



Neutral Citation: [2022] UKFTT 335 (TC)

Case Number: TC 08592

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2016/07216

*VALUE ADDED TAX – Liability for import VAT – C18 Post Clearance Demand Note – whether Appellant was the Declarant for the purposes of Article 4(18) and Article 201 Council Regulation (EEC) No 2913/92 of 12<sup>th</sup> October 1992 (the Community Customs Code) – whether Appellant was acting as a direct agent for a named principal.*

**Heard on:** 2<sup>nd</sup> September 2022  
**Judgment date:** 13<sup>th</sup> September 2022

**Before**

**TRIBUNAL JUDGE ROBIN VOS**

**Between**

**BMW SHIPPING AGENTS LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: **NIGEL GIBBON** of Nigel Gibbon & Co

For the Respondents: **HOWARD WATKINSON** of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. The Appellant, BMW Shipping Agents Limited (**BMW**) describes its business as “international freight forwarders”. It is based in Southampton.
2. On 18<sup>th</sup> April 2016, HMRC sent BMW a form C18 post clearance demand note in respect of import VAT totalling just over £3million. The import VAT relates to goods received in the UK by BMW between April 2013 and March 2016 from suppliers in China and which were immediately forwarded to the ultimate recipients of the goods in continental Europe. BMW had submitted Customs declarations claiming onward supply relief (**OSR**). At the time, OSR removed any liability to import VAT where goods were imported into the UK by a UK VAT registered importer who then, shortly afterwards, made a zero rated supply of those goods to a person registered for VAT in another EU member state.
3. HMRC’s view is that BMW did not qualify for OSR as BMW had not itself made a supply of the goods to the end customers in continental Europe. They consider this to be the case since BMW did not own the goods (and so could not supply them directly) and any supply which was made was not in BMW’s own name, even as agent for another party.
4. BMW accepts that OSR is not available and that, as a result, a liability to import VAT has arisen. However, it appeals against the post clearance demand note on the basis that it was acting as agent for another party and that, in these circumstances, it is the principal rather than the agent who is liable for the import VAT.

### LEGAL FRAMEWORK

5. The only question which the Tribunal has to determine is whether BMW is liable for the import VAT. It is not necessary to consider in any detail the reasons why OSR is not available given that BMW accepts that this is the case. I do however need to mention very briefly the key requirement for OSR as it is relied on by Mr Watkinson, on behalf of HMRC, in support of his argument that BMW is liable for the import VAT.
6. As far as domestic law is concerned, the main requirements for OSR are contained in Regulation 123 of the Value Added Tax Regulations 1995. Regulation 123(a) requires the onward supply to be made by a “taxable person” (i.e. someone who is registered for VAT in the UK). The effect of Regulation 123(c)(2) is that the importer must be importing the goods in the course of a supply of those goods by that person to somebody who is registered for VAT in another EU member state.
7. Section 15(2)(b) Value Added Tax Act 1994 identifies the importer as being the person who would be liable for the import VAT.
8. These provisions do not answer the question as to who is in fact liable for the import VAT. They do however make it clear that OSR is only available if the importer (who is the person who must make the onward supply) is somebody who is registered for VAT in the UK and would be liable for the import VAT if any were due.
9. Turning to liability for the import VAT, this is governed by council regulation (EEC) No. 2913/92 of 12<sup>th</sup> October 1992, also known as the Community Customs Code (the **Customs Code**).
10. The Customs Code uses the term “Customs Debt” which includes import VAT. The person liable for a Customs Debt is referred to as a “Debtor” (Articles 4(9) and 4(12) of the Customs Code).

11. Article 201 of the Customs Code states that the Debtor is “the Declarant”. This is defined in Article 4(18) of the Customs Code as:

*“... the person making the Customs declaration in his own name or the person in whose name a Customs declaration is made”*

12. The position is straightforward if the person making the Customs declaration is acting as principal on their own behalf; that person will of course be the Declarant. Article 5 of the Customs Code deals with the situation where a person acts as an agent or representative. In particular, paragraph 2 of Article 5 identifies two forms of representation as follows:

*“- direct, in which case the representative shall act in the name of and on behalf of another person, or*  
*- indirect, in which case the representative shall act in his own name but on behalf of another person.”*

13. The effect of this is that where the agent is a direct representative, the Declarant is the principal and not the agent. On the other hand, if the agent is an indirect representative, the Declarant is the agent as he acts in his own name, albeit on behalf of another person.

14. It is not suggested by either party that BMW acted as an indirect representative. HMRC’s position is that BMW completed the relevant declarations on the basis that it acted in its own name and on its own behalf. BMW however says that it was acting (at least in relation to some consignments – as to which, see further below) as the direct representative of another party.

15. Both parties agree that in determining who is right, the Tribunal should have regard only to the Customs declarations which were made by BMW and should not investigate, based on external evidence, the true nature of the relationship between BMW and any other person on behalf of whom it may have been acting.

16. I accept that it is likely that this follows from the definition of “Declarant” (see [11] above) which refers specifically to the Customs declaration. It does also find some support in the judgment of the European Court of Justice in *Ilumitrónica* (Case C251/00 – 14<sup>th</sup> November 2002) which observed at [33] (albeit in a rather different context) that:

*“The circumstance that the Declarant acted in good faith and with care, unaware of any irregularity which prevented the collection of duties which he should have paid if that irregularity had not been committed, has no bearing on his capacity as the person liable, which results exclusively from the legal effects associated with the formality of declaration.”*

17. I do however note that this was not a point on which I heard any argument or submissions from the parties.

18. The appeal rights in relation to a post clearance demand note are those contained in sections 13A-16 Finance Act 1994. The Tribunal has a full appellate jurisdiction (section 16(5)). The burden of showing that the grounds of appeal are established is on the appellant (section 16(6)).

#### **THE EVIDENCE AND THE BACKGROUND FACTS**

19. The evidence consisted primarily of a bundle of documents and correspondence. The bundle also contained witness statements from three witnesses being the HMRC officer who made the original decision, Michael Phillips, BMW’s director, Janet Etherington and an employee of BMW who was involved in relation to the relevant shipments, Roger Bishop.

20. In addition, Mr Phillips provided a further witness statement on the day before the hearing. BMW did not object to this witness statement, the purpose of which was to provide

further evidence in relation to the basis on which some of the Customs declarations in question were made by BMW.

21. Perhaps not surprisingly, given the parties' agreement that the point to be determined by the Tribunal rests solely on the content of the Customs declarations, neither party wished to cross examine any of the witnesses. I therefore accept the evidence contained in their witness statements.

22. The background facts are not in dispute and can be stated relatively briefly.

23. In around 2012, BMW entered into an agreement with a lady in Germany, Chen Jianxing, to act as shipping agents/freight forwarders for the import of goods into the EU from China. Ms Jianxing was a director of two companies in Germany. It is not clear whether the contract was with the German companies or with Ms Jianxing personally. However, for the purposes of this appeal, that is not material.

24. Each consignment of goods were sold by the supplier in China to a wholesaler in continental Europe.

25. The consignments were dispatched from China to the UK where they were received by BMW. BMW submitted the relevant Customs declarations on the basis that OSR was available (so that no import VAT was due), paid the Customs duty which was due and arranged for the consignments to be forwarded to Europe in accordance with the instructions given to it by Ms Jianxing.

26. BMW had no ownership interest in the goods and no involvement in the supply of the goods to the ultimate recipients. Its sole involvement was to arrange for the goods to clear customs in the UK and to arrange for the them to be forwarded to the customers in Europe. It invoiced Ms Jianxing for the customs duty and for its freight forwarding services.

27. Over the three year period covered by the post clearance demand note, there were several thousand consignments. The precise number is not known but between April 2013 and November 2014, there were 1,789 Customs declarations representing about £850,000 out of the total import VAT of just over £3m said to be due.

#### **THE CUSTOMS DECLARATIONS**

28. The Customs declarations are made electronically on form C88. The Tribunal only had a sample of nine of the declarations as part of the evidence, eight produced by HMRC and one by BMW.

29. All of the Declarations are made on the basis that OSR is available. The parties identified three parts of the declarations which are particularly relevant:

(1) Box 8 – this contains the details of the consignee. In each case, this is shown as Ms Jianxing but care of BMW and quoting BMW's VAT registration number.

(2) Box 14 – this gives details of the Declarant/representative. In each case, this is shown as BMW together with its VAT number. The Box however also has a numerical Code which identifies the capacity in which the named person is acting. Code 1 means that the person is acting on its own behalf as principal; Code 2 signifies that the person is acting as the direct representative of another person; Code 3 means that the person is acting in its own name but as the indirect representative of another person.

(3) As explained in paragraphs [12-13] above, if Code 1 or Code 3 is entered, this means that the person whose details appear in Box 14 is the Declarant. If Code 2 is shown, on the face of it this signifies that the person whose details are shown is making the declaration on behalf of somebody else who would then be the Declarant.

The Eight declarations produced by HMRC all show Code 1. The one example produced by BMW shows Code 2.

(4) Box 44 – this Box is designed to support the eligibility for OSR. The Box must contain the VAT number of the person importing the goods and the VAT number of the person to whom the goods are being supplied in another member state. The VAT number of the person importing the goods is to be preceded by “Y040GB” if the goods are imported on that person’s own behalf and “Y042GB” if they are being imported as agent for somebody else (see paragraph 2.3 of VAT Notice 702/7 – which has the force of law).

In each case, the declaration has been completed by BMW using the “Y040” prefix, indicating that the goods are imported on their own behalf and not on behalf of somebody else. The VAT number given is BMW’s VAT number.

30. At the hearing, Mr Gibbon conceded on behalf of BMW that, where the form C88 contained Code 1 in Box 14 (signifying that the declaration was made by BMW in its own name and on its own behalf), BMW was indeed liable for the import VAT as the Declarant.

31. Part of the additional evidence introduced by Mr Phillips in his second witness statement shows that all of the declarations made up to 3<sup>rd</sup> November 2014 used Code 1. The form C88 provided by BMW using Code 2 is dated 14<sup>th</sup> December 2015. The eight examples provided by HMRC range in date from August 2015 to February 2016. It is therefore clearly not the case that BMW change from Code 1 to Code 2 at a particular date and continued to use Code 2 consistently.

32. The Tribunal in any event agreed that it should determine, as a matter of principle, whether or not BMW is liable for the import VAT in relation to the declarations where Code 2 has been used. If the conclusion is that BMW is liable, that is the end of the matter. However, if the conclusion is that BMW is not liable for the import VAT where Code 2 has been used, it will be necessary for a further investigation to be carried out in order to identify those consignments where the declaration has been made using Code 2.

#### **THE PARTIES’ SUBMISSIONS**

33. Mr Gibbon’s position on behalf of BMW is straightforward. He submits that, as OSR is not available, Box 44 of the Customs declaration (which is only relevant to a claim to OSR) should be ignored. To the extent material, he says this leaves Box 14 of the Customs declaration which, using Code 2 identifies BMW as acting as a direct representative on behalf of another person and Box 8 which identifies Ms Jianxing as the consignee and therefore the person on whose behalf BMW was acting and in whose name customs declaration was, in reality, being made. On this basis, he concludes that the Declarant (and therefore the person liable for the import VAT) is Ms Jianxing.

34. It is accepted by Mr Gibbon that using BMW’s VAT number in Box 8 was a mistake but he argues that such a mistake does not affect the question as to whether BMW was acting as a direct representative of another person and, if so, the identity of that person.

35. In support of his submissions, Mr Gibbon refers to HMRC’s review letter in which the review officers concludes:-

*“The declarations were completed on direct representation terms. Code “2” was declared in Box 14 of CA88. This means that the declaration was completed in the name of and on behalf of the Declarant (in this case Chen Jianxing c/o BMW Shipping Agents Limited).”*

36. Mr Watkinson on the other hand argues that Box 44 of the Customs Declaration is determinative. He draws attention to paragraph 2.3 of VAT Notice 702/7 (which has the force

of law). This makes it clear that the prefix “Y040GB” is to be used if a person is importing the goods on their own behalf and the prefix “Y042GB” is to be used if goods are being imported as agent for somebody else. In this case, Box 44 has been completed using the “Y040GB” prefix and BMW’s VAT number. This, says Mr Watkinson, makes it clear that BMW was declaring that it was importing the goods on its own behalf.

37. In Mr Watkinson’s view, this is supported by the fact that, although Ms Jianxing is mentioned in Box 8, the address given is BMW’s address and the VAT number specified is BMW’s VAT number.

38. To the extent that there is a discrepancy between the use of Code 2 in Box 14 (indicating that BMW was acting as a direct representative of another person) and the information given in Box 44 (indicating that BMW was importing the goods on its own behalf), Mr Watkinson submits that Box 44 should be given precedence given that the section of VAT Notice 702/7 which deals with the way in which Box 44 should be completed has force of law and is not simply guidance.

39. In further support of his submission, Mr Watkinson makes the point that OSR can only be claimed (even by an agent) by a person who is importing the goods in their own name. Given that the Customs Declaration contained a claim for OSR, he submits that it must follow that BMW was making the declaration in its own name.

40. Mr Watkinson also observes that, in its correspondence with HMRC, BMW also clearly thought that it was acting as the importer of the goods. For example, in an email to HMRC, Mr Chris Davies, the operations manager of BMW at the time, stated that “We have discontinued the “IMPORT” status of our organisation... We now operate only as Agents.”

#### **WAS BMW THE DECLARANT?**

41. As explained above, the Declarant is the person making the Customs declaration in his own name or the person in whose name a Customs declaration is made.

42. Once it is accepted (as it has been in this case) that the identity of the Declarant must be determined based purely on the declaration that was in fact made, there can be no doubt that BMW was, in this case, the Declarant. It has made the Customs declaration in its own name.

43. Although, as it turns out, OSR was not available, I do not accept that, as a result, Box 44 of the Customs declaration can be ignored in determining who was the Declarant. If the question is to be answered looking only at the Customs declaration which was made, logically that must include the entirety of the declaration, looked at as a whole. There is no basis for ignoring parts of the declaration which turn out not to be relevant. It is for example impossible to speculate what might have been contained in the Customs declaration had no claim to OSR been made.

44. Taking this approach, the only conclusion which can be drawn from the fact that the Customs declaration was submitted on the basis that OSR was available and that the “Y040GB” prefix was used in Box 44 in conjunction with BMW’s VAT number is that BMW was identifying itself as the importer of the goods and was therefore making the declaration in its own name.

45. I accept that some doubt is cast on this by the use of Code 2 in Box 14, indicating that BMW was acting as a direct representative on behalf of another person. There is a clear inconsistency between the way in which Box 14 has been completed and the way in which Box 44 has been completed. However, in my view, Box 44 must take priority given that there is a legal requirement to state in Box 44 whether the goods are being imported by a person on their own behalf or as agent for somebody else.

46. In addition, as Mr Watkinson asked rhetorically, if BMW was not importing the goods on its own behalf, on whose behalf could it have been importing the goods in the light of the claim for OSR? As I have already explained, for OSR to be available, the importer must be a UK VAT registered person. Ms Jianxing was not such a person. No doubt this is the reason that BMW's VAT number was inserted in Box 8 which identifies the consignee of the goods. Although Ms Jianxing's name is used in Box 8 as the consignee, the use of BMW's VAT number in effect identifies BMW as the real importer of the goods. Once again, this indicates that BMW was making the Customs declaration in its own name.

47. Mr Gibbon has of course suggested that the use of BMW's VAT number in Box 8 (identifying the consignee) was a mistake. I do not accept this. It is quite clear from the correspondence between Mr Davies and HMRC that he considered BMW to be the importer. Indeed, for OSR to be available, there is a requirement that the importer is a UK VAT registered person. In the circumstances of this case, there is nobody other than BMW who could have satisfied that requirement.

48. I appreciate that HMRC's review officer considered Ms Jianxing to be the Declarant. However this comment was made in the context of a discussion as to whether BMW was entitled to claim OSR and not whether it was liable for the import VAT. In any event, for the reasons set out above, I agree with Mr Watkinson that the review officer was simply incorrect in the conclusion which he came to on this aspect.

49. I reach this conclusion with no great enthusiasm. As Mr Gibbon has pointed out, in reality, HMRC will be receiving a windfall profit given that it seems relatively clear from the evidence that the goods were indeed forwarded to VAT registered customers in continental Europe. There were therefore mechanisms available to ensure that no import VAT would be paid in the UK. Instead, HMRC have become entitled to receive a large amount of tax from a small business which may well be unable to afford to pay it, which had no interest in the goods and which only received by way of remuneration the modest fees charged for its freight forwarding services.

50. Having said that, the guidance in VAT notice 702/7 in relation to the circumstances in which OSR is available to an agent is clear. It was never going to be possible for BMW to maintain a claim to OSR as it was not the person who made the onward supply of goods to the customers in continental Europe. If there is anything to be learnt from this sorry tale, it is that agents need to ensure that they take a great deal of care in understanding the circumstances in which they may be liable for import VAT and the requirements which need to be satisfied in order for a claim to OSR to be available.

#### **CONCLUSION**

51. Even in circumstances where Code 2 has been inserted in Box 14 of the Customs declarations, the declaration is still made in the name of BMW. BMW is therefore the Declarant and, as such, is the person liable for the import VAT in accordance with Article 201 of the Customs Code. The post clearance demand note is upheld and the appeal is dismissed.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

52. 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.

**ROBIN VOS  
TRIBUNAL JUDGE**

**Release date: 13<sup>TH</sup> SEPTEMEBR 2022**