TC01624

Appeal number: TC/2009/13176

Value added tax – Input tax – Post Clearance Demand Note for import VAT – Whether Appellant acting as an agent or a freight forwarder – Whether entitled to Onward Supply Relief – No – Whether issuing of Demand Note manifestly unjust – Whether HMRC unjustly enriched – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX

BIG MISTERS SHIPPING CO **Appellant**

- and -

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

TRIBUNAL: MISS J C GORT (Judge)
RICHARD THOMAS

Sitting in public in London on 6 September 2011

Mr Neil Owen VAT Consultant for the Appellant

Mr David Bedenham of counsel, instructed by the Solicitor's Office, for the Respondents

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AMENDED DECISION

1. This is an appeal against the Commissioners' decision of 13 July 2009 to uphold on review a demand for £42,162.73 to bring to account unpaid input VAT. On 15 January 2009 the Commissioners had issued a Post Clearance Demand Note ("C18") for import VAT in the above sum which was suspended at import under Onward Supply Relief ("OSR"). That decision had been confirmed by a letter dated 2 March 2009. The import entry period to which the Demand Note relates is 19 July 2006 to 9 February 2007.

2. The grounds of appeal in essence were that the Appellant qualified for OSR on the basis that it was at the time acting as an agent and not just as a freight forwarder. It was also claimed that the issuing of the C18 was manifestly unjust because HMRC would thereby be unjustly enriched.

The background

3. The Appellant was incorporated on 30 July 2002, having previously traded as a sole trader since 1999. Its main business is freight forwarding and warehousing. In May 2006 it was contacted by Aegean Spa Baths ("Aegean") who were the UK Sales Agents for a company called Master Spas Inc of Fort Wayne, Indiana, USA ("Master Spas"), who were the manufacturers of High End Spa Baths and hot tubs.

4. In July 2006 the Appellant had entered into a commercial agreement with the representatives of Master Spas to freight forward and customs clear consignments of bespoke hot tubs due to be shipped from the USA factory to the UK, to the rest of the EU and from non-EU European countries. The exact nature of that agreement, its terms and effect are in issue between the parties.

5. Following the review of the decision, on 11 August 2009 the Appellant filed its Notice of Appeal by which it claimed inter alia that the Appellant was a de facto agent for the importer of the goods (Master Spas) and the fact that some of the conditions for claiming OSR were not fulfilled did not disqualify the transactions concerned from OSR. It was also claimed to be manifestly unjust to require VAT to be paid in the UK when it had been paid in other jurisdictions. The Appellant was at all times acting as agent for Master Spas and was not merely a freight forwarder.

Legislative provisions

6. Section 1(4) of the Value Added Tax Act 1994 ("VATA") provides:

> "*VAT on the importation of goods from places outside the member States shall be charged as if it were a duty of customs"*

7. Article 201 of European Council Regulation 2913/92 ("the Customs Code") provides:

> 1. *A customs debt on importation shall be incurred through:*

(a) *The release for free circulation of goods liable to import duties, or*

(b) *The placing of such goods under the temporary importation procedure with partial relief from import duties*

2. *A customs debt shall be incurred at the time of acceptance of the customs declaration in question.*

3. The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.

8. Relief from import VAT where there is to be an onward supply is provided by Regulation 123 of the Value Added Tax Regulations 1995 ("the VAT Regulations").

(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 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.

(2) …

(3) *The relief afforded by paragraph (1) above shall continue to apply provided that the importer –*

(a) Removes the goods to another member state within one month of the date of the importation or within such longer period as the Commissioners may allow, and

> *(b) Supplies the goods in accordance with sub-paragraphs (a)(i) and (ii), and (b) of section 30(8) of the Act and any Regulations made thereunder."*

9. Article 14 of the European Council Directive 2006/112 ("the VAT Directive") defines a supply of goods as being "*the transfer of the right to dispose of tangible property as owner."*

10. Section 30(8) VATA requires that the onward supply must be made to a person who is liable to pay the VAT in another member State:

> 30(8) *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 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* [emphasis added]

11. Paragraph 2.1 of Public Notice 702/7 provides:

> **"The following text has the force of law**
>
> You can only use OSR if you are either:
> - A UK VAT registered importer, or
> - A UK VAT registered agent appointed to act as importer on behalf of a trader who is not based in the UK and not VAT registered in the UK."

12. Paragraph 2.2 of Notice 702/7 further provides:

> **"The following text has the force of law**
>
> *To claim relief* ***you must be making a zero-rated supply*** *of the imported goods,* ***not merely acting as freight forwarder/shipper****, to a*

taxable person (who will account for tax on their acquisition in another EC country."

13. Paragraph 2.2 of Notice 702/7 also provides:

"The following conditions have the force of law

You must …

1. *Be a UK VAT registered trader.* ***Note you cannot claim OSR if you use a non VAT EOR1 number or the code GBPR***

2. be making a zero-rated supply of goods to a taxable person in another EC country.

3. dispatch the same goods as imported. ***Note you cannot process them first.***

4. Remove the goods to another EC country within one month of the date of importation (which is the date when the goods enter free circulation). If you cannot meet this deadline you can apply for an extension (see below for contact details)

and

5. Complete EC sales lists and record EC trade figures.

Paragraph 2.2. of the Notice continues as follows, but there is no reference in the paragraph to the following matters having a force of law,

"In the circumstances where, say, a French VAT registered trader buys goods in the USA and imports (puts them into free circulation) in the UK for onward consignment to France, the agent must:

- be appointed by either the USA or French traders to act on their behalf in the sales/ purchase of the item, and
- complete VAT invoices and the relevant EC sales lists and other formalities relating to supply of those goods from the UK to France."

Paragraph 2.5 of the Notice provides:

"2.5 What are the conditions of OSR?

The following conditions have the force of law:

Condition	you **must** …
1.	be a UK VAT registered trader. **Note you cannot claim OSR if you use a pseudo TURN or the code PR**
2.	be making a zero-rated supply of goods to a taxable person in another EC country
3.	dispatched the same goods as imported. **Note you cannot process them first**
4.	remove the goods to another EC country in one month of the date of importation (which is the date when the goods enter free circulation). If you cannot meet this deadline you can apply to NIRU for extension … and
5.	complete EC sales lists and record EC trade figures on VAT returns.
…	

14. Paragraph 3.3 of Notice 702/7, under the heading "How do I account for the goods in my VAT records", provides:

> *"Whether you are the importer, or an agent acting as importer, the transactions must be accounted for in your VAT records as follows:*
>
> *1. Raise a tax invoice to the EC consignee*
> *2. Record this transaction on EC sales lists*
> *3. Record summary of transactions as EC trade figures on your VAT return, and*
> *4. Complete Intrastat returns as appropriate."*

15. Section 47 VATA, under the sub-heading, "Agents etc", provides:

> *"(1) Where –*
>
> *(a) …*
> *(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 are supplied through an agent who acts in his own name the Commissioners may, if they think fit, treat the supply as a supply to the agent and as a supply by the agent."

16. The relevant provisions with regard to jurisdiction are contained in the Finance Act 1994. Section 13A of that Act defines a 'relevant decision' for the purposes of Chapter 2 of Part I of the Act. Under s.13A(2)(c) a decision to assess excise duty where relief has been given in error under s.12A(2) is a relevant decision:

13A *Meaning of "relevant decision"*
(2) A reference to a relevant decision is a reference to any of the following decisions –

...
(c) any decision by HMRC to assess any person to excise duty under section 12A(2) above …

17. Section 12A allows for an assessment of excise duty where relief has been given in error, and provides a route for an appeal to the Tribunal under s.16 as follows:

12A Other assessments relating to excise duty matters

(1) This subsection applies where any relevant excise duty relief other than an excepted relief –

(a) has been given but ought not to have been given, or
(b) would not have been given had the facts been known or been as they later turn out to be.

(2) Where subsection (1) above applies, the Commissioners may assess the amount of the relief given as being excise duty due from the liable person and notify him or his representative accordingly.
(3) Where an amount has been assessed as due from any person under –

(a) subsection (2) above,
…
and notice has been given accordingly that amount shall, subject to any appeal under section 16 below, be deemed to be

an amount of excise duty due from that person and may be recovered accordingly …

18. Section 15 of the Act provides that HMRC must conduct a review of a relevant decision where an offer of a review has been accepted within 30 days. Section 16 allows an appeal to be made against such a decision on review, and sets out the Tribunal's jurisdiction on appeal thus:

> 16. *Appeals to a tribunal*
> *(1) An appeal against a decision on a review under section 15 … may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.*
> …
> *(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say –*
>
> > *(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;*
> > *(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; …*
>
> *(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed an appeal.*
> …
> *(8) Subject to subsection (9) below references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 13A(2)(a) to (h) above.*

19. Schedule 5 to the Act contains (*inter alia*) the following provisions:

> 1. *The following decisions, so far as they are made for the purposes of the Community Customs Code and are decisions the authority for which is not contained in provisions outside that Code and any directly applicable Community legislation made for the purpose of implementing that Code, that is to say –*
> …

> *(d) any other decision as to whether or not the requirements of any procedure for goods which are to be or have been presented to the Commissioners, or any other formalities in relation to any such goods, have been satisfied or complied with or are to be waived or as to the measures to be taken, including any requirements to be imposed, in consequence of the inability or other failure of any person to comply with the required procedure.*

The evidence

20. The Tribunal was provided with an agreed bundle of documents and heard evidence from Jonathan David Woods, managing director of the Appellant. We find the following facts.

21. Following the conclusion of the hearing we invited the Appellant to submit any documentary evidence, in particular invoices, which showed that the Appellant was acting as more than a freight forwarder. Three invoices were submitted and the Respondents made submissions on those invoices which we will deal with later.

22. It was Mr Woods' evidence, which we accept, that Big Misters was approached by a company called Aegean to act as a freight forwarding agent for Master Spas. However following discussions and a visit to the USA, it was Mr Woods' understanding that it was agreed that the Appellant would act as agents for Master Spas in respect of the EU goods and that they would act as freight forwarders for Aegean.

23. No formal agreement as to the arrangement was ever drawn up between the parties and Mr Woods told the Tribunal that he was not concerned about this because he had shaken hands on the deal with the representative of Master Spas. A Mr Rob West, had acted as the representative for the Appellant and had conducted the initial meeting with Aegean, and had also subsequently contacted HMRC. In late June 2006 e-mails had been exchanged between Rob West and a Mr Kevin Richards of Master Spas and on 29 June 2006 Rob West e-mailed the following:

> "We have identified a scheme (OSR – Onward Supply Relief) for the EC supply cargo to be moved without payment of VAT on removal from the warehouse and without liability falling on either Big Misters/Aegean/Master Spas. We originally suspect that a 'trading company' with a VAT number would need to be set up, this however poses the problems of accountants, Companies House etc, etc. Under this system none of these are required Master Spas US can nominate an 'agent' in the UK who will be responsible for producing 'statistical' invoices which are required for governmental trade figures, checking EC VAT registrations, supplying EC sales lists to HMRC in Southend on a quarterly basis and providing the documentary chain for audit by

HMRC if required. (The agent needn't be a freight agent and could be Aegean.)

"It should be noted that whomever the agent is if they have complied with the above and have validated documentation there is no liability to the 'agent' involved. In view of the paperwork that needs completing and to close the loops in the audit trail both we believe that Big Misters shipping are well positioned for the completing and managing of the above processes on behalf of Master Spas US for which we propose a mutually agreed management fee for this service if required. As you are aware this system would create an immediate positive cashflow effect as no one is paying the VAT straightaway but merely providing a documentary chain that ends with the final buyer 'accounting' for the VAT in his returns to local office wherever that may be in the EC."

In an e-mail dated 6 July 2006 he states:

"My understanding is that the spas are being delivered to dealers for onward supply to their customers. Under this system the dealers need to supply their trading address and VAT number before the Customs declaration can be completed. These are then declared to Revenue and Customs and as long as the VAT number has been validated by HMRC in the UK the VAT liability transfers to the trader declared. It is then their responsibility to declare the VAT on their monthly/quarterly returns to their local Customs.

"In regards to the second point of your original mail, we feel that an approx fee of GBP50.00 per spa (to include the declaration to HMRC, VAT validation with HMRC, discharging the VAT liability to Master Spas, the production of statistical invoices, the final quarterly returns and all the aforementioned being completed to a standard suitable for Customs Audit. We feel that charging on a per unit basis makes for easy costing to yourselves and the buyer, as opposed to a set monthly fee which means your per unit costs will fluctuate dependent on your sales volume."

24. The Appellant's accountants had advised them that it was possible for them to be involved in the supply of goods without taking title to them, and that being a sales agent meant that they would be able to account for VAT through the OSR scheme. The company was to receive commission for this from Big Misters, but they did not receive commission from Aegean when acting as freight forwarders, but would merely receive an entry fee. Mr Woods understood that the commission from Master Spas was based on the sale of goods with a flat fee of £50 per hot tub dispatched. The company would also act as shipping agents in respect of freight and receive payment whether for goods sold in the UK or whether they were for onward sale. The three relevant functions described by Mr Woods were (i) acting as freight forwarders with

Aegean, (ii) acting as freight forwarders with Master Spas goods which came into the United Kingdom, (iii) commission for each sale when acting as sale agents for Master Spas and dealing with the VAT position. It was his view that technically in respect of item (iii) the Appellant company owned the goods which came into the UK for a millisecond, they then loaded the goods on to the ship to go to the EU. Payments were made from the EU in dollars to the US and the company received commission from the US once they had been paid. In respect of goods that came into the United Kingdom, Aegean was the declarant, and for those going to the EU, the Appellant was the declarant. Because he was raising invoices in respect of a commission, Mr Woods had no doubt that the company was acting as a sales agent.

25. The first four containers of freight arrived in the UK on 11 July 2006. Containers continued to arrive at regular intervals and by the end of 2006 thirteen containers in total had been received. The goods were received into the Appellant's bonded warehouse at Felixstowe and formal entries into home use or OSR were made upon instruction being received as to where to deliver the goods. On 13 July HMRC's records show that Rob West made a call. Their query records show: "Enquiry re Onward Supply Relief. They are the Agent to a trader outside the EC (in US). Are going to use them for OSR. They are going to set up a system". HMRC's reply refers Rob West to Notice 702/7 and inter alia advised putting the VAT number and details in Box 9. the Appellant was sent links to the EC Sales Lists and Intrastat, and advised about accounting for VAT. There is a record of an enquiry made by Rob West of HMRC on 21 July 2006 in which it is recorded that: "Caller wanted to know if he had to show VAT on the invoice when supplying goods to EC." Similarly on the same date there is a record of a further query from Rob West saying: "Where do I account for the VAT on EC purchases on the VAT 100?" and was advised: "The VAT element is added to Boxes 2 and 4 with the net amount in Boxes 7 and 9."

26. In October 2006, which was the end of the first VAT quarter since the start of the OSR scheme, the Appellant completed its return including the values of the tubs despatched to the EU in Boxes 8 and 9 and provided a completed EU Sales List. HMRC returned this form with a new blank one in early November 2006 together with a note from the office in Southend stating that the return had been incorrectly completed and needed amending. Mr Woods himself had completed that return and he called Southend to enquire what the problem was. He was informed that they could not include the tubs in Box 8 and 9 as Big Misters was not selling them directly and that completion of EC Sales Lists was not appropriate in their case. He was referred to the HMRC Intrastat team. Robert West contacted the Intrastat team and was informed that the goods were not reportable under their system and he was referred back to the EC Sales team at Southend. Mr Woods then had a further conversation with Southend in which he asked them to talk to their colleagues in Intrastat and then advise the Appellant of the outcome. By January 2007 there had been no contact made by HMRC with the Appellant and so the return was completed with a zero figure in Boxes 8 and 9. Customs continued to accept entries through their CHIEF system, and clearances for the goods to leave the bonded regime and transit within the community as OSR goods were received for all the entries made by the Appellant.

27. By Spring 2007 Master Spas had decided to launch itself across Europe and Master Spas Europe was formed by renaming Aegean. Aegean also at that time ceased using the Appellant as its agent therefore there were no further transactions after Spring 2007.

28. In January 2009 HMRC issued a C18 demand note. The issuing officer confirmed to the Appellant that the VAT referred to was not reclaimable under VAT Trading Rules and he would not allow a post clearance change to enable a C79 to be generated which would allow a VAT reclaim. Following communication with HMRC, the Appellant completed a VAT return reclaiming the input tax claimed by the C18. This reclaim was disallowed.

29. By a letter dated 20 May 2009, A Roden Ltd, accountants, had written to HMRC on behalf of the Appellant stating as follows:

> "In July 06 Big Misters Shipping Co Ltd (BM) were contacted by Aegean who were UK sales agents/franchise holder for Master Spa Inc of Fort Wayne, Indiana, USA. Master Spa Inc had recently expanded its European sales operation to the whole of main land Europe, including some former Soviet States not in EU. BM asked to represent both parties as shipping and customs agents. BM contacted HMRC for advice on best ways of complying with necessary European import regulations."

At the end of this letter Roden wrote:

> "At no time did BM sell or take title to these goods, rather they were paid a small fee for each individual item transhipped."

30. By a letter dated 2 March 2009 Linda Macfarlane, an Officer of HMRC, wrote to Mr Woods and stated inter alia:

> "My understanding and (sic) the details from the discussions with you and Mr Roden … are that your company acted as freight forwarders for Master Spas based in the USA." She later in the same letter recorded: "once again from our discussion, you informed me that you were not Master Spas' agent/tax representative and only acting (sic) as the freight forwarder."

31. The invoices submitted on behalf of the Appellant after this hearing were dated respectively 29 September 2006, 29 December 2006 and 30 April 2007. The first invoice gives under Quantity 1.00 and under Details 'freight', Unit Price £2,250 and no VAT is shown on the invoice. The second invoice gives Quantity 1.00, Details HM Customs Clearance M610475, Unit Price 50 and again no VAT. The final invoice produced gave Quantity 1.00, Details M607582 and unit price £50, again with no VAT shown. These were submitted by e-mail with the information that the

first invoice referred to shipping costs, the second invoice referred to Customs clearance services and the final invoice referred to agency services.

32. Because Rob West had left the Appellant company by the time the C18 was issued, Mr Woods was unable to explain why the e-mail correspondence which was produced between Rob West and Master Spas did not specifically refer to Master Spas being a sales agent. There is no e-mail from Rob West which specifically refers to the Appellant as being a sales agent, and we heard no evidence from him.

The Respondents' case

33. It was HMRC's case that the conditions in relation to the OSR were not satisfied in this case and accordingly the Appellant was liable for import VAT. In particular, as set out in the review decision:

> "A condition of the OSR scheme is that you must be making a zero-rated onward supply of the imported goods – not merely dispatching them to a taxable person. … this is still a requirement of the scheme for freight forwarders/shipping agents as noted in section 2.2 of HMRC Public Notice 702/7000.
>
> "However, where OSR is used by a freight/forwarding agent they are required to act as the principal for the purposes of the import, and intra-EC supply of the goods. This is permitted under section 47 of the VAT Act 1994 … this means that the agent is acting as the importer of the goods into the Community, and the person who makes the zero-rated onward supply of the goods to another Member State.
>
> "For the zero-rated supply to be treated as being made by the agent, they must also comply with the requirements on accounting for the transaction, which are listed in Public Notice 702/07."

34. Further on the review officer stated that:

> "… it has been established that your client did not make a zero-rated onward supply of the imported goods. As confirmed in your letter of 20 May 2009, your client did not act as the purchaser and seller of the goods but merely arranged the import of the goods into the UK, for the onward movement to another Member State, where the VAT would be accounted for on the acquisition.
> "Consequently, this means that your client has not complied with the conditions to use OSR, and the importers declared under this scheme are not entitled to benefit from the relief of Import VAT."

35. It was submitted by Mr Bedenham that if the Appellant was making a zero-rated supply of the imported goods then, as per paragraph 3.3 of PN 702/7, it should have accounted for the relevant transactions in its VAT records by raising an invoice

in relation to the inward supply, recording the transaction in an EC sales list and recording the transaction in the EC trade figures declared on its VAT returns. It was disputed that HMRC had advised the Appellant that it need not comply with certain conditions of OSR, and the Appellant's VAT folder disclosed no record of such advice being given. The Public Notice was clear in its terms and has the force of law.

36. HMRC relied on Public Notice 702/7, in particular paragraphs 2.1 and 2.2 (see paras 10, 11, 12 and 13 above.

37. It was accepted by Mr Bedenham that the Appellant was appointed by Master Spas in some capacity, but that capacity was as a forwarding agent not as a sales agent. Furthermore the Appellant had not correctly accounted for the goods in its VAT records in accordance with section 3.3 of the Notice. Because of the absence of the EC sales list it was very difficult for HMRC to verify whether acquisition tax had been paid in the Member State.

38. It was also HMRC's case that for the Appellant to be an agent it was not sufficient that it thought it was one, there must be an agreement to that effect. It might be expected there would be some evidence if it were a sales agent and in this case there is none. The burden of proof is on the Appellant to show that it was a sales agent. It would be expected that sales invoices would have been raised. The evidence in this case showed that the Appellant was merely a freight forwarder. Principally there is the letter of 20 May 2009 in which the accountant describes the Appellant as a shipping and Customs agent, and in which he stated specifically that the Appellant did not sell or take title to the goods; secondly there is the e-mail of 6 July 2006 in which Rob West referred to "my understanding", rather than to any specific agreement; there is the e-mail of 29 June in which Rob West referred to the fact that Masterspas US can nominate an agent in the UK, but this issue is not revisited; and there are HMRC's telephone enquiry records of the calls made by Rob West.

39. With regard to the recorded calls made by Rob West to HMRC, Mr Bedenham submitted that it was not clear whether Rob West was referring to the goods which the Appellant was dealing with in this particular case.

40. With regard to the invoices provided by the Appellant after the close of the hearing, written submissions were made on behalf of HMRC. HMRC state: "The Appellant has supplied three invoices without accompanying submissions or any further explanation." (That is not in fact the case and the explanations which we have recorded above were on the e-mail which accompanied the sample invoices.) With regard to invoice A it is submitted by HMRC that this is clear evidence that Big Misters was acting as a freight forwarding agent. With regard to invoice B, it said that this is further evidence that Big Misters was providing freight handling services in its role as a freight forwarding agent. With regard to invoice C, it was not accepted that this was an invoice showing that £50 sales commission was paid in respect of each product sold by Big Misters. In particular:

1. There was nothing on the face of the invoice to suggest that the £50 charge relates to a sales commission; there is no wording suggesting any relation to a sale or sales commission, and there is nothing to identify the item sold, who might have made the sale, or who it was sold to;

2. The three invoices were raised in September 2006, December 2006 and April 2007 respectively. It is perfectly possible that invoices B and C both relate to Customs clearance costs but on different shipments;

3. Invoice C is just as likely to be the £50 fee for acting as a freight forwarder, described as a "fee of £50 per spa, to include the declaration to HMRC, VAT validation with HMRC, discharging the VAT liability to Masterspas, the production of statistical invoices, the production of quarterly returns, etc." in Rob West's e-mail dated 6 July 2006.

41. Furthermore, it was submitted, given the absence of any information contained in the invoices that could possibly be regarded as evidence of a sales commission, it was not possible to draw any conclusion that the Appellant was receiving a sales commission or acting as a sales agent. The Appellant had not supplied any evidence to support the assertion that it received a sales commission from Master Spa Inc. Conversely the information which does appear on the face of the invoices strongly supported HMRC's case that the Appellant was acting as a freight forwarder.

42. With regard to the Appellant's claim that it was manifestly unjust to require VAT to be paid in the UK when it had been paid in another jurisdiction, which led to HMRC being unjustly enriched, in the absence of an EC Sales List it was not possible to verify whether VAT had been accounted for in another Member State The Appellant's liability to Import VAT had arisen as a result of an importation from outside of the Member States in relation to which he had failed to satisfy the criteria for relief.

The Appellant's case

43. It was the Appellant's case that although no formal legal agreement was drawn up between the Appellant and Master Spas Inc, it was clear from the telephone records that in Rob West's mind the Appellant was acting as sales agent. He had sought information on the EC Sales List which was provided by HMRC on 13 July 2006 which would not be required if the Appellant were merely a freight forwarder. Initially the Appellant had completed Box 8 of its VAT return as would be required under the OSR. The only reason the Appellant not continued to complete Box 8 was because it believed it had been advised not to do so by HMRC.

44. It was accepted on behalf of the Appellant that, whilst they had the documents as to the import, they could not produce any sales invoices to the customers in the Member State. Whilst it was customary for sales invoices to be issued in the circumstances, and the absence was a defect, the failure to issue the invoice was not a

breach of the conditions of the Notice 702/7. It was reasonable to see the Appellant as having made zero-rated onward supplies to Member States, and it was possible in law to deem the supplies to have been made under section 47 of the VATA.

45. With regard to Public Notice 702/7, the Appellant was acting as an agent in that it was making a zero-rated supply of goods to a taxable person in another EC country. Whilst it had not completed the EC sales list and recorded the EC trade figures on all its returns, this had not been done on the later returns because of HMRC's instructions. The Tribunal was invited to take a purposive view when interpreting agency rules.

46. Given the discussions as to OSR between the parties involved, Mr Owen submitted that there must be an underlying presumption on the part of the parties that the Appellant was an agent, and in those circumstances it should be deemed to have been acting as an agent. The e-mails show that there had to be somebody appointed as an agent, and there is a presumption that it was the Appellant.

47. Mr Owen did not seek to argue that the Appellant bought and sold goods, but that by virtue of section 47 of the VATA, by acting in its own name in importing and onwardly dispatching goods, it should be deemed to be a principal, capable of making an onward zero-rated supply. The absence of invoices occurred because there was a confusion on the part of the Appellant's then accountant as to its status. It was possible to conclude, as Roden did, that the Appellant was only a freight forwarding agent because he did not take title to the goods, but that does not prevent it from raising a section 47 argument.

48. We were referred to section 2.2 of Public Notice 702/7, where it said that the agent must complete the VAT invoices, but this was not subject to the force of law. Mr Owen submitted that it therefore followed that the absence of those invoices was not fatal. Section 2.5 of the Public Notice was fulfilled because the Appellant was the importer and was the deemed supplier as a principal. The fact that there were no invoices did not mean that the Appellant could not fulfil the statutory requirements. Rob West's enquiry on 21 July about showing VAT on the invoice when supplying goods to the EC is circumstantial evidence of agency given that the Appellant was normally a freight forwarder. It was submitted that therefore the conditions for OSR were met by the Appellant.

49. It was the Appellant's case that whilst it was a matter of contract that a person was an agent, it was a general legal principle that a contract could be verbal as well as written. The absence of formal paperwork in which the Appellant can be shown to be appointed as agent is not fatal to its case. The Appellant had agreed with Master Spas that it would enter the goods under the OSR regime on behalf of Master Spas, and OSR would only be available if the Appellant were an agent for Master Spas, it therefore could be construed that such an agreement must have been reached and that the Appellant was acting as the formal agent as well as being a freight forwarder. It was evident from the facts that the Appellant was acting as a *de facto* agent. Its failure to issue invoices was not a failure to fulfil the conditions for OSR, but a failure

to follow the normal procedures that follow from being agent, a failure that could therefore be rectified after the event, but which HMRC had declined to allow to be rectified after the event.

50. It was submitted finally that to impose VAT in the circumstances was inconsistent with the nature of the VAT system itself. Where goods are traded between businesses, it is the basic intention of VAT legislation that the VAT effect should be neutral, up to the point of final sale to the consumer. To enforce a demand for VAT at one stage in a chain of business-to-business transactions was contrary to the scheme of VAT and could not be justified. It was manifestly unjust to require that VAT now be paid in the UK (and be denied as an input tax deduction), since it caused HMRC (or the EC Commission to which the VAT as a duty of Customs may be passed) to be unjustly enriched.

Reasons for decision

51. This appeal is an appeal against the Reviewing Officer's decision of 13 July 2009 which was that the Appellant was not eligible for OSR on two main grounds:

> (i) The Appellant was acting as a freight forwarder and was dispatching the goods rather than making an onward supply, as required under section 2.2 of Public Notice 702/7;
> (ii) The Appellant failed to comply with the requirements on accounting for the transaction, as required by section 3.3 of Public Notice 702/7.

52. Under the Finance Act 1994 ("the Act"), an appeal lies to the Tribunal with respect to any decision by HMRC on a review, and an appeal may only be made by the person who requested the review. The Tribunal has no general supervisory jurisdiction over the administrative decisions of HMRC.

Jurisdiction on Review

53. In the present case, the relevant decision for the purposes of the Act is the Commissioners' decision, dated 15 January 2009, to issue a C18 Post-Clearance Demand Note for £42,162.73 unpaid import VAT (s.13A (c)).

54. It is clear from the Appellant's Notice of Claim that the decision under appeal is the decision on review, dated 13 July 2009 ("the Review Decision").

55. The Review Decision was a decision on two matters, firstly whether the Appellant was acting as a sales agent and is thereby entitled to claim OSR, and secondly whether the Appellant complied with the procedural requirements or any other formalities for OSR. The Tribunal should apply a different test when considering the decision in relation to each of these matters.

56. First, the Commissioners' decision as to whether the Appellant was acting as a freight forwarder rather than a sales agent is a question of fact, and the decision as to whether the Appellant was therefore eligible for OSR is a question of statutory interpretation. Neither of these decisions concerns an ancillary matter set out in Schedule 5 of the Act, and the Tribunal therefore has the power to conduct a full review on the merits.

57. Secondly, the decision as to whether the Appellant failed to comply with the required procedure for OSR and the measures to be taken in consequence is a decision as to an ancillary matter, as set out at a paragraph 1(d) of Schedule 5 to the Act. As such, the Tribunal is confined to considering whether, by refusing OSR on the basis of information available at the time, the Commissioners made a decision that they could not reasonably have arrived at.

58. In *Bowd v Customs and Excise Comrs* [1995] V&DR 212, the Tribunal considered that a decision could not be reasonably arrived at if it was open to challenge on any of the grounds outlined in *Associated Provincial Picture Homes Ltd v Wednesbury Corps* [1948] 1 KB 223, [1947] 2 All ER 680.

59. When considering the decision as to whether the Appellant was acting as a sales agent and is thereby entitled to claim OSR, the Tribunal has full appellate jurisdiction to conduct a full review on the merits.

60. If, and only if, we find in favour of the Appellant in relation to the first question, should we go on to consider the reasonableness of the Commissioners' decision to refuse OSR on grounds that the procedural requirements for OSR were not met.

61. In this case it is very unfortunate that the issuing of the C18 took place so long after the relevant time, and that the hearing of this appeal took place over 2½ years after the issue of the C18, when Mr Rob West was no longer available to give evidence to the Tribunal. However, we have the evidence of Mr Woods, whom we found to be a truthful witness as to those events of which he had direct knowledge; there is the evidence of the e-mails between Rob West and Master Spas; the evidence as to the initial completing of boxes 8 and 9 of the VAT return and of the EC Sales List showing the movements having been completed in respect of the first shipment; there is Mr Woods' understanding that there was an arrangement for the Appellant to be Master Spas' agent, not just a freight forwarder, which was their usual activity; there are the telephone contacts with HMRC and finally there are the three invoices which had been produced and which each give different details as to the item invoiced. Invoice A refers to 'freight', and Invoice B to 'Customs clearance'. Invoice A is clearly evidence that the Appellant was acting as a forwarding agent and Invoice B is evidence that the Appellant was providing freight handling services. Invoice C on its face provides no evidence as to what the item referred to is by which it might be ascertained whether or not it referred to a sale or a sales commission, although we do have the e-mail which accompanied it in which Mr Woods identified it as relating to agency services but no evidence as to why he so decided it. It is

unfortunate that he has not produced the corresponding invoices for freight and Customs clearance for that date, 30 April 2007. Invoice C merely gives a reference number under 'details'. We gave the Appellant the opportunity to provide evidence in the form of invoices and find it odd that instead of producing two or three (if there were three) invoices in respect of any one date, we had been provided with three separate invoices each relating to a different date. In the circumstances the invoices produced do not provide positive evidence of the Appellant's claim to be acting as an agent, but neither are they inconsistent with it.

62. It was said on behalf of the Appellant that their accountant, Mr Roden, had misunderstood its position, and his misunderstanding was passed on to HMRC in his letter of 20 May 2009, which was specifically relied on by the reviewing officer, Jan Pond, in her decision letter of 13 July. If it were only Mr Roden's misunderstanding of the situation which was in issue it might, given the evidence referred to in the above paragraph, have been possible to conclude that the Appellant was acting as more than a freight forwarder. However, in her letter of 2 March 2009, Linda Macfarlane of the Revenue and Customs Advice Team, specifically stated that Mr Woods himself had informed her that the Appellant was not Master Spa's agent/tax representative and was only acting as a freight forwarder and therefore Mr Roden's misunderstanding (if that is what it was) cannot be overlooked. Whilst we accept that it might be possible for a party to show that it was acting as an agent by means of circumstantial evidence where there is no specific contract of agency or a written agreement to that effect, in the present case we do not find that the circumstantial evidence is sufficient, bearing in mind that the burden of proof is on the Appellant to satisfy us on the balance of probabilities that it was at the relevant time an agent for Master Spas.

63. We have set out above our reasons for finding that the Appellant has not satisfied us on the balance of probabilities that it was acting as an agent in the required sense for it to be entitled to claim OSR, and it follows that the Appellant has failed to comply with the requirements in respect of accounting for the transaction and therefore the appeal must be dismissed. Finally, for the sake of completeness we add that we accept Mr Bedenham's submission on the issue of unjust enrichment and do not find that the Appellant has made out its case as to this. If we are wrong in our finding that the Appellant was not acting other than as a freight forwarder, then we nonetheless find that at the time the review decision was made, the evidence before HMRC was, as stated by both Mr Woods and Mr Roden, that the Appellant was only acting as a freight forwarder and therefore the it cannot be said that their decision was such that no reasonable body of commissioners properly directed could have arrived at, and therefore their decision still stands and this appeal is dismissed.

64. 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.

MISS J C GORT
TRIBUNAL JUDGE
RELEASE DATE: 5 December 2011