other businesses had ended up in the Republic of Ireland. The Tribunal decided that Mrs Laverty's disclosure was not relevant to the purported supplies to Enkay. The other businesses had no connection with Enkay. The Tribunal considered that the more likely explanation was that the goods were diverted after they left the Appellant's premises which on the evidence could have taken place in the United Kingdom."

15. We interpose, for clarity, that there was evidence before the tribunal that supplies made by Mr MacMahon to some other customers, based in the Republic, had also been incorrectly documented yet it was accepted by HMRC that the supplies had nevertheless arrived there.

The relevant law

16. The law which is material in this case is identified in ground (a), set out at para 4 above. The relevant part of art 28c(A)(a) of the Sixth VAT Directive (since replaced but in force at the time) provided that

> "Without prejudice to other Community provisions and subject to conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions provided for below and preventing any evasion, avoidance or abuse, Member States shall exempt:
>
> (a) supplies of goods … dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory referred to in Article 3 but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods.…"

17. The "exemption" referred to is known in the UK as zero-rating. This is the primary provision which governs the zero-rating of goods sold by a taxable person in one member State to a taxable person in another member State (the situation with which we are concerned in this appeal), and transported from (usually) the member State of the seller to (usually) the member State of the purchaser. It should, however, be borne in mind that while, in order to satisfy this provision, the goods must move from one member State to another, it is not a requirement that the destination member State is that of the purchaser. It will also be observed that the article requires member States to impose their own conditions for the purpose of preventing evasion, avoidance or abuse.

18. That provision of the Directive is transposed into United Kingdom domestic law by s 30(8) of the Value Added Tax Act 1994, which provides that

> "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 in question 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 to that member State, to the provisions of section 10; and
>
> (b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled."

19. The subsection governs, by para (a)(ii), acquisitions of the kind in issue here, and provides, by para (b), for the imposition of conditions. Section 10 (of the 1994 Act) deals with acquisitions where the recipient of the supply is a taxable person within the United Kingdom. We should add, parenthetically, that s 30(8)(a)(ii) refers to *liability* for VAT; it is not predicated upon *registration* for VAT, and thus does not preclude the supply to a trader who is registered in one Member State of goods for delivery in another.

20. The conditions referred to in s 30(8)(b) are to be found in reg 134 of the Value Added Tax Regulations 1995:

> "Where the Commissioners are satisfied that—
>
> (a) a supply of goods by a taxable person involves their removal from the United Kingdom,
>
> (b) the supply is to a person taxable in another 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 section 50A of the Act, for VAT to be charged by reference to the profit margin on the supply,
>
> the supply, subject to such conditions as they may impose, shall be zero-rated."

21. It can be seen that this regulation, too, reflects the scheme of the Directive: the sale must be by a taxable person in one member State to a person taxable in another member State, and the goods must travel from one member State to another, but not necessarily to the member State of the purchaser. It does not even require that the recipient is taxable in the member State of destination; taxability in any member State other than that of the seller will suffice. In that, it may go a little further than art 28c(A)(a) contemplates. Paragraph (d) excludes goods which are not the subject of a wholly taxable supply, and is not engaged here. It will also be observed that the regulation permits the Commissioners to impose further conditions which must be satisfied if the sale is to be zero-rated; the conditions which are relevant in this case were to be found in para 18.5 of Public Notice 725, as it was in effect at the relevant time (it has since been re-written, and the equivalent provisions now appear at para 4.3 of the current version). As these conditions are imposed pursuant to statutory authority, they have the force of law. They read as follows:

> "A supply from the UK to a customer in another Member state is liable to the zero-rate where you:
>
> - Obtain and show on your VAT sales invoice your customer's EC VAT registration number, including the 2-letter country prefix code; and
> - Send or transport the goods out of the UK to a destination in another EC Member State; and
> - Obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out in paragraph 18.6".

22. Those conditions, and particularly the third, are plainly aimed at ensuring that the minimum requirements of zero-rating are met. The Notice also provided lists of the documents, or in some cases types of documents, HMRC would accept as evidence; it is not necessary to set out the lists here. It is accepted by HMRC in this case that Mr MacMahon satisfied the first bullet point, but they do not accept that the second and third were satisfied. Mr MacMahon accepts that the goods did not reach Spain, but argues that it is enough that they reached the Irish Republic, and that they did so as a matter of fact. HMRC's objection in respect of the third is that the evidence produced is incomplete and some is invalid; they do not argue that the appeal should fail because it was produced late. The tribunal agreed with them on both points, and it was for those reasons that it dismissed the appeal.

Did the tribunal interpret and apply the law correctly?

23. Mr MacMahon was not able to deal with this ground of appeal in any detail, understandably so since he is not a lawyer. The essence of the legislative provisions, as we have explained them above, is to zero-rate a supply of goods which can be shown to have been made by a taxable person in one Member State, in this case the United Kingdom, to a person who is taxable in, usually but not essentially, the (other) Member State of destination. As we have said, Mr MacMahon accepted—as indeed he must, in view of the tribunal's findings of fact—that the goods did not reach (or, at least, could not be shown to have reached) Spain. His contention is that the tribunal did not consider, or adequately

consider, the argument that, whether or not they reached Spain, on the balance of probabilities the goods did reach the Republic of Ireland, and that is enough. There was no evidence, or any suggestion, that Enkay was registered for VAT in Ireland, but we assume for the purposes of this appeal that, if it did take delivery, and make an acquisition, of the goods in Ireland it would have been liable to register there. There was, unsurprisingly in the circumstances, no evidence that it accounted in Ireland for VAT on the goods.

24. It is true that the tribunal made an error in this respect. It said, of this argument,

> "93. The Appellant asserted that the goods had been transported to the Republic of Ireland, which was sufficient to satisfy the legislative requirement of removal to another Member state. This argument fell down on the facts with the Tribunal finding no persuasive evidence that the goods actually left the United Kingdom.
>
> 94. The Tribunal, however, considers that the Appellant's proposition was also flawed in law, even if he had showed that the goods crossed the border into the Republic of Ireland. The Appellant was not entitled to zero-rate the supplies to Enkay under the legislative provisions unless he demonstrated on the balance of probabilities that the goods were dispatched to Spain. The zero-rating of dispatches from one Member state to another works on the principle that VAT is payable as acquisition tax in the Member state of destination, otherwise fiscal neutrality is breached. Enkay was registered for VAT in Spain. Thus even if the goods had reached the Republic of Ireland the Irish Authorities had no power to levy acquisition VAT from Enkay."

25. As will be apparent from what we have said above, that is not a correct statement of the law: leaving to one side the *Teleos* argument, to which we come later, it would have been sufficient for Mr MacMahon to show that the goods reached the Republic and were the subject of an acquisition there. As [88(8)] and [93] indicate, the tribunal found that Mr MacMahon had not done so and that his appeal failed on this ground too. Thus although the proposition of law set out at [94] is wrong, the tribunal nevertheless examined the evidence and made findings of fact relevant to a correct interpretation of the law. Ultimately, therefore it did interpret and apply the law correctly.

Was the finding at [88(8)] perverse?

26. The background to [88(8)] is that the tribunal had concluded, at [88(1)], that the goods did not reach Spain; as we have said it then considered Mr MacMahon's alternative argument that the goods had at least reached Dublin. It heard evidence (including the oral evidence of Ms Tracey, mentioned above) about enquiries made by the Irish Revenue authorities of Whelans which, as the tribunal recorded, revealed that a Whelans employee had sent a fax which purported to confirm the delivery of one load to Whelans' premises in Dublin. The tribunal concluded, from the explanation given to Ms Tracey, that it was a forgery: see [88(18)], set out above. Ms Tracey also learnt, and the tribunal accepted, that Whelans' directors disclaimed any knowledge of Enkay or of the consignments. It did not make any express finding that the directors' disclaimer was truthful, but the sentence "The Tribunal was persuaded by Ms Tracey's evidence which showed

that the goods never reached Whelans" is consistent with no other conclusion. It is also plain from the decision that Mr MacMahon produced no evidence of his own to support his contention that the goods had reached the Republic.

27. He relied, instead, on the fact, as the tribunal accepted, that most of the consignments had been loaded onto Whelans' lorries. That, he said, must lead to the presumption that the goods were taken to the Republic. The tribunal did not agree that such a presumption could be made, concluding instead (as [88(8)] shows) that evidence of loading was not evidence of arrival.

28. Despite Mr MacMahon's considerable efforts before us, we cannot see anything perverse in that, or any other, finding in [88(8)]. As we have said, the tribunal erred in its stated view that in order to succeed Mr MacMahon must show that the goods reached Spain. But it is clear from not only [88(8)], but from other findings, that in fact it did consider, and reached conclusions about, the alternative case that the goods arrived in the Republic. If one starts from the position that, as here, the purchaser of goods has stated (in order that his supplier should zero-rate the supply) that he intends to transport the goods to a named member State, and the evidence he produces of their transport is incomplete and, so far as it is produced, false, it must be reasonable to conclude that the stated intention was also false. That was what the tribunal found.

29. It also seems to us entirely rational to treat evidence that the goods might instead have reached a different member State with some circumspection. Perusal of the decision shows that the tribunal examined such evidence as there was of arrival in the Republic with care, that it found it wanting, and was not satisfied that Mr MacMahon had succeeded in showing, on the balance of probabilities, that the goods had left the United Kingdom. The tribunal did not resolve the, perhaps only apparent, conflict between the evidence that the goods were loaded onto Whelans' lorries and the directors' disclaimer of any knowledge of the consignments or of Enkay, but we nevertheless agree with it that while the loading of goods onto the lorry of an Irish Republic haulage company might well support other evidence of arrival in the Republic, it is, taken alone, inadequate evidence from which such a finding might be made. The tribunal correctly concluded that Mr MacMahon had not discharged the burden of proof.

30. That leads us to the argument Mr MacMahon advances that the tribunal wrongly imposed the burden on him. There is nothing in this argument. It has been said many times, beginning with *Tynewydd Labour Working Men's Club and Institute Ltd v Customs and Excise Commissioners* [1979] STC 570, that it is for a person wishing to persuade the tribunal to overturn or amend a VAT assessment to show that it is wrong; it is not for HMRC to show that it is right. This case differs in no way from any other in that respect. Moreover, as the Public Notice makes perfectly clear, it is for the taxable person wishing to zero-rate a supply to gather and retain the evidence supporting his contention that the supply is properly zero-rated. That requirement, which could not be described as unduly onerous, is consistent only with the trader's bearing the burden.

Did the tribunal incorrectly interpret or apply the judgment in Teleos*?*

31. The Court was required in *Teleos* to consider a situation similar to that here: Teleos had sold goods, in that case mobile phones, to a Spanish customer which was itself to transport the goods from a warehouse in the United Kingdom to stated destinations in Spain and France. The customer provided what appeared to be good documentary evidence that the goods had duly arrived, and the Commissioners initially accepted the documents as sufficient justification of Teleos' claims to zero-rate the sales. It later transpired that the documentary evidence was false, and the Commissioners then assessed Teleos for the output tax which was due upon the assumption that the phones had not, in truth, left the UK.

32. The issue was accordingly whether an innocent seller was liable to account for output tax when there was a contractual arrangement, on which he had relied when zero-rating the sale, for the export of the goods, and he had produced apparently valid documents establishing the export to the tax authorities which had initially accepted them: that is, did the seller have to show that the goods had in fact left the member State of origin? The Court answered that question with a qualified negative. At [45] of its judgment it said:

> "As is clear from the first part of the sentence in art 28c(A) of the Sixth Directive, it is for the member states to lay down the conditions for the application of the exemption of intra-Community supplies of goods. It is important to note, however, that when they exercise their powers, member states must comply with the general principles of law which form part of the Community legal order, which include, in particular, the principles of legal certainty and proportionality (see, to that effect, *Garage Molenheide BVBA, Schepens, Bureau Rik Decan-Business Research & Development NV (BRD)* and *Sanders BVBA v Belgium* (Joined cases C-286/94, C-340/95, C-401/95 and C-47/96) [1998] STC 126, [1997] ECR I-7281, para 48, and *Customs and Excise Comrs v Federation of Technological Industries* (Case C-384/04) [2006] STC 1483, paras 29 and 30)."

33. After developing those points, it then said, at [50]:

> "Accordingly, it would be contrary to the principle of legal certainty if a member state which has laid down the conditions for the application of the exemption of intra-Community supplies by prescribing, among other things, a list of the documents to be presented to the competent authorities, and which has accepted, initially, the documents presented by the supplier as evidence establishing entitlement to the exemption, could subsequently require that supplier to account for the VAT on that supply, where it transpires that, because of the purchaser's fraud, of which the supplier had and could have had no knowledge, the goods concerned did not actually leave the territory of the member state of supply."

34. Mr MacMahon's argument was that he had indeed provided the evidence which was identified in Public Notice 725 and it had been accepted, at least initially, by one HMRC officer, a Mr Lecky, who gave evidence to the tribunal. It recorded in the decision that he had first expressed concern about the absence of documentation, and had indicated that an assessment was likely if it was not produced. Some documents were then produced, and Mr Lecky, according to the

tribunal's narrative, was satisfied that they met the Notice 725 requirements in the sense that they corresponded with the listed items, but was nevertheless sufficiently concerned about them to refer them to another HMRC department for verification. At [88(11) and (13)] the tribunal said:

> "(11) At each visit the HMRC's Officers made the Appellant aware of the requirements of HMRC Notice 725. The Appellant did not act upon the advice given. This was demonstrated by his handling of [some identified] consignments. He only obtained the necessary paperwork to evidence removal of the goods from the United Kingdom after [an HMRC officer] refused repayment of the VAT due under the 06/06 return.…
>
> (13) Mr Lecky was the only Officer who expressed satisfaction with the Appellant's basket of evidence for his supplies to Enkay. Mr Lecky, however, had to prompt the Appellant into action by the prospect of an assessment if he did not produce the necessary documents. [Two other officers] held continuing doubts with the Appellant's records despite authorising the repayment returns."

35. At first sight, this might be regarded as sufficient to satisfy the requirement set out at [50] of the Court's judgment although, in our view, the Court clearly had in mind unqualified acceptance, rather than (as was clearly the case here) the giving of the benefit of the doubt to the trader. However, the Court then went on to consider the words of art 28c(A)(a) which provide that one purpose of the conditions to be imposed by member States is the prevention of "any evasion, avoidance or abuse", and at [68] it said:

> "The reply to the third question referred must therefore be that the first subparagraph of art 28c(A)(a) of the Sixth Directive is to be interpreted as precluding the competent authorities of the member state of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for VAT on those goods where that evidence is found to be false, without, however, the supplier's involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion."

36. In other words, legal certainty demands that a trader acting in good faith and taking adequate and appropriate precautions to avoid his participation (even unwitting participation) in tax evasion is protected if he produces apparently valid evidence of export which is accepted by the tax authority.

37. Sadly for Mr MacMahon, the tribunal made clear findings that his precautions were wholly inadequate. As we have mentioned, there were no credit checks and only a late VAT registration check. Shipping and delivery documents were obtained, if at all, only after prompting by HMRC. The tribunal found that the goods were not accurately identified in Mr MacMahon's own documents, and the evidence he produced was incomplete. The tribunal made many other criticisms of detail which it is not necessary for us to set out. In short, the tribunal made it quite clear that Mr MacMahon was not a trader who "took every reasonable measure in his power" to avoid becoming involved in the tax evasion of another.

38. We detect no error of law in this part of its decision. On the contrary, we are satisfied that the tribunal understood the *Teleos* tests, made relevant findings of fact which were supported by the evidence before it, and came to the right conclusion.

Did HMRC take proper account of the documents produced?

39. It will be apparent from what has gone before that this ground can be dealt with shortly. The tribunal identified numerous shortcomings in the documents Mr MacMahon did produce, and many omissions. The documents produced, whether or not false, were designed to show that the goods had reached Spain; yet Mr MacMahon was compelled to accept that the documents could not be relied upon as evidence that they did, and instead put his case on the basis that the goods probably travelled as far as Dublin. That alternative case was not supported by any more than a handful of documents, some of which were also suspect at best, and by Mr MacMahon's evidence that the goods were loaded on Whelans' lorries.

40. Against that background it is difficult to see how the officers' scepticism about the documents and the conclusions they drew from them can be faulted. Mr MacMahon's argument requires them, in effect, to take the documents at face value even when they can be shown to be false, and to overlook the fact that many documents which should have been produced were not, and to do so against the background of a lamentable failure to take adequate precautions. It is an impossible argument and one which, even if only obliquely, the tribunal rightly rejected.

Disposition

41. We differ from the tribunal in some respects, as we have indicated, but in our judgment it reached the correct conclusion and the appeal must be dismissed.

Colin Bishopp
Upper Tribunal Judge

Ian Huddleston
Upper Tribunal Judge
Release date: 23 March 2012