# TC01315

*Value Added Tax - Request for voluntary registration refused to an intending trader - Supplies intended to be made of second-hand cars from Spain to other European countries (principally Germany and Italy, and not the UK) - Whether a business was currently being conducted - Appeal allowed*

**FIRST-TIER TRIBUNAL** **Reference no: TC/2010/06673**

**TAX**

**CAR FACTORS LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**Tribunal: HOWARD M. NOWLAN (Tribunal Judge)**
**RUTH WATTS DAVIES**

**Sitting in public at 45 Bedford Square in London on 23 June 2011**

**Clive Morton, managing director of Car Factors Limited, on behalf of the Appellant**
**Christopher McMeeken of the Solicitor's Office of HMRC on behalf of the Respondents**

## DECISION

1. This was a relatively short case, whose facts were simple. Reviewing the authorities after the hearing, particularly one that had not been found prior to the hearing, has revealed that the case is slightly more involved than at first appeared. Notwithstanding this, we still reach the decision that the Appeal should be allowed and that the Appellant has proved its case for the proposition that it is entitled to registration, as it has requested.

***The background facts***

2. The facts were as follows.

3. Mr. Morton, the Managing Director of the Appellant, was a semi-retired businessman, marginally above retirement age, who had had a distinguished career both in business and as an accountant. Since it may be of some relevance we should perhaps record that he was a most impressive gentleman, of apparent total honesty and integrity.

4. In his semi-retirement, Mr. Morton was planning to spend a considerable time in Spain, where he happened to know a Spaniard, Didier Di Micelli, ("DDM") a Spanish resident who has operated in the motor car industry in Spain for over twenty years.

5. We were unaware of the shareholding details in the Appellant, but the plan evolved by Mr. Morton and DDM was that the two would form and own the Appellant with a view to exploiting the fact that the second-hand price of cars in Spain was generally lower than the prices that the self-same cars could command in other European countries, notably Italy and Germany, even taking into account the transport costs of moving the cars. The plan was therefore that cars would be bought in Spain, generally from the car rental companies (in particular an ING company operating a car rental business in Spain), and these cars would be pre-sold to dealers in Germany and Italy.

6. It was not critical for us to understand the VAT position of this proposed business in detail, but we were told that if the Appellant had been a Spanish company, ING and other Spanish suppliers would have had to charge Spanish VAT on the supplies to the Spanish purchaser; that Spanish purchaser would then recover the tax on exporting the cars to taxable dealers in Italy and Germany, and those dealers would then deal with the VAT in their own countries in the appropriate manner. The only disadvantage of this arrangement would be the delay factor in the Spanish company recovering the Spanish VAT that would have been added to the prices charged by ING and other suppliers. With fairly fine margins, this was apparently considered significant.

7. We were told that if instead of the activity being conducted by a Spanish company, it was conducted by a UK company, such as the Appellant, the position would be different. If the UK company was registered for VAT purposes in the UK, we were told that ING and others would not then have to account for VAT, and so would not have to increase the sale prices to fund the VAT. We did not enquire into precisely why ING etc would not have to account for VAT in Spain, though since the sale would be to a UK company, presumably for delivery of the cars outside Spain, the explanation may be that the ING sale would have been treated as the equivalent of a zero-rated sale to another EC jurisdiction. The advantage of the trade being

conducted by a UK company was that there would not be the financing cost of having to recover the VAT in Spain on the export of the cars.

8. We were also told, however, that if the Appellant, as a UK incorporated and resident company, was not registered in the UK for VAT purposes, the plan in the previous paragraph would not work, and ING would be unable to sell to the Appellant on a VAT exclusive basis.

9. Approximately 18 months ago, Mr. Morton sought voluntary registration on the basis that the Appellant was carrying on a business; that it had the intention of making supplies and of trading, and that although those supplies would be deemed not to be in the UK (and not thus to be "taxable supplies" for UK VAT purposes) paragraph 10 Schedule 1, VAT Act 1994 had the effect of making those non-UK supplies count as intended supplies in the trade, notwithstanding that no VAT would actually be chargeable in respect of them.

10. When the application was made for voluntary registration, HMRC were suspicious that the Appellant might intend to implement "missing trader" or MTIC activities. With the regrettable prevalence of those activities, and bearing in mind that many companies have sought and obtained registration on the basis that they were going to conduct one activity, whereupon they have often changed activity on obtaining registration, and commenced MTIC trading, HMRC's caution was perhaps entirely understandable. It is worth saying however that HMRC now appears to have realised that these concerns were ill-founded. Since Mr. Morton seemed to us to be manifestly honest, and second-hand left-hand drive cars represented about the worst possible class of goods with which to conduct MTIC fraud, and the strange nature of the proposed trade was one that was obviously going to invite scrutiny, it might perhaps have been realised earlier that this Appellant was far removed from MTIC trading.

11. When the MTIC concerns had diminished however, HMRC still resisted granting the voluntary registration that the Appellant claimed that it was entitled to, essentially on the ground that the Appellant had not provided objective evidence to establish that it intended to trade. Failure to show an intention to trade was the case advanced in the Respondents' Statement of Case, albeit that during the hearing, attention was also given to the separate requirement that the applicant for registration should "be carrying on a business".

***The law***

12. Paragraph 10 Schedule 1 to the VAT Act 1994 provides that:

> *"(1) Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he:-*
>
> > *(b) is carrying on a business and intends to make supplies [within sub-paragraph (2) below] in the course or furtherance of that business,*
>
> *and … is within sub-paragraph (3) below, they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him.*
>
> *(2) A supply is with this sub-paragraph if:*

*(a) it is made outside the United Kingdom but would be a taxable supply if made in the United Kingdom ….*

*(3) A person is within this sub-paragraph if:_*

*(a) …….. his usual place of residence is in the United Kingdom; and*
*(b) he does not make and does not intend to make taxable supplies.*

*(4) (b) "usual place of residence" in relation to a body corporate, means the place where it is legally constituted"*

13. It appeared to be common ground that the Appellant satisfied the requirements quoted above, subject to the issues of whether the company was "carrying on a business", and whether it had established its intention to make supplies in the course of that business.

***The Appellant's problem***

14. The VAT notion that a person might be "carrying on a business", but not yet making supplies in the course of that business, and quite possibly not be in an immediate position to make such supplies, is rather curious, and is certainly absent in the equivalent direct tax rules concerning the commencement of trade, and pre-trading expenditure. The oddity is the conflicting notion that the conduct of the business is a present state of affairs, whereas the intention is merely to make supplies in the course of the business in the future.

15. HMRC's case has been that the Appellant has been unable to show the normal type of objective evidence of intention to trade. The "pointers" that HMRC indicate that they look for in testing "the intention to trade" issue are features such as the obtaining of premises, entering into contracts, obtaining finance, soliciting customers and advertising. In a rather confusing manner, some of those factors (such as the obtaining of premises, or even contracting to acquire premises, can be indicative both of a present "carrying on a business", as well as the intention to trade.

16. The Appellant has faced two problems in demonstrating the type of objective evidence that, in the normal case, HMRC wish to see.

17. First, in a "chicken and egg" sense, it cannot enter into actual contracts to acquire cars from ING and others until ING and others will deal with it, and they will not do so until it has been registered for VAT purposes in the United Kingdom. And if it cannot secure registration until it has trading contracts and is in an immediate position to acquire cars, it faces an impasse.

18. Its second problem is that, because of the nature of its proposed trade, many of the indicators that HMRC is traditionally looking for are absent, and many will never exist. We were told that the cars would always be pre-sold to customers and paid for in advance so that no material finance was required. Any finance that was required could be provided, if and when needed, by the shareholders. There was no need for long-term or umbrella contracts with either suppliers or customers. Once the Appellant was registered, ING had made it clear that they would sell cars, and several traders (particularly in Italy) had indicated that they would be likely buyers. Such trades would simply be made when the cars were available, and no prior contracts would be required. No particular advertising would be required because the Appellant would always be buying from rental companies such as ING, or other

traders with whom DDM was very well acquainted, and the same would apply to the trade customers. Very little UK office space would be required. Accordingly, as Mr. Morton put it, the Appellant was essentially in a position to commence trade and the making of supplies as soon as it was registered for VAT purposes, and needed to do little else. And pending the registration, it was blocked from commencing acquisitions and supplies.

***The Appellant's evidence***

19. We were shown letters from both ING and potential customers in Italy, indicating that both were ready to trade with the Appellant. All were presumably aware of the pricing differential said to exist between Spain and some other European countries, and so ING and the potential customers must have understood the business plan.

20. It seemed clear that Mr. Morton had the business experience to administer the company and perform the sort of limited activities that would be performed in the UK, and it sounded as if DDM was experienced in the car trading aspect of the business which would essentially involve selecting cars in Spain that could be sold at the relevant margin. It certainly sounded as if Mr. Morton was a highly-experienced accountant and businessman, with a most impressive CV, and we would be astonished if he had entered into a venture without being confident, and justifiably confident, that he and DDM could carry matters through to a successful activity.

21. We were also shown the letters that indicated that the part-time use of office space that the Appellant would need in the UK was available and had been negotiated.

22. Mr. Morton was also adamant in saying that the company did intend to trade, and that it was only on account of the delays in securing registration that that intention had, to date, been frustrated and delayed.

***Our decision***

23. The basis on which very limited office space had been negotiated on behalf of the Appellant, and the feature that the required business contacts, on which the trade and the supplies will be based, have all been made, seem to us to indicate that in the limited sense required by the *D.A. Rompelman and E.A. Rompelman-Van Deelen v. Minister van Financien* (Case 268/83) decision, the Appellant is carrying on business, and we consider that it is abundantly clear that it intends to make supplies in the course of that business.

24. We can understand and sympathise with HMRC's initial suspicion, concerning MTIC risks, albeit that they would appear to have been modest in this case. Those concerns appear, however , to have been unfounded. We also believe that HMRC cannot judge the issues of whether a business is being conducted, and there is an intention to make taxable supplies by adhering to a list of factors that, in the case of some trades, will never be required. In this case, it seems to us from Mr. Morton's evidence that the Appellant has done everything that it can do to prepare for its trading and its supplies, and all that remains to be put in place before trading can commence is its VAT registration.

25. We also accept Mr. Morton's evidence in relation to the Appellant's intentions. Mr. Morton appeared to us to be entirely honest, and a good judge of whether the

Appellant would be able to carry through its business plan, and we were convinced that the Appellant intended to do just that.

26. Our conclusion is that this Appeal is allowed, and that the Appellant should be registered in the UK for VAT purposes. Back-dating such registration appears fairly irrelevant, and we assume that it is not requested.

**HOWARD M. NOWLAN (Tribunal Judge)**

**Released: 12 July 2011**