



[2021] UKFTT 0200 (TC)

TC08150

Keywords VAT: whether HMRC exercised discretion available to consider a document other than a valid invoice in assessing a claim to input tax deduction – NO, whether satisfactory documentation of export of goods from Community as required by Regulation 29(2) VAT Regulations 1995 and Public Notice 703 to claim zero rate - Yes. Appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2017/07161

BETWEEN

BJ TRADING LIMITED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE HEATHER GETHING
MEMBER DUNCAN MCBRIDE**

The hearing took place on 31 March 2021. With the consent of the parties, the form of the hearing was V (video). All parties attended remotely and the remote platform was Tribunal video platform. A face-to-face hearing was not held because of covid 19 restrictions. The documents to which we were referred were a hearing Bundle (“the Bundle”) in two parts comprising 426 pages and an Authorities Bundle of 124 pages. We had the benefit of witness evidence provided by Mr Dike of BJ Trading Limited (“BJ Trading”), and Officer Baxter for HMRC, and skeleton arguments prepared by each of the parties.

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

Neil Manley of McNamee McDonell Solicitors, for BJ Trading

Gareth McKinley litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. The BJ Trading appeals against decisions of HMRC to:
 - (1) Deny a deduction for input tax for the period 09/16 in the sum of £20,138.07,
 - (2) Disallow claims for zero rating for the following periods:
 - 12/16 - £23,125/61
 - 03/17 - £11,947.29
 - 06/17 - £10,453.64,on the basis that BJ Trading did not hold a valid invoice to support the input tax deduction in 09/16 and insufficient evidence to support the claims to zero rating for 12/16, 03/17 and 06/17.
2. The issues to be determined are whether:
 - (1) BJ Trading, through its servants and agents had provided sufficient evidence to justify the claim for input tax deduction for 09/16
 - (2) BJ Trading, through its servants and agents had provided sufficient proof of export to satisfy a claim for zero rating for 12/16 to 06/17.
 - (3) The assessments made by Officer Baxter of HMRC can be considered “best judgment” assessments, in light of the facts and evidence available.
3. For the reasons set out below we allow this appeal.

FACTS

4. We heard evidence from Mr Dike and Officer Baxter and find the facts below.
5. BJ Trading was incorporated on 9 March 2016. Mrs Dike, the wife of Mr Dike is a director of BJ Trading. Mr Dike works in the business but was not a director.
6. In the periods in question BJ Trading had 20 employees operating 9am -5pm from premises in South Armagh, Northern Ireland. The business carried on was the purchase from suppliers, mainly in the Republic of Ireland, of second-hand shoes and clothing for export to customers in countries in Africa. Mr Dike had worked in this business for several years before BJ Trading was incorporated. He has contacts in the business in the Republic of Ireland and in many African countries.

The operating model of the business

7. BJ Trading buy the second-hand goods from a small number of suppliers. There is a significant range of goods acquired in terms of style and quality, and state of repair in consequence all goods acquired require cleaning, sorting and grading. A company called Cash for Clothes collects clothes and brings them by van to the premises of BJ Trading where the vehicle is weighed with and without the goods.
8. The soiled and broken items are identified and payment made.
9. BJ Trading provides to its customers lists of goods available or likely to be available.

10. In most cases customers wishing to purchase the goods make pre-payments to BJ Trading before BJ Trading acquires the goods. The customer will notify BJ Trading of the amount of any payment when it is made.
11. Payments are in sterling and are usually received in a series of small payments as the customers do not have access to foreign currency except through small bureau de change in their territories. All payments received are allocated to a customer's account upon receipt.
12. When BJ Trading has acquired sufficient goods to fill a shipping container, their shipping agent would provide a container. BJ Trading would load the container and provide the list of goods to the shipping agent who would remove the container from the premises in Armagh, complete the documentation and arrange export. When the container is full it is sealed and issued with a serial number. The seal is not broken until it reaches its destination.
13. The shipping agent would issue their invoice for the services provided and upon receipt of payment they would issue a bill of lading. BJ Trading would send a copy of the bill of lading to the relevant customer with the list of the goods.
14. BJ Trading were not experts in shipping matters and always engaged a shipping agent.
15. In some cases, the customer would arrange for the shipping of the goods themselves. The customer would arrange for the container to be delivered to the premises of BJ Trading. BJ Trading would fill the container with the goods and inform the customer when the container was ready for collection. The customer and their agent would organise export and provide a copy of the bill of lading to BJ Trading for their records. BJ Trading provides the list of goods to the customer. The shipping agent prepares all other documentation.
16. A customs declaration requires the agent to provide the following details:
 - nature of the goods,
 - name and address of the consignee, and
 - address for delivery
17. Most contact between BJ Trading and their customers in Africa is by phone. This is because very few customers in Africa have access to computers, but all have access to mobile phones.
18. When a container is ready for shipment, the payment for the goods is subtracted from the amount held in the customer's account. This is recorded in the customer's statement of account. A copy of which is sent to the customer together with the invoice.
19. The address for delivery is not always the address of the customer but rather an address closer to where the goods will be sold to as to save haulage costs. BJ Trading considers the customer has the right to require the goods to be delivered to the location of the customer's choosing. This information is provided to the shipping agent.
20. There are no written contracts for the supply of the second-hand clothes. BJ Trading understands the requirements of its customers and seeks to satisfy them. Only if the customer is satisfied with the goods will they wish to buy more. There are many suppliers of these goods and if they do not get what they want the customers will go elsewhere. Communications are mainly by phone. Some have email accounts and initial communications will begin with an email but thereafter it is mainly by phone.
21. The containers are not separately insured. The shipping agent secures insurance for the vessel and its entire contents.
22. BJ Trading had not obtained copies of the customs declarations.

23. BJ Trading did get draft bill of lading, before the final version is issued. BJ Trading did not receive draft copies of Forms C88 but began to ask for them following the meeting with Officer Baxter.

24. Customers are able to on-sell the goods generating profits of 2/3000 times the price paid for them. For this reason, customers are happy to send money in advance and for their accounts to be in surplus.

HMRC's visits and enquiries

25. Officer Baxter of HMRC made a visit to the premises of BJ Trading to review the records on 20 January 2017. Mr Dike informed him of the business practices as described above. Officer Baxter stated that he required further evidence of shipment, namely copies of the customs declarations, contracts, insurance and evidence of communication with customers.

26. Following the meeting with Officer Baxter BJ Trading obtained from their shipping agent copies of the customs declarations. It was only at that point that BJ Trading was aware of certain discrepancies in the paperwork. Some of the containers had been mis-declared. The descriptions on the bills of lading were however accurate and accorded with the lists of goods sent to the customers and the description of the goods in which BJ Trading deals. BJ Trading contacted its accountant who advised HMRC of the issue.

27. At the second meeting on 10 May 2017 at the offices of BJ Trading's accountant, BJ Trading asked Officer Baxter how the errors could be corrected. Office Baxter indicated BJ Trading could correct the data using Form C81. BJ Trading's accountant corrected the mistakes and provided the corrected forms to Officer Baxter.

28. It transpired that the errors had occurred in documentation where the shipping had been organised by the Customer. BJ Trading had assumed that as the customers had appointed shipping agents to do this on their behalf the documentations would have been completed correctly.

29. On 17 May 2017 HMRC wrote to BJ Trading informing it that the return for 09/16 contained errors. The amount of VAT stated to be due was incorrect because there are supplies in respect of which zero rating had been claimed but the official and/or commercial evidence of export does not satisfy the conditions set out in Notice 703. Further the claim for input tax on purchases of goods from the Republic of Ireland is denied because BJ Trading does not have an invoice which contains all relevant details as set out in Regulation 29(2) VAT Regulations 1995 ("**the VAT Regulations**"). This relates to the invoices from Irish Youth Clothing. When the adjustments are taken into account, VAT due is £47,377 and not £4,241.00. There is no mention in the letter of 17 May of other evidence that could be accepted in the absence of a valid invoice.

30. Officer Baxter never visited the premises of BJ Trading. The meetings he attended were at the offices of BJ Trading's accountant.

31. Mr Dike is a Nigerian national but had lived and worked in Northern Ireland for many years. The relationship between Mr Dike and Officer Baxter was not cordial and appears to have been adversely affected by prior dealings between a company of which Mr Dike had been a director. Mr Dike considered that he was being discriminated against and complained to Officer Baxter. The complaint is recorded in the note of final meeting between Officer Baxter and BJ Trading prior to the issuing of the decision.

32. Officer Baxter had 5 years' experience working for HMRC in Northern Ireland but was totally unfamiliar with the manner of conduct of business with African states.

33. Officer Baxter considered the guidance to officers where invoices are not available is to request the supplier for a copy. He considered that he followed that guidance. Mr Baxter was unaware that BJ trading could not get the copy invoices.

34. Officer Baxter accepted that the decision letter written by him does not refer to the exercise of the discretion. Further he accepted that he had not spoken to Officer Johnstone about the exercise of discretion. Officer Baxter accepted that the reference in Officer Johnstone's letter about the exercise of discretion is incorrect.

35. Officer Baxter admitted that he had not contacted his counterpart in the Republic of Ireland which would be expected if the case was one of suspected evasion or abuse.

Review of Officer Baxter's decision

36. The decision was the subject of a review by Officer Johnstone. Officer Johnstone wrote to BJ Trading on 25 August 2017 confirming the disallowance of input tax and the denial of zero rating to the goods exported. Officer Johnstone recited in the letter what he had reviewed, namely the correspondence between HMRC and the representatives of BJ Trading, and the documents provided by BJ Trading and concludes that input tax should be denied for the period 09/16. Officer Johnstone states that Officer Baxter had considered whether to exercise his discretion to allow recovery of the input tax by accepting evidence of input tax having been paid (other than a perfectly completed VAT Invoice), under Regulations 29(2)(e) VAT Regulations 1995. There is no such discussion of the matter in Officer Baxter's decision letter and none in the items Officer Johnstone took into account. In relation to the zero rating of supplies, Officer Johnstone agreed with Officer Baxter that the evidence submitted is not to the standard required by Public Notice 703, specifically paras 6.5 and 6.6. Three invoices do not mirror the details in the export evidence documents. Two of the export documents refer to supermarket goods and calcium chloride. Officer Johnstone also noted that the purchaser's address and the address for delivery do not coincide. Officer Johnstone states that he understands the explanation offered to Officer Baxter but noted there is no corroborating evidence. Officer Johnstone confirms that in his view the decision of Officer Baxter was a best judgement decision.

37. BJ Trading had provided to HMRC copies of:

A list of all customers and values of goods sold to each in the period.

Details of the transfer of funds by customers to BJ Trading in the period.

Invoices from Irish Youth Clothing which do not include their VAT Registration number or that of BJ Trading, and nor is there any reference to the goods being zero rated.

A letter dated 2 March 2017 from Phelan & Prescott which explains the procedures adopted by BJ Trading.

Invoices from Quick Recycle and Cash for Clothes where it is clear the VAT registration numbers of the suppliers are omitted.

38. Mr Baxter had asked for copies of invoices from the suppliers and Mr Dike's accountant had obtained copies and submitted them to HMRC.

39. BJ Trading has changed its processes to ensure the details on the VAT invoices, the bill of lading and the customs declarations are all consistent. Mr Dike was not an expert when he started the business but he is now much more expert.

THE LEGISLATION - AVAILABILITY OF INPUT TAX DEDUCTION

40. Regulation 29(2)(e) of the Value Added Tax Regulations 1995 deals with the documentary requirements for a successful claim for input tax in relation to goods purchased from another member state. The state in this case is the Republic of Ireland. BJ Trading is required by Regulation 29(2)(e) to hold a document required by the Revenue authority of the Republic of Ireland which shows the claimant's own VAT registration number including the GB prefix, the supplier's VAT registration number with the Republic of Ireland prefix, the consideration exclusive of VAT, the date of issue and a description sufficient to identify the goods. Regulation 29(2) is subject to the following proviso:

“provided that where the Commissioners so direct, either generally or in relation to particular cases or class of cases of cases, a claimant shall hold, instead of an invoice (as the case may require) specified in sub-paragraph (a), (b), (c), (d), (e) or (f) above, such other documentary evidence of the charge to VAT as the Commissioners may direct.”

41. The discretion afforded to Officers of HMRC under Regulation 29 is permitted by Articles 180 to 182 of the Principal VAT Directive. Article 182 permits Member States, where a valid invoice is not held, *“to determine the conditions and procedures whereby a taxable person may be authorised to make a deduction”*, in respect of input tax.

42. The period in respect of which a claim for input tax is available was determined by the CJEU in Case C-152/02 *Terra Bauberdarf-Handel GmbH v Finanzamt Osterholz-Scharmbeck*, *“(Terra Bauberdarf “)* on a reference from the UK. The CJEU confirmed in its judgment in that case that the right to input tax is established in the period in which the two conditions in Article 17 of the Sixth Directive are satisfied namely, *“that the goods have been delivered and that the taxable person holds the invoice or document which, under the criteria determined by the Member State in question.”*

THE LEGISLATION- AVAILABILITY OF ZERO RATING

43. Article 146 of the Principal VAT Directive requires Member States to exempt certain transactions from VAT. Relevantly Article 146(1)(b) provides:

“Member states shall exempt the following transactions:

(a).....

(b) the supply of goods despatched or transported to a destination outside the Community by or on behalf of a customer not established within their respective territories, ...” [Our Emphasis added].

44. Article 131 permits member States to introduce regulations to prevent evasion, avoidance or abuse.

45. Section 30(8) VAT Act 1994 (*“the VAT Act”*) permits the introduction of regulations that provide for zero rating of goods 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 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]

46. Regulation 129 of the VAT Regulations provides that supplies will, subject to certain conditions, be zero rated if:

“(1) ...the Commissioners are satisfied that-

(a) goods intended for export to a place outside the member States, have been supplied, otherwise than to a taxable person, to-

(i) a person not resident in the United Kingdom,

(ii) a trader who has no business establishment in the United Kingdom from which taxable supplies are made, or

(iii) an overseas authority, and

(b) the goods were exported to a place outside the member States.”

47. Public Notice 703 deals with indirect exports and some of the paras have legal effect. It provides at para 3.4:

“A supply of goods to an overseas customer (see paragraph 2.4) sent to a destination outside the EC is liable to the zero rate as an indirect export where:

- overseas customer*
- exports the goods from the EC within the specified time limits (see paragraph 3.5), and*
- Obtains and gives you valid official or commercial evidence of export as appropriate (see paragraphs 6.2 and 6.3) with the specified time limits,*

And you:

- Keep supplementary evidence of export transactions (see paragraph 6.4) and*
- Comply with the law and the conditions of this notice.”*

48. Paragraphs 6.1 to 6.4 specify what proof is required to validate an indirect export. Official transport evidence or commercial transport evidence may be provided, and equal weight will be given to each category but in each case, it must be supported by supplementary evidence to show that a transaction has taken place and that the transaction involves goods that have been physically exported.

49. Examples of the evidence are set out in paragraphs 6.2 to 6.4 all of which have legal effect, and include:

Paragraph 6.2 - Official evidence

- To include evidence produced by customs systems e.g. Goods departed messages

Paragraph 6.3 – Commercial transport Evidence

- To include authenticated evidence such as Waybills, PMX/PIEX International consignment notes, Bills of Lading, Certificates of Shipment (including full details of consignment) and /or International Consignment Notes:

Para 6.4 - Supplementary Evidence

- To include Customers Order, Sales Contract, Inter-Party Correspondence, Copy of Export sales Invoice, Advice Note, Consignment Note, Packing List, Insurance, and freight Charges Documentation, Evidence of Payment and Evidence of Receipt of Goods Abroad.

Para 6.5 sets out what must be shown as proof of export and has the force of law.

“The evidence to obtain as proof of export, whether official or commercial, or supporting must clearly identify:

- *The supplier*
- *The consignor (where different from the supplier*
- *The customer*
- *The goods*
- *An accurate value*
- *The export destination*
- *The mode of transport and the route of the movement.”*

Evidence required to support export where the shipment is organised by the customer is set out at paragraph 6.6 but this paragraph does not have force of law. The note indicates that the standard of evidence required to substantiate VAT zero rating when the supplier does not arrange the export is high.

50. Section 73 VAT Act enables HMRC to make an assessment where a taxpayer has not filed a return or a complete return, or failed to keep proper records. It provides:

“Where a person has failed to make any returns required under the Act....or to keep any documents and afford facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amounts of VAT due from him to the best of their judgment and notify him.”

51. The general rule regarding the timescale for making such assessments is set out in section 73(6) VAT Act and requires that an assessment must be made within 2 years of the end of the prescribed accounting period, or one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.

52. An assessment is a best judgment assessment if it satisfies the criteria identified by Woolf J in *Van Boeckel v Customs and Excise Commissioners* (“**Van Boeckel**”) [1981] UKHC STC 290:

- The Commissioners should not be required to do the work of the taxpayer
- The Commissioners must perform their function honestly and bona fide
- The Commissioners should fairly consider all the material before them and on that material, come to a decision which is reasonable and not arbitrary, and
- There must be some material before the Commissioners on which they can base their judgment.

53. The Tribunal may not treat an assessment as invalid just because the members disagree as to how the Commissioners’ judgment should have been exercised. See Carnwath J in *Rahman v Customs and Excise Commissioners* (“**Rahman**”) [2002] EWCA Admin 627.

INPUT TAX DEDUCTION – BJ TRADING’S POSITION

54. BJ Trading says that input tax deduction in the period 09/16 should be allowed notwithstanding that the invoices issued by suppliers in the Republic of Ireland failed to record the VAT registration numbers of the supplier and BJ Trading and the prefixes because:

(1) Officer Baxter’s decision of 17 May 2019 refusing a claim to input tax is silent on the issue of the possible exercise of discretion afforded by Regulation 29(2) of the VAT Regulations to accept a document in the absence of a valid invoice. BJ Trading point out that

HMRC's own guidance in Statement of Practice dated March 2007, indicates that where there is sufficient evidence that a supply of goods has taken place the officer may consider the exercise of the discretion in allowing a claim for input tax credit.

(2) Officer Johnstone in his review decision of 25 August 2017, upheld the original decision to deny the input tax claim on the basis that there was no valid invoice as the document produced lacks the VAT registration numbers of the parties and the prefixes. Further Officer Johnstone records that Officer Baxter "*has considered the exercise of the discretion*" on the basis of alternative evidence and states, "*He has concluded that there is insufficient evidence in this case to allow the exercise of discretion...I agree with his conclusion on the basis of information available*". As there is no mention of the exercise of discretion in Officer Baxter's decision, Officer Johnstone cannot be satisfied that Officer Baxter had considered the exercise of discretion. Officer Baxter agreed at the hearing that this is an incorrect statement. Officer Baxter did not consider the discretion because he was waiting for the supply of copy invoices.

(3) In *Terra Baubedarf* the CJEU held that the right to deduct input tax under Article 18(2) of the Sixth Directive had to be exercised where two conditions are satisfied namely (i) that the goods have been delivered and (ii) the taxable person holds an invoice or other document which may serve as an invoice. BJ Trading had produced evidence that the goods had been delivered (See pages 87-96,124,230,289,315 of the Bundle) and had provided invoices/documents which may be considered as an invoice (See pages 87-96 of the Bundle).

(4) Following the Court of Appeal decision in *GB Housley v The Commissioners of Her Majesty's Revenue & Customs* ("**Housley**") [2016] EWCA Civ 1299 at [80] [82], [87] and [89], HMRC is required to consider alternative evidence and failure to do so renders the decision of Officer Baxter flawed. As Officer Baxter had admitted he had not considered the exercise of discretion, he had failed to consider relevant alternative evidence, his decision is flawed. BJ Trading's appeal against the assessment must be allowed and the amended assessment should be discharged.

INPUT TAX DEDUCTION – HMRC'S POSITION

55. HMRC consider the burden of proof rests on BJ Trading to demonstrate that HMRC had failed to exercise the discretion afforded to HMRC under Regulation 29. The standard of proof is the civil standard. BJ Trading had failed to do so.

56. HMRC considers that all the "invoices" from Cash for Clothes Westmeath, Irish Youth Clothing Limited and Quick Recycle Monaghan in the period 09/16 were not valid invoices as they omitted the necessary VAT registration numbers and Country Prefixes and EC declarations of the parties and therefore do not satisfy the requirement of Regulation 29(2)(e) of the VAT Regulations.

57. HMRC say that the evidence relied upon to indicate that goods had been received from the Republic of Ireland include weighbridge documents but the documentation lacks credibility as HMRC say BJ Trading had been unable to explain some of the details.

58. HMRC say they had afforded BJ Trading with the opportunity to provide further information and documentation to support their claims which was fully taken into account. HMRC had considered whether to exercise the discretion and concluded that it should not be so exercised due to discrepancies between the EC Declarations made by the Appellant and their suppliers, and concerns about the weighbridge.

59. HMRC say that the jurisdiction of the Tribunal is supervisory only and that if discretion should be exercised it is for HMRC to do so following the decision in *John Dee Ltd* [1995] EWCA Civ 62, STC 941 an extract of which is at para [50] of the decision of the Court of

appeal in *Housley*. Given the lack of evidence provided by BJ Trading Officer Baxter would reach the same conclusion as he did in 2019.

INPUT TAX DEDUCTION _ DISCUSSION

60. Burden of Proof - It is clear that the burden of proof lies with BJ Trading to demonstrate that Officer Baxter failed to exercise the discretion. Officer Baxter’s decision does not mention the issue of the discretion. Officer Baxter admitted that he had not considered exercising the discretion conferred by Regulation 29(2) before issuing his decision (as he was waiting for copies of invoices to be supplied), and he accepted that the reference to him having done so in Officer Johnstone’s decision is incorrect. We therefore conclude that BJ Trading has discharged the burden of proof. The discretion has not been considered, let alone exercised.

61. Jurisdiction of the Tribunal – We note the reliance of HMRC on the decision in *John Dee Ltd* that the jurisdiction of this Tribunal under an appeal such as this is supervisory only so that this Tribunal may not substitute its own decision on how the discretion ought to be exercised. We also note that Officer Baxter considers he would reach the same conclusion again so no other decision could be substituted.

62. The issue before this Tribunal is not whether the exercise of the discretion was reasonable or whether, if the discretion were to be exercised, the same conclusion would be reached. The issue is whether the discretion conferred by Regulation 29(2) has been exercised by HMRC at all and the consequences of failure to do so. The issue was discussed in the Court of Appeal in *Housley*. At [82] Gloster LJ rejected that the starting point is that the assessment is valid unless and until it is shown that the taxpayer is entitled to have the discretion exercised in their favour. Officer Baxter admitted he did not exercise the discretion available under Regulation 29(2). His failure to do so and to consider the alternative evidence renders the decision flawed.

63. We allow the appeal against the assessment in relation to the denial of the deduction for input tax for the period 09/16 in the sum of £20,138.07,

AVAILABILITY OF ZERO RATING - BJ TRADING’S POSITION

64. BJ Trading rely on Article 146(1)(b) of the Principal VAT Directive which mandates that member States shall exempt from VAT supplies of goods despatched or transported to a destination outside the Community, by or on behalf of a customer not established in the Community. That article is implemented by Section 30(8) VAT Act which simply requires the Commissioners to be satisfied that the goods “*have been or are to be exported to a place outside the member states*”. Regulation 129 and Public Notice 703 give effect to that intention by setting out the specific conditions and evidence required to enable the Commissioners to be satisfied.

65. There are six transactions under consideration in respect of which HMRC consider there were inconsistencies in the documentation which justified the denial of zero rating.

	Date	Recipient of Supply	Nature of supply	Alleged deficiencies
1.	12/07/2016	Kreeson Ventures Ltd	Used clothes	1. Description of goods on C88 is calcium Carbonate 2. Consignee is Mozi Chukwe
2.	01/09/2016	Kreeson Venture Ltd	Used clothes	1. Description of goods as supermarket items

				2. Consignee Mac Resolute Services Ltd (Olodi Apapa)
3.	30/09/2016	Fashion For Fair Trading		1. Address absent from invoice 2. Consignee on shipping doc Ejere Okoronkwo 3. Discrepancy between the weight of goods reported on shipping documents and verified Gross Mass as weighed in port
4.	21/11/2016	Fashion For Fair Trading		1. Shipping Docs state consignee as Chumik Global Logistics 2. Payment records inconsistent
5.	17/02/2016	Eke Okoroafor	Used clothes	1. Address absent from invoice 2. Shipping Docs state Consignee is Meiumd Access Global Ventures
6.	30/03/2017	Reuben Orji.	Used clothes	1. Address absent from invoice 2. Shipping Docs show consignee as Alfatek

66. BJ Trading say that in each case BJ Trading has provided to HMRC sufficient commercial and supplementary evidence to satisfy the Commissioners that in each case the goods were exported to a person outside of the Community and in consequence the assessments raised by HMRC were not best judgment assessments. Specifically, the following evidence was provided in respect of these transactions and the references below are to page numbers in the Bundle:

(1) Transaction 1:

- a. A letter from Phelan & Prescott (BJ Trading's accounting adviser) dated 7 April 2017, enclosing documentation [p.101] which provided commercial and supplementary evidence demonstrating export of the goods outside the Community
- b. An invoice [p.103 & 105]
- c. A bill of lading identifying Mozi Chuckwe as consignee on behalf of Kreeson and content of the container when it left the UK [p.106]
- d. Export Document showing container number SLSU6336842 and gross mass 26,000Kg [p.107] demonstrating consistency of product description
- e. Shipping tracking information [p.293-294] evidencing shipment and exportation of container SLSU633842
- f. The erroneous detail of the content was made by an agent and not BJ Trading. Phelan & Prescott tried to amend the description as is permitted by form C81 but this required permission from HMRC which was not forthcoming and inhibited BJ Trading's right to claim zero rating of the supplies.

(2) Transaction 2:

- a. By letter from Phelan & Prescott of 7 April 2017 documents were provided to HMRC which provided commercial and supplementary evidence to demonstrate export of the goods outside the Community [P.101]
- b. An invoice [p.108-9]
- c. A bill of lading showing Mac Resolute Services was acting as consignee on behalf of Kreeson [p.110]
- d. Export Document showing the container number CARU984280 and gross mass as 26,000 Kg showing product consistency [p.111]
- e. Phelan & Prescott letter enclosing C81 amended customs declaration [p.238-242]. This changed the goods to “used clothing”. The original customs document had been prepared by an agent.
- f. Shipping tracking information showing export of container CARU989428 [p.298 and 237]

(3) Transaction 3

- a. By letter from Phelan & Prescott of 7 April 2017 documents were provided to HMRC which provided commercial and supplementary evidence to demonstrate export of the goods outside the Community [P.101]
- b. An Invoice [p.117&118]
- c. A bill of lading showing E- EJ Tex International Lt as consignee. BJ Trading had informed Officer Baxter that Fashion Fair Trading Co had requested the goods be sent to EJ Tex International Limited
- d. A statement of Account showing offset of monies held in the account of Fashion Fair Trading which is consistent with the figure in the Fee Advice (£41,570.50). [p.131]

(4) Transaction 4

- a. By letter from Phelan & Prescott of 7 April 2017 documents were provided to HMRC which provided commercial and supplementary evidence to demonstrate export of the goods outside the Community [P.101]
- b. An Invoice [p.151&152]
- c. Exportation documents showing the container number CAIU834878 and gross mass 26,000Kg, demonstrating consistency of product. [p.154]. The receipt of payments in smaller sums over time is normal in Africa as access to foreign exchange is limited as explained by Phelan & Prescott by letter of 2 March 2017 [p.634].
- d. Evidence of consistency of payment – the fee advice [p.151] and the Statement of Account [p.161]

(5) Transaction 5

- a. By letter from Phelan & Prescott of 7 April 2017 documents were provided to HMRC which provided commercial and supplementary evidence to demonstrate export of the goods outside the Community [P.101]
- b. An invoice [p.169-170]
- c. A bill of lading showing Meiumd Access Global Ventures as Consignee [p171]

(6) Transaction 6

- a. Letter from Phelan & Prescott of 7 April 2017 documents were provided to HMRC which provided commercial and supplementary evidence to demonstrate export of the goods outside the Community [P.101]
- b. An invoice [p.177-178]

67. Most of the transactions carried out by BJ Trading are not supported by written contracts. Oral agreements were made by telephone. Sales are made to the highest bidder. BJ Trading does not arrange insurance. Customers rely on the insurance of the ship. Monies are received in small sums over a period of time because of the lack of access to foreign currency in this part of Africa. This is the normal method of trading in used clothing in this part of Africa. Albeit it may not be the standard model used in the EU. BJ Trading has provided the evidence of export. The assessments were made in disregard of the evidence and are not therefore best judgment assessments.

68. The estimated assessments should be set aside because they were unreasonable and/ or capricious or motivated by hostility and prejudice.

69. Officer Baxter demonstrated hostility towards Mr Dike a Nigerian national as can be seen from the meeting notes. Mr Dike had been an officer of another company that had gone into liquidation and HMRC took Umbridge that Mr Dike had started a new business.

70. The failure of Officer Baxter to provide the code to enable BJ Trading's agent to make corrections via form C81 online is an example of the unfair treatment Mr Dike had suffered.

71. Mr Baxter had no experience of the conduct of business in West Africa. His experience involved working as tax specialist handling the affairs of small taxpayers. Officer Baxter was unable to accept the business model involving oral contracts and the provision of payments based upon trust. Officer Baxter brought this prejudice to his approach to assessing the evidence.

72. BJ Trading obtained copies of invoices with the correct information. They were supplied to Officer Baxter. Officer Baxter did not take them into account. Nor did Officer Baxter visit the premises of BJ Trading.

73. There is a basket of evidence available to demonstrate that the goods had actually been exported to a person outside the EU. What level of evidence is sufficient? Officer Baxter admitted in cross examination that there was some supplementary evidence available.

74. In relation to Kreeson it is true that some of the details were missing of the address and the consignee but these documents were not created by BJ Trading. Mr Dike was unaware the details were incorrect. There is ample evidence to show the goods were transported outside the Community.

75. In relation to the nature of the goods, the containers are taken by a shipping agent and customs declarations are made. No checks of the content of the containers are made by HMRC at the point of export. This is unacceptable.

76. In relation to the nature of the trade, it is a family run business drawing on his background contacts in Africa. BJ Trading's customers do not have bank accounts They use bureau de change to enable them to buy foreign currency. The Banks do not deal with them. It should not be inferred or implied that that the trade involves avoidance or evasion just because the business model is different. Officer Baxter fell into this prejudicial manner of thinking.

77. The estimated assessments should therefore be set aside.

AVAILABILITY OF ZERO RATING - HMRC's POSITION

78. HMRC say there are 7 transactions. The additional transaction is dated 20/09/2016 to Diorama where the description of the goods is misdescribed.

79. HMRC point to Article 131 of the Principal VAT Directive which permits member States to lay down conditions to ensure correct and straight forward application of the exemptions and prevent possible evasion, avoidance or abuse. Section 30(6) of the Vat Act permits zero rating where HMRC are satisfied goods have been shipped outside of the community but only *“if such other conditions, if any, as may be specified in regulation or the Commissioners may impose are fulfilled.”* Further Regulation 129 of the VAT Regulations adds nothing to section 30(6) and refers to *“such other conditions as they may impose”*. The further conditions are found in Public Notice 703. Para 3.4 is in point where there is an indirect export, evidence must be held as set out above at [45].

80. To zero rate an export *“satisfactory official or commercial evidence”* must be obtained. Para 6.5 of Public Notice sets out the detail that must be capable of being identified from the documentation as set out above at [46] and [47] above There is no right to zero rating. It is dependent on conditions being satisfied. In relation to the six transactions identified by BJ Trading, HMRC say BJ Trading has been given numerous opportunities to provide the satisfactory evidence and have not provided explanations acceptable to HMRC. It is not unreasonable to expect BJ Trading to keep a complete set of business records which would include written contracts, insurance arrangements, transport of goods and clear audit trails of payment.

81. The statements of account do not contain details of instructions from the buyers nor is there any clear obvious guarantees confirming that the supplies would be made. Therefore, these statements of account were not supplementary evidence.

82. The supplementary evidence failed to demonstrate correspondence between the supplier and the recipients of the supplies, the payments were sporadic and illogical, and there was a lack of documentary evidence showing a clear audit trail.

83. HMRC say that the officers carefully considered the evidence and concluded that the basket of evidence was insufficient. HMRC says the records of BJ trading cannot be relied upon and therefore the assessments were best judgment assessments within section 73 VAT Act, see [51] above and satisfy the criteria identified by Woolf J in *Van Boeckel*, see [53] above. In consequence the Tribunal may not treat the assessment as invalid just because the Tribunal disagrees as to how the Commissioners' judgment should have been exercised. There is no evidence that the assessment had been reached *“dishonestly, vindictively or capriciously, or was a spurious estimate or guess in which all elements of judgment were missing or was wholly unreasonable. Short of such a finding there was no justification for setting aside the assessment.”* See Carnwath J in *Rahman*.

AVAILABILITY OF ZERO RATING – DISCUSSION

Conditions necessary for zero rating

84. The terms of Article 146 are mandatory. Member states **“shall”** exempt transactions where a supply of goods has been despatched or transported to a destination outside the community by or on behalf of a person who is not established in the Community.

85. The ability of Member States to impose conditions, as permitted by Article 131, is confined to conditions necessary to prevent evasion, avoidance and abuse.

86. Regulation 129 of the Regulations (introduced under section 30(8) VAT Act) does nothing more than require evidence to enable the Commissioners to satisfy themselves that the

goods intended for export to a place outside the Community are in fact exported to such a place and to a person who is resident outside the Community and has no establishment in the UK. Notice 703 identifies the categories of evidence that may be relied upon to support a claim that goods have been so exported. The categories include Official evidence (produced by Customs systems) or Commercial evidence (such as Bills of lading, Certificates of shipment or consignment notes) each category will be given equal weight and, in each case, there should be supplementary evidence to show the transactions had taken place and that the goods have been physically exported.

87. BJ Trading has provided to HMRC commercial evidence of the transactions.

(1) In every case BJ Trading has provided evidence of the payments for the goods in the form of the financial statements which shows the price paid which corresponds to the value of the supply in the return.

(2) BJ Trading has provided Commercial evidence of the weight of each container, 26,000Kgs.

(3) BJ Trading has provided evidence of the purchaser and shown that the consignee of the Container was either the customer or an agent of the Customer.

(4) The goods sold were accurately described in the Official Documents as “used clothing” in 4 of the 6 transactions. BJ Trading did not complete the customs documents in the cases where the goods are inaccurately described but had corrected the transaction documents once the error had been pointed out.

88. BJ Trading provided Commercial evidence that the goods were exported to a place outside the Community in each of the six cases.

89. BJ Trading has provided supplementary evidence of the business model as described at [7]-[23] above to support the Commercial evidence referred to at [87] and [89] above.

90. In the opinion of the Tribunal, the Commissioners had received a significant body of evidence to support the official documents to prove the transactions had taken place and the goods had been exported.

Jurisdiction of the Tribunal

91. The Tribunal’s jurisdiction in the case of appeals under section 83 VAT Act is supervisory only. The Tribunal can only set aside the decision of the Commissioners. The Tribunal may not remake the decision.

92. It is well understood principle of English law the Tribunal may set aside a decision of the Commissioners where the Commissioners have taken into account irrelevant matters or failed to take into account relevant matters, see Greene M.R., final Para, in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] EWCA Civ 1 (“**Wednesbury**”).

93. The issue of whether a best judgment assessment may be set aside was specifically considered in *Van Boeckel* where Woolf J identified that the following four factors that must be taken into account in assessing whether an assessment was a best judgment assessment:

- The Commissioners should not be required to do the work of the taxpayer
- The Commissioners must perform their function honestly and bona fide
- The Commissioners should fairly consider all the material before them and on that material, come to a decision which is reasonable and not arbitrary, and
- There must be some material before the Commissioners on which they can base their judgment.

94. The Tribunal may not treat an assessment as invalid just because the Tribunal disagrees with the assessing Officer as to how the Commissioners' judgment should have been exercised. Evidence is required that the assessment had been reached without fair consideration of the material before the Commissioners.

95. HMRC's conclusion was that the records of BJ Trading were incomplete and cannot therefore provide supplementary evidence to support the commerciality of the transactions and of the export of the goods because:

- (1) there were no written contracts
- (2) there were no guarantees
- (3) BJ Trading did not organise insurance of the goods
- (4) the Statements of Account did not record written instructions to transfer monies

96. That conclusion is wrong for the following reasons:

(1) There is no requirement under English law that contracts for the sale of goods should be in writing. As no evidence was produced of the law in Northern Ireland, we assume that it is the same as English law.

(2) The goods were insured by the shipping agent and so no separate insurance of the goods by BJ Trading would be required.

(3) That the Statements of Account did not contain written instructions from the customer should not detract from their probity and value as supplementary evidence of the transactions as they did reflect the receipts and deductions in the amounts equal to the value of the transactions between the parties.

(4) There is no requirement under English law that a transaction for the sale of goods or payment mechanisms of the sort employed by the parties in this case, should benefit from a guarantee.

97. Following *Van Boeckel*, *Wednesbury*, and *Rahman*, a decision that excludes valid supplementary evidence is wholly unreasonable and may be set aside.

98. In relation to the issue of whether Officer Baxter fell into a prejudicial manner of thinking in his failure to accept cultural differences and had demonstrated ill feeling towards Mr Dike who was known to him from a previous failed business venture, we would wish to see a transcript of the hearing to consider in detail Officer Baxter's replies to questions in cross examination. If the case were to be appealed and this issue was in point, we would wish to receive a transcript and provide a finding on that point.

99. For the reasons set out above we set aside the best judgment assessments in relation to the claim for zero rating in respect of the following periods and amounts:

12/16 - £23,125/61

03/17 - £11,947.29

06/17 - £10,453.64

DECISION

100. We allow the appeals and set aside the best judgment assessments of the Commissioners for the periods 09/16 relating to denial of input tax deduction and for the periods 12/16, 03/17 and 06/17 relating to denial of zero rating.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

101. 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.

**HEATHER GETHING
TRIBUNAL JUDGE**

RELEASE DATE: 01 JUNE 2021