



**TC01785**

**Appeal number: MAN/2008/1494**

***Key words – VAT assessment – cars imported from Germany into UK – German supplier incorrectly charged VAT – Importer liable for UK VAT – unable to recover German VAT – insolvency of German supplier – double taxation***

**FIRST-TIER TRIBUNAL**

**TAX**

**JAMES B DAVISON**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Mr Alastair J Rankin (TRIBUNAL JUDGE)  
Mr Anthony F Hennessey**

**Sitting in public at Tribunals Unit, 3<sup>rd</sup> floor, Bedford House, 16-22 Bedford Street, Belfast, BT2 7DS on 1 November 2011**

**Mr Hegarty for the Appellant**

**Mr Jonathan Cannan BL, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### The Appeal

- 5 1. James Baird Davidson ('the Appellant') was appealing the Notice of Amendment of Assessment issued on 11 July 2008 whereby the Respondents assessed the Appellant for VAT in the sum of £49,864.00.

### The Facts

- 10 2. The Appellant trading as Country Cars carries on business as a car dealer from premises at 124 Church Road, Glenwherry, Ballymena, County Antrim, BT24 3EJ. The Appellant is registered as a sole proprietor under VAT registration number 516 8232 50 with effect from 01 June 1991.
- 15 3. The Respondents visited the Appellant to conduct a VAT inspection of the business records on 10 October 2006. The Respondents identified that the Appellant had imported a number of new BMW cars from a German company ASG & Winschel Automobile GMBH in late 2004 and early 2005. The German company VAT number was DE13198626.
- 20 4. The German supplier had charged the Appellant a withholding tax amount equivalent to German VAT on the supplies of cars. It is understood that the withholding tax was charged to protect the German supplier's position if the cars were not removed to another member state. The withholding tax would be refunded by the German supplier on receipt of proof that the cars had arrived in the United Kingdom and were registered in the United Kingdom.
- 25 5. The cars were purchased from Germany and declared as commercial acquisitions on the Appellant's VAT returns. The Appellant was solely responsible for all negotiations with the German supplier and made payments to the supplier for the cars including tax. The cars were supplied by the Appellant to UK customers.
- 30 6. The German supplier has not refunded the withholding tax to the Appellant or to the Appellant's customers despite the provision of evidence to the German supplier to demonstrate the arrival and registration of the vehicles within the United Kingdom.
- 35 7. The Appellant accounted for acquisition tax in respect of the supplies and reclaimed it on the relevant VAT returns. The Appellant did not account for VAT on the full selling price as a new means of transport. The Appellant accounted for the onward supplies using the second hand margin scheme and declared VAT on the profit margin only.
- 40 8. The Respondents concluded that the Appellant had underdeclared the VAT on the supply of vehicles originating in Germany. VAT was due on the full selling price of the new means of transport and the supplies could not be accounted for using the second hand margin scheme.

9. An assessment was notified to the Appellant in the sum of £57,621.00 on the 25 October 2006. The assessment also included the sum of £7,757.00 considered due on the supply of a Land Rover.
10. The Appellant wrote to the Respondents on 07 December 2006 to request a reconsideration of the decision to assess.
11. The Respondents requested an exchange of information with the German tax authorities in relation to the German car dealer's supplies to the Appellant.
12. The German authorities confirmed the supplies and indicated that all of the necessary preconditions for an intra community supply were in place.
13. The Respondents removed the VAT assessed in the sum of £7,757.00 in relation to the Land Rover. The Respondents upheld the decision to assess the supplies of new means of transport in the UK in respect of the BMW cars.
14. The Respondents wrote to the Appellant on 23 June 2008 and stated inter alia that:
- “the German Authorities have now accepted that the vehicles in dispute should have been supplied to you VAT free ie zero rated. The German Authorities have allowed this (despite documents which are still missing) because they now accept that these vehicles are subject to VAT on acquisition into the UK.
- I understand that you have already made efforts to secure a refund of this VAT from your German Supplier. Unfortunately the extent to which a refund of tax will now be made by your German Supplier to yourself would seem to be a civil law problem.”
15. The Respondents issued an amended notice of assessment in the sum of £49,864.00 on 11 July 2008.
16. The Appellant wrote to the Respondents on 13 October 2008 to advise that an appeal would now be made to the VAT and Duties Tribunal.
17. The Respondents wrote to the Appellant on 03 November 2008 to confirm that they had considered the question of double taxation. The Respondents confirmed to the Appellant that the German Authorities had been contacted and that they had confirmed that tax was not due in Germany. The Respondents advised the Appellant that the dispute between the German supplier and the Appellant was therefore a civil matter between two parties.
18. The Respondents advised the Appellant that the assessment in relation to the supply of new means of transport was upheld in the sum of £49,864.00.
19. The Appellant appealed the amended assessment in the sum of £49,684.00 to the VAT Tribunal on 12 November 2008.

20. The Respondents contacted the Appellant, following receipt of the appeal to the Tribunal, to establish the VAT declared using the second hand margin scheme.

5 21. The Appellant faxed the Respondents with information relating to the VAT declared on the vehicles on 31 March 2009.

22. The Respondents reviewed the assessments again and have amended the assessment for a second time to the sum of £46,623.00. The assessment was sent for processing on 21 April 2009.

### **The Law**

10 23. The law in question is:

23.1 Section 1(1) VAT Act 1994.

23.2 Section 95 of the VAT Act 1994 defines the meaning of “New Means of Transport”

23.3 Schedule 11 paragraphs 2(4) and (5) of the VAT Act 1994

15 23.4 Regulations 146 to 155 Value Added Tax Regulations 1995

23.5 Sections 10 to 14 VAT Act 1994

23.6 Value Added Tax (Special Provisions) Order 1995

23.7 Section 73 of the VAT Act 1994

### **The Appellant’s Case**

20 24. The Appellant’s case, as disclosed by his Notice of Appeal is that “The assessments due to output tax levied on the UK sale of motor vehicles which were sourced in Germany from another EU registered trader. However the German supplier charged VAT on the vehicles which I treated as being VAT  
25 paid in the EU + dealt with the vehicles under the second hand margin scheme. My understanding of EU VAT regulations is that tax is paid in one member state only.”

25 25. Mr Hegarty on behalf of the Appellant contended that since the Appellant has already paid VAT on the vehicles in Germany it was inequitable to pay VAT on them again in the UK. The Appellant considered that VAT should not  
30 be payable in two different EU jurisdictions.

26. The Appellant had instructed his Northern Irish solicitors to try to recover the German VAT both direct from the German tax authorities and from the original supplier, ASG & Winschel Automobile GMBH but without success.

The original supplier had become insolvent and the principals involved had disappeared.

### **The Respondent's Case**

5 27. The Commissioners contend that the Appellant had purchased new means of transport from Germany and had correctly accounted for acquisition VAT in the UK. The German supplier had charged a withholding tax equivalent to German VAT and has refused to repay the said amounts to the Appellant despite documentation to prove that the new means of transport have been registered for road use in the UK and acquisition VAT has been  
10 accounted for.

28. The German tax authorities have confirmed that German VAT is not due on the supplies of vehicles to the Appellant by the German company.

15 29. The Appellant remains in dispute with respect to the repayment of the withholding tax charged by the German supplier and has taken legal action in Germany to obtain redress.

30. The dispute between the German supplier and the Appellant is a matter of civil law in Germany and is outside the jurisdiction of the Tribunal.

20 31. The vehicles supplied by the German dealer and accounted for by the Appellant as acquisitions constitute new means of transport in the UK and VAT is due on the supplies in the UK to the customers.

32. The Value Added Tax (Special Provisions) Order 1995 cannot apply to the supplies of motor vehicles since they constitute new means of transport and are not second hand goods.

25 33. The Appellant has incorrectly accounted for VAT in respect of the said motor vehicles as second hand goods using the second hand goods margin scheme. Accordingly the Respondents have assessed the Appellant correctly in accordance with section 73 of the VAT Act 1994.

### **Reasons for our Decision**

30 34. The German supplier of the eight cars, BMQ & Winschel, incorrectly charged the Appellant German VAT when supplying the cars to the Appellant. Mrs Sharon Spence of the Respondents in her evidence to the Tribunal indicated that the German authorities appear to have allowed BMQ & Winschel to treat the supply of the vehicles to the Appellant as tax free in Germany with the result that adjustments were made to the German VAT  
35 liability of BMQ & Winschel.

35. Mr Cannan advised the Tribunal that there is no mechanism under the tax legislation of the United Kingdom for the Respondents to pay to the Appellant

VAT paid by BMQ & Winschel in Germany. Mr Hegarty on behalf of the Appellant accepted during the hearing that this appeared to be correct.

5 36. Mr Cannan referred the Tribunal to the judgment of the Second Chamber of the European Court of Justice dated 15 March 2007 in the case of Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze. In paragraph 3 of the ruling the Court stated that 'where reimbursement of the value added tax would become impossible or excessively difficult, the Member States must provide for the instruments necessary to enable that recipient to recover the unduly invoiced tax in order to respect the principle of effectiveness'.

10 37. The Tribunal interprets the reference to 'Member States' to mean that all the Member States must make such provision rather than the two Member States involved in a particular cross-border transaction as in the subject matter of this case.

15 38. It is not within the powers of the First Tier Tax Tribunal to order the Respondents to reimburse the Appellant in respect of value added tax paid by the Appellant in Germany.

39. Accordingly the Tribunal considers that if the Appellant has any redress against the apparent double taxation such redress can only be in Germany either against GMQ & Winschel or against the German VAT authorities.

20 **Decision**

40. The Tribunal decided that the Appellant is liable for output VAT totalling £46,623.00 covering the periods 10/04 to 01/06 in respect of eight BMW cars sold by him in the United Kingdom and this was accepted during the hearing by Mr Hegarty on behalf of the Appellant.

25 41. The appeal is therefore dismissed with no order as to costs.

42. 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. 30 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.

35 **TRIBUNAL JUDGE**

**RELEASE DATE: 27 January 2012**