



TC03040

Appeal number: TC/2010/07603

VAT – s73 assessment for under-declared output tax – whether appellant’s supplies of motorcycles to its customers were made under the second hand margin scheme – motorcycles acquired from Danish and Dutch traders – eligibility condition that appellant received goods pursuant to a supply which was chargeable to VAT under the other Member State’s margin scheme rules not met – assessment upheld - s60 penalty for dishonest evasion – invoices from Danish and Dutch traders tampered with to include second hand margin scheme notations submitted by appellant to HMRC – penalty upheld – appeals dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**DARRYL HASLEN
t/a RACER MX
- and -**

Appellant

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
MICHAEL SHARP**

Sitting in public at 45 Bedford Square on 22, 23 and 24 January 2013

The Appellant appeared in person

Luke Connell, Appeals and Reviews Unit, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant ran a business selling motor cycles and accessories for motor
5 cross racing. He made a number of supplies to customers which he says were subject
to the second hand margin scheme. That scheme allows VAT to be charged on the
difference between the price paid and the price sold (the margin) rather than on the
price the motorcycles were sold for. HMRC say the supplies did not meet the second
hand margin scheme criteria set out in the law and that VAT output tax was therefore
10 due on the sale price. The VAT on the margin was lower than the VAT due on the
sale price. HMRC made an assessment under s73 Value Added Tax Act 1994
("VATA 1994") of £108,487 for VAT periods 07/04 to 01/07 which the appellant
appeals against.

2. The appellant also appeals against a dishonest evasion penalty of £75,940 under
15 s60 VATA 1994. HMRC say the appellant falsified invoices from a supplier based in
Denmark and one based in the Netherlands so that they carried wording (in Danish
and Dutch respectively) which suggested those supplies were made under the second
hand margin scheme when that was not the case. The appellant denies this and
appeals against the penalty.

20 *Evidence*

3. We received a witness statement and heard oral evidence which was cross-
examined from the appellant, Mr Darryl Haslen. For HMRC we received witness
statements and heard oral evidence from Ms Catherine Bruce, a local compliance
officer handling the original enquiry of the VAT affairs of Racer MX, and Ms Patricia
25 Luk, an investigator in the Civil Investigation of Fraud team of HMRC. The appellant
had the opportunity to ask questions of HMRC's witnesses. In addition all three
witnesses answered questions put to them by the Tribunal. While the appellant had
instructed a solicitor in relation to some of the preparations for the hearing including
preparation of a witness statement he was not professionally represented at the
30 hearing. The appellant attended with his partner Ms Dawn Waples who assisted him
in asking questions and in making submissions.

4. The documentary evidence consisted of bundles of purchase invoices and
orders, spreadsheets and book keeping analyses which included the details of sales
and purchases made, correspondence, and details of reports of information given by
35 the Danish and Dutch tax authorities in response to enquiries made of them.

Applications / directions in the course of hearing / Conduct of hearing

5. Various matters relating to admission of new documents or originals of
documents, and new arguments arose in the context of the hearing. Some of these
matters could have been addressed before the hearing. The fact that some of these
40 matters were left until the hearing to be dealt with arose in part from the appellant not
being professionally represented but it also arose from the fact that at points in time

where both parties were represented issues as to what documents were to be admitted or relied upon were embedded in witness statements rather than addressed explicitly in correspondence or by way of separate application. It should be noted that using witness statements in this way is inappropriate.

5 ***Additional documents: -
Invoices and order forms***

6. In the course of putting questions to Ms Bruce towards the end of the first day of the hearing the appellant invited her to comment on documents which the appellant described as original versions of purchase invoices and purchase orders. The
10 appellant's witness statement had mentioned that the appellant would provide original invoices upon request but it does not appear this was followed up on by HMRC. The documents are listed at [65] below. These versions of the documents were a subset of the copy invoices which appeared in the hearing bundles in the category of copy invoices and orders sent to HMRC by the appellant. The appellant was permitted to
15 rely on these documents on the basis that the documents should also be made available for the Tribunal and HMRC to examine. Copies of the new documents were taken by the Tribunal's staff and the versions the appellant brought in were returned to the appellant.

7. The documents had the second hand margin scheme wording printed on them. It
20 was apparent from the way the second hand margin scheme wording appeared on them that the method of tampering that HMRC had suggested in their skeleton argument (physical cutting and pasting of strips of paper onto the original document) had not taken place in relation to these documents. HMRC were invited to consider the documents and if it was the case that they maintained that the documents were
25 tampered with to outline the means by which the tampering was said to have been achieved in order that the appellant knew the case being made against him. The documents are discussed further at [66] to [67].

Documents in relation to another tribunal case involving purported second hand margin scheme transactions

8. One of the witness statements put forward on behalf of HMRC (that of Ms Luk
30 dated 1 August 2011) mentioned that there had been another tribunal case which involved a trader purporting to make acquisitions under the second hand margin scheme from Action Sport (the Danish supplier in this case). Ms Luk's view in the statement was that none of the information in the file lent support to allegations that
35 UK traders were the victims of misrepresentations on the part of Action Sport. The statement mentioned that if the Tribunal so ordered, Ms Luk would make appropriate documents from HMRC's files in that case available to the appellant. Following a directions hearing on 19 March 2012 the Tribunal had made a direction requiring the appellant to obtain written authorisation from the trader (Mr Petchell) authorising
40 disclosure of Mr Petchell's tax affairs to the appellant in so far as they were relevant or could be relevant to the appeal. The appellant told us he had been told by his representative that there had been no point asking for documents in the Petchell file. We granted the appellant a short adjournment to make a phone call to Mr Petchell to

see whether the appellant did want to see documents in the file. After the adjournment the appellant confirmed he did want to see the file as he had been told there was a letter in it from Lars Green of Action Sport confirming that he had sold goods second hand. HMRC said that if it was going to be ordered that the file be disclosed it would rather the file were disclosed to the Tribunal and that any relevant material the Tribunal found be copied and made available to the appellant during the course of the hearing. The Tribunal directed HMRC to bring the file to the Tribunal for the Tribunal's inspection and review. The following documents were disclosed to the appellant:

- 10 (1) A letter from Day Associates, the representative of Mr Petchell to HMRC dated 2 October 2007. This enclosed a copy of a letter from Lars Green of Action Sport to TP Motor Cycles with a fax header date of 14 June 2007.
- (2) A form "SCAC 2004" containing a reply from the Dutch tax authority to an information request of 22 January 2008 from HMRC.
- 15 9. The appellant was given the opportunity to review these documents and to consider what questions he wanted to put to Ms Luk as a result of these and what submissions he wanted to make on the documents. Copies of the documents were made available to him during the remainder of the hearing. The significance of these documents to the appeal is discussed at [138] to [141] below.

20 *Evidence and argument on language error in HMRC Notice 718*

10. In the course of the hearing HMRC sought to put in documents from Google translate with a view to showing that the Dutch version of the second hand margin wording in HMRC's Notice 718 was incorrect. HMRC wished to make an argument on the basis of the translation that as between the possibilities of the appellant adding the notation and the Dutch trader adding it; it was unlikely that a mother-tongue Dutch speaker or resident Dutch trader would make this error if they had put the margin scheme wording on their invoices.

11. The Tribunal noted the argument HMRC sought to raise was not particularised in its pleadings or in its skeleton argument. There was no good reason why the issue could not have been raised sooner and any prejudice to the appellant in being caught unaware avoided. Further the relevance of the documents or any translation was not clear cut given no evidence was being adduced as to the Dutch trader's language abilities. The Tribunal refused HMRC's application to put in the Google translate documents and also refused HMRC's application to obtain a sworn translation of the second hand margin scheme wording present on the Dutch website.

Particularisation of dishonesty by HMRC

12. At the hearing and in an amended skeleton presented mid-way through the hearing HMRC sought to introduce an argument that the appellant's act of using the second hand margin scheme while knowing that the goods were not eligible for treatment under the scheme was dishonest. We were not satisfied this allegation had been particularised in HMRC's pleadings sufficiently in advance of the hearing in

order that the appellant might know that this was part of the case against him or that there was any good reason why the argument was raised so late and therefore did not allow HMRC permission to introduce this argument.

Balance between time allotted for HMRC's and the appellant's representations

5 13. In his closing reply the appellant raised concerns that the majority of time had been taken up with HMRC making their representations and asking questions. The Tribunal noted that some of the time allocated for the hearing had been taken up with adjournments arising out of the production of further documents by the appellant and
10 by HMRC's retrieval of the Petchell file in order that the letter the appellant wished to see could be obtained. The Tribunal explained that in view of these breaks, which had eaten into the hearing time, if there were further issues or representations the appellant wanted time to address, even if this mean the hearing had to go part heard, it would view any application the appellant wished to make to that effect sympathetically but no such application was made.

15 **Relevant law**

The Second Hand Margin Scheme

14. Before setting out the relevant facts it is necessary to outline the legal background to the second hand margin scheme.

15. Normally VAT is due on the full value of goods sold. For certain goods, and in
20 certain circumstances traders have an option to calculate VAT on the margin between the buying price and the selling price. The margin scheme covers second hand goods, works of art, antiques and collectors' items.

16. Allowing the margin to be calculated in this way avoids double-taxation where certain goods re-enter the economic cycle. For example a taxable person who buys
25 goods from a non registered person will not have been charged VAT and will not have deducted input tax on their purchase. Before the goods got to the non registered person they may have already been subjected to VAT. Without the margin scheme option a taxable person buying goods from the non-registered person and then selling them on would be paying VAT on the full value of the goods sold without being able
30 to deduct input tax.

17. The relevant provisions of the UK margin scheme are set out below.

18. Section 50A of VATA 1994 enables the Treasury to make Orders to introduce second hand schemes. Article 12 of the VAT (Special Provisions Order) 1995 provides where relevant as follows:

35 **“Relief for certain goods**

12

(1) Without prejudice to article 13 below and subject to complying with such conditions as the Commissioners may direct in a notice

5 published by them for the purposes of this Order or may otherwise direct and subject to paragraph (4) below, where a person supplies goods of a description in paragraph (2) below, of which he took possession in any of the circumstances set out in paragraph (3) below, he may opt to account for the VAT chargeable on the supply on the profit margin on the supply instead of by reference to its value.

- (2) The supplies referred to in paragraph (1) above are supplies of—
 - (a) works of art, antiques and collectors' items;
 - (b) second-hand goods.
- 10 (3) The circumstances mentioned in paragraph (1) above are—
 - (a) that the taxable person took possession of the goods pursuant to—
 - 15 (i) a supply in respect of which no VAT was chargeable under the Act or under Part I of the Manx Act;
 - (ii) a supply on which VAT was chargeable on the profit margin in accordance with paragraph (1) above or a corresponding provision made under the Manx Act or a corresponding provision of the law of another member State;...

20 19. The UK provisions implement Article 26a of Directive 77/388/EEC (“the Sixth Directive”). The Directive provides as follows where relevant:

“Article 26a
Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques

25 **A. Definitions**

For the purposes of this Article, and without prejudice to other Community provisions:

...

30 (d) second-hand goods shall mean tangible movable property that is suitable for further use as it is or after repair, other than works of art, collectors' items or antiques and other than precious metals or precious stones as defined by the Member States;

35 (e) taxable dealer shall mean a taxable person who, in the course of his economic activity, purchases or acquires for the purposes of his undertaking, or imports with a view to resale, second-hand goods and/or works of art, collectors' items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale;...

B. Special arrangements for taxable dealers

5 1. In respect of supplies of second-hand goods, works of art, collectors' items and antiques effected by taxable dealers, Member States shall apply special arrangements for taxing the profit margin made by the taxable dealer, in accordance with the following provisions.

2. The supplies of goods referred to in paragraph 1 shall be supplies, by a taxable dealer, of second-hand goods, works of art, collectors' items

10 or antiques supplied to him within the Community:

— by a non-taxable person,

or

....

15 — by another taxable dealer, in so far as the supply of goods by that other taxable dealer was subject to value added tax in accordance with these special arrangements.

3. The taxable amount of the supplies of goods referred to in paragraph 2 shall be the profit margin made by the taxable dealer, less the amount of value added tax relating to the profit margin. That profit margin shall be equal to the difference between the selling price charged by the taxable dealer for the goods and the purchase price.”

20. HMRC’s assessment in this case is made under s73 VATA 1994 which provides where relevant as follows:

25 **“73 Failure to make returns etc**

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

...

35 (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

5 but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.”

10 21. HMRC have also imposed a penalty in relation to dishonest evasion of VAT under s60 VATA 1994.

22. Section 60 of VATA states as follows, where relevant:

“(1) In any case where –

(a) for the purpose of evading VAT, a person does any act or omits to take any action, and

15 (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability), he shall be liable ... to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.

20 (2) The reference in subsection (1)(a) above to evading VAT includes a reference to obtaining any of the following sums ... (b) a VAT credit ... in circumstances where the person concerned is not entitled to that sum.

25 (3) The reference in subsection (1) above to the amount of the VAT evaded or sought to be evaded by a person's conduct shall be construed –

(a) in relation to VAT itself or a VAT credit as a reference to the aggregate of the amount (if any) falsely claimed by way of credit for input tax and the amount (if any) by which output tax was falsely understated ...”

30 *Burden and standard of proof*

23. The burden of proof on the merits and the amount of the s73 VATA 1994 assessment is on the appellant. In relation to the penalty, under s60(7) of VATA the burden of proof as to the matters specified in s60(1) (a) and 60(1) (b) is on HMRC; it is therefore for HMRC to prove the appellant's conduct involved dishonesty and that he did an act or omitted to take any action that was for the purpose of evading VAT.

24. The standard of proof is the ordinary civil standard of the balance of probabilities.

Background facts

Mr Haslen and Racer MX

25. Mr Haslen is the proprietor of Racer MX which is an outlet which trades motor cross bikes and accessories. He has had experience in the motorcycle trade since
5 2000. He started sole trading in 2003 when he engaged Steve Copeland as his business accountant.

Mr Haslen's previous businesses – involvement in VAT

26. Prior to Racer MX Mr Haslen had been a partner in another business Tower Moto-X with Andrew Potts. This was VAT registered from 1 February 2000.

10 27. The appellant said Mr Potts ran the business, and the appellant was just a mechanic and did not deal with the company accounts or VAT affairs. On 4 April 2001 the business was visited by a VAT assurance officer. The officer's report which covered a number of matters records second hand margin scheme compliance requirements being discussed with "Mr Potts & Mr Haslen". Mr Haslen says this is
15 incorrect and that he was not there when the officer attended. This issue is discussed at [173] below.

The supplies made to customers which are the subject of the assessment

28. The appellant made supplies of motorcycles in the VAT periods 09/04 through to 01/07. The fact that these supplies were made, and the quantities and prices of
20 motorcycles supplied were not a matter of dispute. The appellant did not charge VAT on the full value of those supplies to his customers. The appellant also accepted a small number of part exchange motorcycles from his customers.

29. The goods were bought from Action Sport, a trader in Denmark, and Emile Gebben a trader in the Netherlands. In relation to Emile Gebben, Mr Haslen dealt with
25 Stephen Haylett who was based in Shrewsbury.

30. In relation to Action Sport, Mr Haslen would telephone them and quote the make and model which he required. Action Sport would fill out the purchase order. He would then be faxed the order. Mr Haslen told us that the motorcycles were categorised 1-10 according to their condition and that they were priced accordingly.

Variation in purchase prices of similar models of motor cycles

31. There are some variations of price in what are described to be the same model of motorcycle. But equally there are invoices which show the same prices for the same model e.g. Action Sport invoice 954244.

32. For a given model there are price variations. These occur across time and occur
35 according to whether the seller is Action Sport or Emile Gebben.

33. The exhibits to the appellant's witness statement included a schedule of purchase prices broken down according to model, supplier, and time of sale. This had been submitted to HMRC by Mr Copeland and was referred to in his letter to HMRC of 31 August 2010.

5 34. We noted the table showed some omissions. On 9 November 2004 the table suggests that model YZ125 was sold at two different prices, one for £3500 and one for £3350. The invoice reflects a sale of 2 such models at £3350 but no invoice was produced showing the sale of the model at £3500.

10 35. In relation to the model CR85 where it is said these models are sold on 15 November 2004 for two different prices, on examination of the invoice (954432) we noted the models are not exactly the same. One model type is a "Honda CR 85 BW 2005", the other a "Honda CR 85 SW 2005".

15 36. We noted that one invoice, (Action Sport Invoice 954378) which describes the motorcycle being sold as "S/H" and as an ex-demonstrator model, makes special mention of this and the price is significantly different from another motorcycle of the same model which is not noted on the invoice as being ex-demonstrator. The invoice shows the purchase of the ex-demonstrator Yamaha YZ125 at £2,500 on 9 November 2004 whereas according to invoice 954244 four such models were bought from Action Sport on 21 October 2004 at £3,350.

20 37. The appellant also sold motorcycle accessories and clothes. These were sold new.

Ms Bruce's enquiry and visit

25 38. HMRC noted discrepancies between the EC sales lists returns of 3 of the appellant's suppliers and the appellant's VAT returns. Ms Bruce, an HMRC local compliance officer, began an enquiry on 30 March 2007 to seek explanations and wrote to the appellant to say she would be visiting the premises.

30 39. On 9 May 2007 Ms Bruce visited the appellant's premises. Mr Copeland was there along with Mr Haslen. She examined purchase invoices, sales ledgers and the VAT account. She examined a random selection of documents. Enquiries were carried out for random periods on the VAT summaries of 12/04 and 03/05. The periods between 2005 and 2006 were selected for purchase invoice checks, second hand stock sheet checks and SAGE print checks.

35 40. Ms Bruce recollects that the purchase invoices she saw did not bear wording indicating the supplies were despatches within the second hand margin scheme. She was not sure whether such statements were mandatory so did not raise the matter then but wanted to check with a colleague. It is a matter of dispute between the parties as to whether Ms Bruce saw invoices in relation to second hand motorbikes. The appellant argues the reason she did not see the second hand margin wording is because the invoices she looked at related to accessories and clothing items which

were not second hand and so there would not have been any margin scheme wording on those. This issue is considered further at [144] to [151] below.

41. She noticed records had not been properly kept. The appellant's attention was drawn to his failure to keep adequate second hand stock records. Ms Bruce took away with her VAT summaries, SAGE prints, stock records but no original invoices as the discrepancy she was investigating between the EC Sales Lists and returns was in her view explained at the time by the appellant's statement that the goods it was purchasing were bought second hand.

42. Ms Bruce carried out further inquiries into the VAT history of the appellant on her return to the office.

43. On 7 June 2007 and again on 13 June 2007 Ms Bruce e-mailed Mr Copeland to ask for copies of the purchase invoices.

44. On 8 June 2007 Ms Bruce returned in person to the appellant to give back the documents she had taken away.

45. It is a matter of dispute as to whether a copy of Public Notice 718 which deals with the margin scheme for second hand goods ("Notice 718") was handed to Mr Haslen when Ms Bruce returned on 8 June 2007. Ms Bruce says she handed a copy of this Notice to Mr Haslen when she took back original documents in early June. She says she did not give this to him on 9 May 2007 because she did not know at the time of that visit that second hand goods were going to be in issue and she wanted to give him the up to date version of the notice. Notes of Ms Bruce's report of her audit visit refer to Ms Bruce issuing a copy of the notice. Mr Haslen says he did not receive it. We have difficulty placing any significant weight on Mr Haslen's recollection that he did not receive the notice as we think it unlikely that receiving an information booklet or conversely not receiving it is something which would stick in Mr Haslen's mind many years later. We prefer Ms Bruce's evidence on the basis that she recorded the giving of the notice in her internal report of the visit and that it seems quite plausible that an officer visiting a trader in the context of looking into compliance issues with operation of the second hand margin scheme would provide the trader with the relevant public notice about the scheme.

46. Between 13 June 2007 and 3 August 2007 Ms Bruce discussed the lack of second hand margin scheme wording on the invoices with Alan Mullock an HMRC colleague who was a Higher officer and who had a higher degree of specialisation in the second hand margin scheme than Ms Bruce.

47. Between 13 July 2007 and 3 August 2007 Mr Haslen sent in copies of the purchase invoices.

48. When Ms Bruce inspected the invoices, the presence of the second hand margin scheme wording did not tally with her recollection that no wording was contained on the invoices she saw on her visit. She made a request for further information via HMRC's information exchange team to the Dutch, Danish and French tax authorities. The Dutch and Danish requests were sent to the foreign tax authority on 22 August

2013 and are discussed in more detail below. In relation to the French supplier, SAS MX No Fear Europe, Ms Bruce's evidence was the French authority's investigation indicated that the motorcycles supplied to the appellant were brand new and taxable at the standard rate and that no second margin scheme supplies were made to the appellant. Her evidence went on to say that "the level of apparent non-compliant behaviour was insufficiently significant to justify further investigation." Beyond this, the Tribunal did not receive any evidence or submissions in relation to the enquiries made of the French tax authority.

49. On 14 August 2007 Ms Bruce issued a VAT assessment in the amount of £153,564.00 and asked for further copies of purchase invoices.

50. On 11 September 2007 the appellant's accountant Mr Copeland wrote to Ms Bruce and declined to give further copies of invoices unless HMRC told him what invoices she had already received from his client (Mr Haslen). HMRC replied on 14 September 2007 with a list of documents.

15 *Notice 718*

51. In the section of Notice 718 which deals with transactions within the Community the Notice sets out in a table the second hand margin scheme wordings used by other Member States. The wording set out for Denmark is:

"Varerne sælges efter de særlige regler for brugte varer m.v."

20 52. For the Netherlands (described as Holland) the wording set out is:

"Verkocht on de marge regeling".

The first set of enquiries made of Danish and Dutch tax authorities and their responses

53. On 22 August 2007, HMRC filed a request for information from the Danish tax authorities. In the section of the request form dealing with "Detailed questions about specific schemes" the question was asked:

"Please confirm the VAT arrangements applicable. In respect of second hand goods, is this a transaction under the margin scheme or the normal VAT arrangements for intra-Community supplies?"

30 54. In the free text section HMRC stated amongst other things:

"The copy of the purchase invoices quote the second hand margin scheme, but a large number of the motor bikes appear to have very close chassis numbers and also some are 'year of manufacture' in the same year or the year after the invoice date."

35 55. The Danish authority replied on 24 October 2007:

"Yesterday I visited the Danish company, Action Sport and obtained information:

...

2. The goods in question are all new goods

3. The VIES [*VAT information exchange system*] details are correct

I enclose invoices and debtors account as requested from the Danish company.”

5

56. No official is named. We do not know who the “T” in the report referred to.

57. On 22 August 2007 HMRC also filed a request for information to the Dutch tax authority. The request again asked for confirmation that the transactions were, in respect of second hand goods, under the margin scheme, and the free text section made the same point about close chassis numbers made in [54] above.

10

58. On 27 November 2007 the person replying on behalf of the Dutch tax authority stated:

“Our local office has confirmed the following. Our trader has a storage room in...Schrewsbury. The administrator for the storage room is Mr. Stephen Haylett. He has arranged the following sales to the English trader. For his services he received a management fee from Emile Gebben BV...

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Conclusions

1. The carrier delivered the goods to the following address ([the address of the storage room above]) Out of that the goods were sold.

20

2. All motor bikes were new!

No margin scheme!

3. The goods were paid by Stephen Haylett by cheque on the English bank account.

25

4. According to the CMR’s all the goods were transported to England and declared as an Intra Community Supply.

No corrections.”

59. The reply annexed invoices (copies of which were in the hearing bundle before us). The annexed invoices did not contain the second hand margin wording present on the copies the appellant had provided. Also the Emile Gebben invoices supplied by the Dutch authorities contained the following wording: “sold to you the following new motorcycle(s)” immediately below the tramline heading “invoice” and immediately above a description of the goods whereas on the invoices from Emile Gebben supplied by the appellant there was a horizontal blacked out line.

30

60. In addition to the above differences it was apparent that the invoices supplied by the Dutch and Danish authorities were file copy versions of the invoices the appellant had supplied. In the case of the Emile Gebben invoices the file copy version omitted the graphic logo and printed address of Emile Gebben present on the copies supplied by the appellant. In the case of Action Sport, the file copy omitted details of the

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business' opening times which were present on the Action Sport invoices supplied by the appellant.

61. We also noted that one of the invoices from Action Sport (954378) dated 9.11.04 describes one Yamaha YZ123 being sold for £2,500. Below the following words appear in the same type: "S/H demo super cross bike". On the same date under invoice 954379 2 bikes of the same model are sold for £3,350. No wording indicating the bike is second hand or a demo next to the model description appears on any of the other Action Sport invoices supplied by the Danish authority or on the invoices supplied by the appellant (save for the second hand margin scheme wording in Danish the location of which does not appear next to any particular motor cycle or product described on the invoice).

What the second hand margin wording looked like on the copy invoices provided by the appellant

62. The Respondents drew our attention to the following:

(1) The imprinted words are not horizontally aligned with the rest of the words. We were referred to 14 example invoices including Invoice 954029 Action Sport, and Invoice 20040737 for Emile Gebben.

(2) The imprinted words are not vertically aligned with the rest of the words on the tax invoice. We were referred to 9 example invoices including Invoice 20050954.

(3) The imprinted words appear in a different location to that in most other examples. We were referred to 3 example invoices including Action Sport invoice 957260.

(4) The imprinted words appear twice the second time in an "inappropriate" location. The reference to "inappropriate" was to the fact that the second set of words had either been super-imposed over the section of the invoice setting out Action Sport's opening hours, and that in one invoice the second set of wording appeared upside down. We were referred to 8 example invoices including Action Sport invoice 954862.

(5) On the Emile Gebben invoice the imprinted strips of font-height black bars did not completely cover the "S" of "Sold to you...". This was described by the Respondents as a "peeping S". We were referred to 4 such invoices including Emile Gebben invoice 20040840.

(6) The second hand margin scheme wording appears on invoices for clothing, spare parts or protective gear which it is agreed were not sold second-hand. We were referred to 3 such invoices including Action Sport invoice 954022.

63. We accept all of these features were present on the invoices identified to us.

64. Not all of these features were present on all of the invoices in issue. However from the similarity of the typeface on the documents and the dispersion of time

periods across which the features appeared, we find that whoever made the amendments on the invoices where the above features were present also made the amendments on the invoices where the features were not present.

Our examination of the invoices the appellant brought in and what we noted

- 5 65. At the hearing, the appellant also produced the following invoices and order forms:

Supplier	Invoice number	Date
Emile Gebben	20060556	30-03-2006
Action Sport	950272	27-03-2003
	950727	26-05-2003
	954030	15-09-2004
	954032	15-09-2004
	954689	13-12-2004
	956566	15-08-2005
	956569	31-07-2005
	956570	15-08-2005
	956816	07-09-2005
	957262	22-11-2005
	957744	12-01-2006
	959039	08-05-2006
	959534	07-06-2006
	961132	09-11-2006
	961207	20-11-2006
	961292	27-11-2006
	Order Number	
	10535	[space for date not filled in]
	11165	[space for date not filled in]
	11168	[space for date not filled in]
	11169	[space for date not filled in]

		in]
	11313	[space for date not filled in]
	11368	[space for date not filled in]
	11377	[space for date not filled in]

66. We noted the second hand margin scheme notations were in bolder type and that when we held the documents up to the light the notation text looked to have been inserted separately to the printing of the rest of the invoice.

5 67. The typeface of the inserted wording for the two suppliers Emile Gebben and Action Sport appeared similar but not exactly identical.

The second set of enquiries to the Danish and Dutch tax authorities

10 68. On 11 December 2008 Ms Luk, an investigator in HMRC’s civil investigation of fraud team, made a second request to the Danish and Dutch tax authorities. She asked them to approach the directors or responsible persons of the companies with a list of questions to verify the condition of the motorcycles sold to Mr Haslen to determine if they were brand new or had been used in anyway before selling to Mr Haslen. It was highlighted that Mr Haslen’s invoices bore the respective Danish and Dutch wording. The invoices were enclosed, and the wording quoted verbatim.
15 HMRC asked the authorities to get comments from the two suppliers in relation to the wording, and to comment on the different sets of invoices. The authorities were also asked if the taxable person could “confirm and sign in writing what he has just answered.”

20 69. In relation to the Danish enquiry the replying Danish officer (unnamed) stated in their reply that they had visited the Danish Company and talked with Gitte Andersen (accountant) and that she had given the answers. She replied that invoices were sent by post and fax, and that the goods were new motorcycles ordinarily bought from Danish firms. In relation to the particular vehicle the enquiry was about she said the vehicle was not used before it was sold to the appellant, nor was it used for
25 demonstration purposes. It was held for about a week before selling it. In response to a question which asked whether the invoice contained markings or entries that the trader or his representative did not enter, and if so what had been added and or deleted Ms Andersen referred to the margin scheme notation wording and said “Is unknown to the Danish company”. Ms Andersen is said by the Danish authority not to have
30 wanted to give the requested confirmation and signature as to what she had said because of language problems.

70. The Dutch authority replied on 4 June 2009 to the enquiry sent to it. From a translation of a letter Mr Emile Gebben sent on 6 May 2009, the officer who visited the premises was a Mr C. F. Wijnhoud. Although Ms Luk had carefully constructed

her questions sequentially so that the trader would be asked for comments on the invoice the appellant supplied first and then asked to compare the two, we cannot tell from the Dutch authority's reply whether the questions were posed in the sequential manner Ms Luk had suggested. The Dutch reply stated:

5 “Our taxable person purchased 44 brand new motorcycles for and
 behalf of Honda Zambia, from Two Wheels Ltd in Dublin Ireland
 including the Honda CRF 450 R with stock number 103425...the
 motorcycles were delivered to our taxable person's address and
 immediately stored for resale. The motorcycles were never used and no
10 Dutch vehicle registration documents were applied for. The Honda
 CRF 450 R was...never used and resold in original packaging to Racer
 MX. So, this motorcycle was also never used for demonstration
 purposes. The original invoice was sent to Racer MX by normal post.
 A copy of this invoice was faxed to Mr Stephen Haylett of the
15 warehouse at...Shrewsbury. Our taxable person swears he sold brand
 new motorcycles to Racer MX. He did not add the statement
 “Verkocht on der marge regeling” on the invoice, which by the way is
 incorrect usage. He does not know who blacked out the statement
 “Sold to you the following new motorcycle(s)”. He signed his
20 statement (see attachments) [*this was the statement confirming that the
 invoice supplied by him was the invoice sent (on its headed paper),
 that the second hand declaration was not added, nor was the black line
 and that the new vehicles sold to Racer MX were new*]. Our taxable
 person does not do business anymore with Darryl Haslen/Racer MX
25 since mid-2008.

As far as our taxable person is concerned, things happened the right way. We did not find evidence of fraud, or what so ever.”

The assessment / penalty

71. On 22 June 2009 Ms Luk raised a formal assessment in the reduced amount of
30 £108,487.00. This amount revised the previous amount of £153,564 to reflect the
 sales of zero rated goods. The assessment covered VAT periods 07/04 through to
 01/07. The assessment was calculated in respect of each period by deducting zero rate
 sales from net output value. The VAT fraction 7/47 was then applied to the difference
 of those figures. Output tax declared was deducted from the previous figure to get the
35 amount of output tax under-declared.

72. On 15 December 2009 HMRC imposed a penalty of £75,940 under s60 VATA
1994. The penalty had been mitigated by 30% to reflect Mr Haslen's co-operation in
attending two meetings with HMRC.

Signed disclaimers

40 73. Following the second meeting with HMRC, Mr Haslen tracked down some, but
 not all, of his customers and obtained signed documents from them in which they
 confirmed they had bought the motor cycles second hand. These were in the format:

“I [name] declare that [motorcycle type] motorcycle was in a used condition when purchase from Racer MX on the [date]. [signature / date / contact details]”.

Appellant's arguments

5 74. In addition to the arguments made by the appellant at the hearing we also noted that his witness statement, which was drafted by his solicitor at the time, contained matters which amounted to submissions. We set out those arguments and have considered them too.

10 75. The second hand margin wording for Netherlands was not mandatory. Knowing this to be the case, there would have been no reason for the appellant to have put the wording onto the Emile Gebben invoices.

15 76. In relation to the goods which were not second hand (the accessories and clothes) the appellant knew these were subject to VAT so there would have been no reason for him to put the second hand margin wording on invoices covering these goods.

20 77. The second hand margin scheme wording said to be added is in a different font size and on some invoices the wording has inverted commas around it. If the appellant had doctored them why would this not be done in the same format for every invoice? In the alternative the appellant argues he would not have been able to incorporate the same font type for the wording given he says that by his own admission he is computer illiterate.

25 78. The copy invoices Emile Gebben have supplied to the Respondents are their file copies. The font size is smaller and the heading and footer is missing as would be expected on a file copy. These invoices are not a true reflection of the invoices received from the supplier.

79. The appellant has an original fax copy of an invoice sent from Action Sport which bears the second hand margin endorsement. This cannot have been edited at the recipient's end.

30 80. The appellant did supply the motorcycles second hand and can prove it. Ms Bruce says she saw a second hand motorcycle on the forecourt of the premises on her visit. The appellant says the records show this motorcycle had chassis number 503311, it was supplied on 25 January 2007 and was sold to a customer of Racer MX on 5 June 2007. There is an inconsistency between the fact that Ms Bruce saw this motorcycle and said it was second hand and the fact that according to the invoice produced by Emile Gebben for this motorcycle, the motorcycle was new. The statement on the Emile Gebben invoice that it was new must be incorrect as Ms Bruce saw the motorcycle and noted it was second hand.

40 81. When Ms Bruce visited the premises and inspected the purchase invoices she did not see all the invoices. When she recollects not seeing invoices with the second hand margin notation she must have been looking at non-second hand invoices.

82. Different prices are charged for same model. This price variability suggests they were second hand and reflects the different level of condition the motor cycles were in.

5 83. The profit margins were small. This fact points against HMRC's view that the appellant had a motive to use the second hand margin scheme in order to under cut competitors.

10 84. The Dutch and Danish Suppliers do have a motive. The appellant described this as "double bubble" meaning their motive was to both claim the VAT back on their sale to the appellant but at the same time market themselves as margin scheme traders which would incentivise sales to buyers who wanted to apply that scheme. It was to be noted that Lars Green did not confirm his answers in writing and it was surprising that the language barrier was used as a reason for this given Action Sport were able to interpret orders and deal with purchases in English. The appellant also queried why the Dutch and Danish suppliers were not giving evidence in court too.

15 85. There is a letter from Lars Green, of Action Sport in the Petchell matter, which was another appeal involving second hand margin scheme supplies of motor cycles in which Lars Green says he supplied second hand motor cross bikes to Mr Petchell.

20 86. If, at worst, the appellant did not distinguish between the standard rated sale of new motorcycles and accessories and margin scheme sales in the accounts then this is because he an incompetent book-keeper. It is not because he is an evasive or avoiding tax payer.

Respondents' arguments

25 87. In brief, in relation to the assessment, the Respondents say the eligibility conditions for use of the second hand margin scheme are not met. The Respondents' more detailed arguments are set out in the discussion section below.

88. In brief, in relation to the penalty for dishonest evasion, falsification of invoices in an attempt to misrepresent the true facts is dishonest. Again, the Respondents' more detailed arguments are set out in the discussion section below.

Discussion

30 *The s73 Assessment*

35 89. There was no evidence or submissions put before us to suggest that Racer MX had not made supplies to its customers in the relevant VAT periods or that the value of the supplies upon which HMRC's assessment was based was incorrect. However, the appellant disputed HMRC's view that the margin scheme treatment could not be applied to its sales.

90. The relevant UK law on the eligibility circumstances for the second hand margin scheme is set out at Article 12 of the VAT (Special Provisions Order) 1995 (“the Order”):

- (3) The circumstances mentioned in paragraph (1) above are—
- 5 (a) that the taxable person took possession of the goods pursuant to—
- (i) a supply in respect of which no VAT was chargeable under the Act or under Part I of the Manx Act;
- 10 (ii) a supply on which VAT was chargeable on the profit margin in accordance with paragraph (1) above or a corresponding provision made under the Manx Act or a corresponding provision of the law of another member State;...”

91. No VAT would be chargeable on the appellant’s purchases from the Dutch and Danish traders if those traders were not registered for VAT. But that is not the case
15 here. We are satisfied that both traders were registered.

92. It is the second paragraph of Article 12 (3)(a) which is in issue. Unless the circumstance in Article 12(3)(a)(ii) can be satisfied the appellant’s supply to its customers cannot be a supply under the second hand margin scheme.

93. We note that Article 12(3)(a)(ii) of the Order refers to “supply” whereas VATA
20 1994 makes a distinction between “supply” and “acquisition”. However for the reasons which follow we think the use of “supply” in the context of this particular provision in the Order must be read in the broader sense to cover both supplies and acquisitions under the Act. Given none of the other circumstances set out in Article 12(3) of the Order appear apt to cover acquisitions of second-hand goods, interpreting
25 the provision so that it only applies to a transaction made within one Member State as opposed to a transaction between one Member State trader and another Member State’s trader would mean a UK trader could access the second hand margin scheme treatment if it bought goods from another UK trader but not from a non-UK Member State trader. That restriction on the availability of the margin scheme relief cannot be
30 a result that is intended and the Directive provisions on the second hand margin scheme in Article 26a, do not draw any distinction which suggests eligibility for the margin scheme is not available in respect of situations where the goods are acquired from another Member State as opposed to being supplied within the Member State. Reading the UK provisions in conformity with the Directive provisions we think that
35 “supply” in Article 3(a)(ii) of the Order is able to cover situations where the UK trader has acquired goods from another Member State.

94. The issue is then whether the appellant took possession of goods pursuant to a supply which was one on which VAT was chargeable on the profit margin in accordance with a corresponding provision of the law of another Member State. In
40 other words the issue is whether with respect to each of the Danish and Dutch traders and each transaction the supply (in the broader sense used in the Order so as to cover acquisitions as well) was one on which VAT was chargeable under the provisions implementing the second hand margin scheme rules in respectively Denmark and the

Netherlands. It is to be noted that the issue is whether VAT was chargeable not charged. The fact that input tax was claimed by the other Member State trader does not of itself mean that VAT was chargeable. (The fact that the VAT was not claimed does not necessarily mean VAT was not chargeable). To the extent there is evidence
5 that input tax was paid by those traders and not challenged by the other Member State authorities this may allow an inference to be made that VAT was not chargeable under the relevant Member State's margin scheme rules but it could not be determinative.

95. How then can it be established that VAT was chargeable under the Dutch or
10 Danish margin scheme rules?

96. The Directive provisions at Article 26a (see [19] above) set out provisions which Member States must implement in relation to the margin scheme. The Member States do not have discretion to set up a scheme which allows VAT to be charged on the margin but without complying with the requirements although arguably there is
15 scope for the Member State to adopt additional requirements.

97. On the basis of the Member State's legislative provisions which implemented the directive provisions it would need to be established that Action Sport and Emile Gebben, when they purchased the motorcycles, were either supplied by 1) a "non taxable person" or 2) "by another taxable dealer, in so far as the supply of goods by
20 that other taxable dealer was subject to valued added tax in accordance with [the second hand margin scheme rules]".

Were the motorcycles supplied to the appellant under the second hand margin scheme?

98. It is to be noted the Directive makes no mention of the second hand margin
25 scheme wordings or endorsement that Member States may or may not require to be put onto the invoice. The fact that the invoices carry (whether mandatory or not under the Member State's implementation of the scheme) certain notations does not mean it is correct that VAT is chargeable under the margin scheme provisions as set out in the Directive. That will depend on whether the goods supplied to the EU trader were from
30 either a non-taxable person or by a supply which was itself objectively within the margin scheme rules. The words "subject to... in accordance with" in Article 26a of the Directive are supportive of the test being whether VAT was correctly chargeable not simply whether an amount described as VAT in B.2 indent 4 of Article 26a was in fact calculated and paid.

99. It is not conclusive that placing margin scheme wording on the sales invoice means VAT is chargeable on the profit margin. For example if a trader in the UK (Trader B) put the wording on its sales invoice to another UK trader (Trader C) which it is instructed by Notice 718 to do namely "input tax deduction has not been and will not be claimed by me in respect of the goods sold on this invoice", even though the
40 goods came from a taxable person (Trader A) and the goods were not sold to that trader under the margin scheme, if Trader C received such an invoice from Trader B, Trader C could not argue that the presence of the wording meant it was eligible to

apply the margin scheme when it sold the goods on. The eligibility circumstance in Article 12(3)(ii) is clearly not satisfied because Trader B did not take possession of the goods pursuant to a supply on which VAT was chargeable in accordance with the margin scheme.

5 100. In any case, even if the appellant received invoices with the margin scheme wording (which is a matter of dispute), and it is to be inferred from that that the goods were on the face of it supplied under the margin scheme, the evidence from the Dutch and Danish authorities in relation to matters that can reasonably be expected to be within their direct knowledge (that input tax was claimed, and that no disclosure was made on those traders' returns that the second margin scheme was being used) raises enough of a question mark to counter that inference such that enquiry then shifts back to the nature of the supplies made by Emile Gebben and Action Sport.

101. It is for the appellant to show that Action Sport and Emile Gebben bought the motorcycles from non taxable persons or from persons who themselves were able to and did apply the margin scheme rules.

102. It has not been demonstrated to us that the supplies made by Action Sport and Emile Gebben were within the margin scheme because it has not been shown to us that when Emile Gebben and Action Sport bought the motorcycles they bought them from non-taxable persons or that they bought them from suppliers who were applying the margin scheme. In relation to Emile Gebben the Dutch authority's reply annexed a purchase invoice in relation to an import from outside the EU. But the import does not in our view mean Emile Gebben bought the motorcycles from a non-taxable person. The exporter in the non Member State would not by definition be able to operate margin scheme rules (which require Member State implementation) so the eligibility circumstance under the Directive would not be satisfied. Furthermore Article 26a B.2 refers to supplies "within the Community".

Relevance of rewording of margin scheme wording in Directive 2006/112/EC

103. We note that with effect from 1 January 2007, Article 26a in Directive 77/388/EC was repealed and the provision corresponding to B.2 indent 4 of that article appeared reworded in Article 314 (d) of Directive 2006/112/EC. This states:

"Article 314

The margin scheme shall apply to the supply by a taxable dealer of second-hand goods...where those goods have been supplied to him within the Community by one of the following persons:

35

...

(d) another taxable dealer, in so far as VAT has been applied to the supply of goods by that other taxable dealer in accordance with this margin scheme."

104. Recitals (1) and (3) of Directive 2006/112/EC make it clear the Directive 2006/112/EC is a recast of previous directives including Directive 77/388/EC and that the small amount of substantive amendments are listed exhaustively in the provisions

of the Directive governing transposition and entry into force. Article 314 is not one of those provisions so on the face of it no substantive change was intended by the rewording of Article 314 as compared with Article 26a. We have considered whether Article 314 affects the legal test to be applied. There are two aspects to this. First in
5 relation to the small amount of supplies covered by the assessment under appeal which were made after 1 January 2007 (i.e. those made for VAT period 01/07) and second in relation to any argument that Article 314 being a recast of Article 26a of Directive 77/388/EC throws light on the interpretation of that latter provision (which is relevant to all the supplies covered by the assessment whether they were made
10 before that date or not). We consider that the different wording in Article 314 does not alter our analysis that it needs to be demonstrated by the appellant that the supplies by Action Sport and Emile Gebben were ones which were chargeable to VAT under the margin scheme. If anything the wording in Article 314 suggest that it is not enough that VAT was chargeable on that supply but that VAT must actually have been
15 applied to the supply in accordance with the margin scheme. The presence of the second hand margin scheme wording on the Action Sport and Emile Gebben invoices does not of itself establish that VAT was applied to their supplies and as mentioned above evidence from the Danish and Dutch tax authorities as to matters which can reasonably be expected to be within their own knowledge means that we are not
20 persuaded that VAT was in fact applied by the Action Sport and Emile Gebben under the margin scheme.

Relevance of other issues

105. In reaching the conclusion that we do that the appellant was not entitled to operate the margin scheme, and that Action Sport and Emile Gebben were also not
25 entitled under their Member State's implementation to operate the margin scheme we should explain why some of the issues raised by the appellant are not relevant.

106. The issue of whether the goods were second hand or not is one such issue. Even if the motorcycles were sold second hand this is insufficient if the circumstances set out in Article 12(3) of the Order on eligibility are not made out. So, for the purposes
30 of the s73 VATA assessment it does not matter whether it is correct that Emile Gebben and/or Action Sport used the goods and then sold them on.

107. We mention above at [61], an Action Sport invoice describing a motorcycle as "S/H" and ex-demonstrator. But there is no indication that the margin scheme treatment had been applied in relation to this motorcycle by Action Sport. Even if it
35 was enough to show that the motorcycles were second hand (i.e. it had been established that the eligibility circumstances under Article 12(3) of the Order were satisfied) the fact that this particular motorcycle was described in a way which suggests it was second hand and an ex demonstrator does not we think indicate that the other motorcycles which were sold were also second hand or ex demonstrators
40 (when no such similar description was put next to them). If anything it tends to indicate that the other motorcycles were not ex demonstrators because if they were this would have been specified.

108. Also the signed statements the appellant has obtained from customers saying the goods they bought from the appellant were second hand do not assist in showing that when the appellant bought the motor cycles they were second hand at that point in time or that the motorcycles were second hand at the point in time when Emile Gebben or Action Sport bought the goods from their suppliers. The motor cycles could e.g. have been used for demonstration by Racer MX or by Emile Gebben or Action Sport so by the time they got to Racer MX's customers they looked second-hand.

109. As discussed above at [99], it is not enough, for the purposes of the s73 assessment issue, to show invoices were received with the second hand margin scheme notations. The appellant raised the issue of how would he know, or how would he be in position to check whether input tax had been claimed or not? While we can see why the appellant raises that point given the way HMRC have emphasised in their arguments the need to show that input tax had been claimed and from the text in Notice 718 (namely that the issue is one of fact as to whether VAT was deducted by the EU trader on the supply) the eligibility condition looks at whether VAT was chargeable in accordance with the other Member State's rules. It does not take account of whether the appellant found out, or could reasonably have found out whether input tax had in fact been claimed.

110. It is up to the purchasing trader to satisfy themselves that the trader they are buying from is entitled to operate and is operating the margin scheme in relation to the particular supply. The risk that the trader making the supply does not satisfy the requirements and that the purchasing trader is also therefore not entitled to operate the scheme falls on the purchasing trader. On the face of it that may seem onerous, but it is of note that the margin scheme treatment is an option not an obligation. The appellant did not have to apply the margin scheme treatment but chose to do so. There is no suggestion within the drafting of the Directive or domestic provisions that whether the second hand margin scheme applies to a supply by a trader to its customers depends on what level of enquiry the trader has made or could be expected to make to its supplier.

Conclusion on s73 assessment

111. The supplies the appellant made to its customers were not made under the margin scheme as the eligibility circumstance in Article 12(3) of the Order was not satisfied. The appellant has not established he was not liable to output tax on the full value of the goods sold in the relevant period or that the amount upon which he was assessed was incorrect. The s73 assessment in the amount of £108,487.00 is confirmed.

Section 60 dishonest evasion penalty

Discussion

112. The burden is on HMRC to show dishonesty and evasion. HMRC say the appellant falsified the invoices. We accept from examining the versions brought in by

the appellant that the second hand margin scheme notations and, in relation to the Emile Gebben invoices, the solid horizontal black strip, were added separately to the invoices by some means after the original invoice was printed.

5 113. HMRC accept they do not have direct evidence the appellant falsified the invoices by placing the second hand margin wording on the invoices and inserting the black strip after those invoices were produced. But, they point to evidence from which they say inferences may be drawn that the appellant tampered with the invoices or submitted them to HMRC knowing they had been tampered with.

10 *The reasons why HMRC says it is the appellant who tampered with the invoices or submitted them knowing they had been tampered with:*

15 114. HMRC say the appellant had a motive to insert text and operate the margin scheme when he was not entitled to do so in that the appellant could make the same profit but by selling at a lower price could undercut competitors. While the Danish and Dutch traders might have a motive to put the second hand margin scheme notation on thereby attracting traders who want to deal with someone who appears to be a margin scheme trader they say this is a weak motive and an unlikely one because the appellant is a small trader compared to the Danish and Dutch traders.

20 115. The appellant disagrees. He says there would be a motive for the Danish and Dutch traders to put the second hand margin scheme notations on but to treat the supplies as sales of new goods.

25 116. As to the relative size of the traders, we do not know who else they deal with. Even if they do not deal with other traders in the UK we do not know the extent of their dealings with other traders in their respective countries or elsewhere. We cannot agree that the relative size of Action Sport and Emile Gebben indicates that their motive to tamper with the invoices is unlikely as HMRC suggest.

30 117. HMRC say the invoices were altered after their receipt by the appellant and that the notation looks to have been done by a similar printer. The typeface of the second hand margin scheme wording on any Action Sport invoice when compared with other Action Sport invoices which carried that wording appeared to us to be identical. The typeface of the second hand margin scheme wording on any Emile Gebben invoice when compared with other Emile Gebben invoices which carried that wording appeared identical. As between an Action Sport invoice and an Emile Gebben invoice the typeface of the second hand margin scheme notation appeared similar but not exactly the same.

35 118. In relation to the Emile Gebben invoices which are written in English, HMRC say the reference to notations in Dutch stands out as strange. Why, having written the invoice in English, would the Dutch trader then revert to Dutch?

40 119. HMRC say whoever falsified the invoices has faithfully reproduced the wording in Notice 718. They say the form of wording contains errors that would not be used by a mother tongue speaker or resident trader. These are: “on der” (highlighted as

incorrect usage in the Dutch authority's reply) and the use of the separate letters "ae" rather than the single Danish character "æ". A mother tongue speaker or resident trader would not copy the foreign language notations in Notice 718 or make those kinds of errors.

5 120. We are not persuaded that these points have the significance HMRC seeks to
place on them. If, as we have discussed above, it is possible that Action Sport and
Emile Gebben had a motive to tamper with the invoices and were seeking to indicate
to a UK trader they were a margin scheme trader it seems quite plausible that they
would use the wording that a UK margin scheme trader would be expecting to see as
10 set out by the trader's own tax authority and therefore that they would faithfully
reproduce the text as set out in that notice. There is no reason to think a non UK trader
could not access Notice 718 which was a public notice in a relatively straightforward
manner back at the relevant time.

15 121. In any case we approach with caution any assumption as to the language
abilities of the Danish and Dutch traders in Danish and Dutch respectively as we do
not have any evidence on that. We would not necessarily assume that traders in the
UK, even if they were mother tongue speakers of English would write perfect
grammatical English with perfect spelling. Why then should Action Sport or Emile
Gebben (assuming they were mother tongue speakers of Danish and respectively) be
20 held to that standard?

122. Similarly, if the Danish or Dutch traders had a motive to put the notation on the
invoices and further to cast the notation in such a way that it set out what a UK trader
might expect to see, this also means it might not be surprising that there is the
translation mix that HMRC have drawn our attention to i.e. Dutch invoices which are
25 in English but a notation which is in Dutch.

123. Having said that we do find it odd in the case of the Danish second hand margin
scheme notation that even if the Danish trader making an alteration were seeking to
replicate the Danish version of the text found in the UK public notice it would type
"ae" as separate characters rather than type the character "æ".

30 124. HMRC say if the Danish or Dutch trader wanted to falsify their invoices they
could have used their software to do this. We did not receive any evidence on what
software / or other mechanisms were used for printing the purchase invoices. We do
not know how easy or otherwise it would be for the Danish or Dutch trader to use the
software to add the wording. Further, if the Danish or Dutch traders wanted to use the
35 invoices to mislead other traders into thinking they were margin scheme traders it is
plausible that they would prefer manual alterations rather than using their software so
as to leave a less easily traceable evidential trail.

Fax sent from Actionsport which already carried the notation?

40 125. The appellant refers to a fax of an invoice from Action Sport (Invoice 957262).
This, it is said, was printed on Racer MX headed paper because that was what had
inadvertently been loaded into the fax machine. The copy carries the second hand

margin notation and bears the fax number of the sender which corresponds to Action Sport's fax number and the date "23 NOV 14:42". The appellant says it is impossible to reproduce these sender details by sending the fax from another machine. HMRC say it is possible to buy another fax machine and pre-programme it with details which are different from the actual sender and that this is what the appellant has done. Beyond what Mr Connell and Mr Haslen told us we did not receive any evidence on either of these points. We are not satisfied we have sufficient evidence before us to make a finding that it would be possible to pre-programme a fax machine in the way suggested by Mr Connell. Equally we are not satisfied there was sufficient evidence before us to make a finding that the fax we were shown could only have come from Action Sport because of the fax number in the header.

126. In any event, even if the fax had come from Action Sport and we were satisfied the document which the appellant put forward as being an original was in fact an original the fact that there is second hand margin wording on it does not mean it was necessarily there on the document which was faxed. It is possible that the wording could have been inserted later onto the original fax received.

127. None of the above points allow us in our view to make the inference that HMRC seeks that it was the appellant who added the second hand margin scheme notations. Nor, in relation to the fax the appellant referred to, is it established that the appellant must have originally received it with the second hand margin scheme wording on it.

Assessing the evidence from the Danish and Dutch authorities

128. HMRC say the information received from the Dutch and Danish authorities in the so called SCAC reports say all is in order with those traders. The Danish and Dutch authorities have no reason to misrepresent the situation.

129. We accept those authorities have no reason to misrepresent the situation and that there would not have been any reason for them not to act with reasonable diligence in putting HMRC's questions to the traders. But, for a number of reasons discussed below we do not think it can necessarily be inferred from these reports alone that there was nothing untoward with the Danish and Dutch traders.

130. Those reports are statements from the authorities which are derived from enquiries the authorities have made of the trader. We do not know the basis for those tax authorities saying the goods were new as they did not see the motorcycles, and we do not know what led them to the conclusion the motorcycles were new. There is no evidence as to what secondary enquiries or checks the authorities performed beyond putting the questions HMRC had asked to the traders.

131. In relation to the Danish reply the second enquiry was made of Gitte Anderson, Action Sport's accountant. This was not signed by her due to language difficulties. We do not know how intimately she was involved in the business, and who she had spoken to, or what enquiries she had made to get her information.

132. As noted at [61] above there was one invoice amongst those disclosed in relation to Action Sport which describes the motorcycle which was being sold as “S/H” and an ex-demonstrator. This suggests that when the Danish authority gave the answer that the goods in question were “all new goods”, this was not strictly correct.

5 133. We have a translated letter of a declaration from Mr Gebben. It is not clear the questions were put to him in the way HMRC intended so as to see if Mr Gebben picked up on the additional wording and deletion when shown the invoice which had been supplied by the appellant or whether he was only able to do this when shown the two versions side by side. The report does not say anything about what level of investigation took place. (The information the Danish authority provided in relation to
10 Stephen Haylett was inconsistent with Ms Luk’s enquiries to the extent there was no trace of such a person according to the records accessible to HMRC.) If the Danish and Dutch traders were running two sets of invoices the second being altered manually, there would no reason why anything untoward would be turned up by the enquiries by the Danish and Dutch tax authorities. While Mr Gebben’s statement
15 about the motorcycles being new is consistent with the fact that his purchase invoices say nothing about the goods being bought second hand, there is nothing apart from Mr Gebben saying so, which shows whether the motorcycles he sold were new when he sold them.

20 134. We have not received evidence from either of the traders, or the Danish or Dutch authority officers as to their enquiries. There has been no opportunity to test what is stated on their behalf in cross-examination. Nor have we been able to ask questions of those traders and those officers to assess what weight should be given to the enquiries and responses of the authorities.

25 135. HMRC referred us to the information exchange regulation (Council Regulation No 1798/2003 on administrative cooperation in the field of value added tax) which they say forms the basis for the SCAC reports. There is however nothing in that which indicates statements from other authorities have any heightened status or that there is not any need, as with any other evidence that is before the Tribunal, for the Tribunal
30 to assess the relevancy, reliability and weight of the report. Article 41.1 of the Regulation provides that information communicated in any form pursuant to the Regulation may be used for the assessment of certain taxes and that:

35 “In addition, it may be used in connection with judicial proceedings that may involve penalties, initiated as a result of infringements of tax law without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in such proceedings.”

136. While this allows HMRC to put the Danish and Dutch authority evidence before the Tribunal it does not override the Tribunal’s consideration as to the relevance, reliability and weight to be attributed to the evidence.

40 137. HMRC referred us to the cases of *Megantic Services Ltd. v HMRC* [2010] UKUT 464 (TCC) and *Dragon Futures Limited v HMRC* (2005) VAT Decision 19186 as examples of cases where evidence from a Member State authority was admitted before a Tribunal and in the case of *Dragon Futures* was relied upon by the

Tribunal in making certain findings. *Megantic* concerned the admissibility of documents provided to the Dutch authorities, and a question of interpretation of s9(2) of the Crime (International Co-operation) Act 2003, and *Dragon Futures* was an appeal concerning input tax recovery and circular transactions in mobile phones. Neither assists in our view. There is not any question that HMRC are able to admit the reports and documents sent in by the Danish and Dutch tax authorities. The particular issue is the relevance, reliability and weight to be attributed to the evidence. That is something which depends on the facts and circumstances of this particular case.

The documents in relation to another trader (Petchell)

10 138. We had before us a copy of a letter date 5 May 2007 from Lars Green of Action Sport to another UK trader. It states:

15 “We hereby confirm that all moto cross bike sold to TP motorcycles is second hand bike from cross in Denmark..all bike is sold using the second hand vat scheme or test bike used for testing spareparts etc...All bike sold without any warranty.”

139. We also saw a copy of the SCAC form dated 22 January 2008 which set out an information request from HMRC to the Danish tax authorities and that authority’s answers. The response states that the Danish authorities visited Action Sport and talked to the accountant: Gitte Andersen. The answer given to the question : “Please could tax inspector confirm whether the statement contained in the fax stating that the bikes were sold under the margin scheme, is correct or incorrect, the Danish authority answered “No the bikes etc. are new articles.” .

140. HMRC say this request was in relation to different supplies made to a different trader. They say it tells us nothing about supplies made to the appellant.

25 141. Although the documents relate to different supplies they are relevant in that (in the absence of any explanation) they tell us that the answers given by Mr Green’s accountant are contradicted by what Mr Green told the trader. They are more consistent with the appellant’s view that there is an incentive on the part of the Danish supplier to say one thing to the UK trader and another through its accountant and through its documentation to the Danish tax authority. They go against the Respondents’ view to the effect that nothing untoward has been indicated on the Danish side of the transaction.

35 142. The evidence from the Danish and Dutch authorities is insufficient by itself to persuade us that the possibility that it was the Danish or Dutch trader who altered the invoices should be ruled out. With the exception of the point about the use of English as opposed to Danish characters discussed above at [123] above, which does, we think, tend to point towards the Danish alteration in respect of the Action Sport invoices not being performed by Action Sport in Denmark, none of the points arising in relation to the use of language, software, or the Danish and Dutch authority evidence are of sufficient relevance, reliability or weight by themselves to persuade us that the invoices were tampered with after they were received by the appellant.

143. In a situation where we are not satisfied that the way in which the tampering was done rules out the Danish or Dutch traders doing it the key issues are, we think, an evaluation of Ms Bruce's recollection that the invoices she saw when she carried out her visit did not carry the second hand margin scheme notation, and an assessment
5 of whether the invoices she saw were motorcycle invoices as opposed to invoices for accessories and clothes (which it is not in dispute were sold new). If Ms Bruce saw motorcycle invoices without the second hand margin scheme notation it points against the Danish or Dutch traders falsifying the invoices. It points towards the invoices being tampered with after their receipt by the appellant.

10 *Ms Bruce's recollection that she saw purchase invoices without the second hand margin notation*

144. The appellant argues that when Ms Bruce says she did not recollect seeing the margin scheme wording she must have been looking at invoices for clothing and accessories which were not second hand.

15 145. In the appellant's favour Ms Bruce accepted in cross examination and in the answers that she gave to the Tribunal's questions she could not be sure which invoices she saw. She did not make a note. There is no contemporaneous or near
contemporaneous note of what she examined, of her recollection, of the concerns she had, or of the conversations she had with the specialist officer. There are invoices
20 which are purely for clothing and accessories in the period in issue. Ms Bruce was only at the premises for an hour.

146. On the other hand we accept Ms Bruce's evidence that she did speak to a colleague with a higher degree of specialisation in the second hand margin scheme than herself and this is consistent with her having concerns about the invoices she
25 saw. We do not think Ms Bruce can have looked at invoices which carried the second hand margin scheme notation (imprinted in the same manner as the ones we saw) and not have noticed the notation. The imprinted wording is distinctive and stands out from the rest of the invoice. This was particularly apparent on the versions of the invoices the appellant brought in but even when looking at copies of the documents
30 which carry the notation, the wording stands out as it is not in the same typeface as the rest of the invoice and the print is bolder.

147. In relation to the appellant's argument that Ms Bruce must only have seen clothing and accessory invoices we have considered the likelihood of this being the case. We note that out of a large number (125) of invoices and order forms supplied
35 by the appellant, a much smaller number of invoices (22) relate to only accessories and clothes. Of these, looking at the batch of copy invoices the appellant supplied to HMRC, only 3 do not carry the second hand margin scheme endorsement. Those 3 invoices are all for Action Sport. There were no invoices which only covered accessories and clothing for Emile Gebben. The 3 Action Sport invoices are invoice
40 numbers 950272 dated 27.03.2003, 950727 dated 26.05.2003 and 957934 dated 2.2.2006.

148. Ms Bruce says she looked at a random selection of invoices for 3 traders and we accept that in conducting a random check an officer would not focus on only one trader. Furthermore we accept that the period she was interested in was VAT periods during 2005 and 2006.

5 149. We also ask ourselves how likely is it that Ms Bruce's random selection would only cover accessory invoices when the business was motorcycles. We also think it is likely she would have looked at the Emile Gebben invoices too not just the Action Sport ones.

150. There is a low probability in our view that Ms Bruce's random search would:

10 (1) only look at the accessory invoices of Action Sport (2 of which were outside the period she was interested in), and

(2) that those accessory invoices which she looked at would be in the minority of accessory invoices which (on the appellant's case) did not carry the erroneous second hand margin wording .

15 151. On the balance of probability we find that Ms Bruce did look at motorcycle invoices in the VAT periods for 2005 and 2006 for both Action Sport and Emile Gebben and not just clothing / accessory invoices.

152. We accept Ms Bruce's evidence that she recollects the invoices she examined did not carry the second hand margin scheme wording.

20 153. Those invoices did not carry the second hand margin scheme wording that appears on the invoices we were shown by the appellant at the hearing or on the invoices that were sent in by the appellant to HMRC later. The wording is prominent and distinctive and, as discussed above, if the wording had been on the invoices it is something we think Ms Bruce would have noticed.

25 154. There is then a conflict on the one hand between Ms Bruce seeing the invoices without the second hand margin scheme notation on 9 May 2007 and Mr Haslen saying he received the invoices with the notation already on them. Balancing that evidence against Mr Haslen's denial he received the invoices without the notation we prefer Ms Bruce's evidence for the reasons below.

30 155. We accept Ms Bruce consulted further with a specialist colleague and this gave rise to further queries. This action is consistent with her concern that something she had expected to see was missing from the invoice.

35 156. If the notations were on the invoices it is likely Ms Bruce would have noticed them and either would have been satisfied they were evidence of correct margin scheme usage or not satisfied in which case we think it is likely that her investigations would have gone into whether the wordings were correct.

157. For the reasons explained below which relate to an answer Mr Haslen gave in cross-examination, which was inconsistent with what he told HMRC in an earlier meeting we also have concerns about the reliability of Mr Haslen's evidence. We

approach Mr Haslen's evidence with caution and are unwilling to accept it unless it is corroborated by other evidence.

158. A meeting between the appellant, Steve Copeland, and HMRC officers Ms Luk, Mr Colwell and Mr Hanton took place at Colchester Tax Office on 29 October 2008. Ms Luk took a note of the meeting which was subsequently signed as an agreed note by the attendees including the appellant subject to two queries the appellant had raised. The note which was exhibited to Ms Luk's witness statement and which used the abbreviation "JC" for Mr Colwell and "DH" for Mr Haslen states:

10 "JC asked DH if he had ever tampered with these invoices. DH confirmed categorically that he has never tampered with any invoices from Emile Gebben or any other suppliers. He did not put on the second hand statement.

DH stated he had requested Emile Gebben to add this statement on because he believed the goods in question were acquired second hand."

15 159. In a later letter dated 25 January 2009 the appellant's agent, Mr Copeland clarified that the reference to Emile Gebben should have been to "Darren Fretwell, the agent" and that when another part of the note talked about Mr Green's contact details not being known, this was referring to Mr Fretwell. Having been taken to these documents it was put to Mr Haslen in cross-examination that he had not made a request to put the second hand margin wording onto the invoices. Mr Haslen said he did not tell the traders to add the second hand margin scheme wording. He said that what he asked for was for there to be a description next to the motorcycle details that the motorcycle was second hand. It seemed odd to us that having taken the trouble to correct the reference to Emile Gebben in the meeting note, no query had been raised by him at the time about the record of the meeting referring to the request to the trader being about something other than the second hand margin scheme notation. The answers reported as being given by Mr Haslen follow on from the note reporting Mr Haslen's denial of tampering with the invoices. If Mr Haslen had indeed said at the meeting that he had asked the traders to put a description next to the motorcycle detailing that it was second hand, and the note was therefore inaccurate we think he would have alerted HMRC to the error. We find that at the meeting, Mr Haslen did refer to asking the Danish and Dutch trader to add the second hand margin wording. We note that what he said to HMRC is inconsistent with the evidence he gave before us. The inconsistency causes us to question the reliability of Mr Haslen's evidence.

35 160. We have also considered and take into account that the probability of two unrelated suppliers in different countries using the same means to tamper with invoices is more unlikely than similar means being used to tamper with the invoices by someone who has access to both sets of invoices after their receipt.

40 161. The use of "Ae" instead of the Danish character, discussed above at [123] does tend towards it being more likely than not that the tampering took place in the UK in relation to the Danish invoices.

162. We have considered the evidence from the Petchell file which points in the appellant's favour, but even if there was something untoward in Mr Green's

statements in view of what his accountant said the fact that Mr Green was saying the goods were second hand in Petchell does not preclude it being the case that the invoices in this appeal were tampered with once received. In any case there was no suggestion that there was anything untoward going on in relation to Emile Gebben.

5 163. We remind ourselves the standard of proof is the balance of probability. We find that it was more probable than not that when the invoices were received by the appellant from the Danish and Dutch traders that they did not carry the second hand margin scheme notation and that the notation was put on after they were received.

10 164. Mr Haslen says he did not tamper with them. But he was the sole proprietor of the business. He received the invoices, they remained within his control and he subsequently sent copies of them to HMRC. There was no evidence to suggest that after receipt the invoices did not remain within his possession or control and that if someone else had access to them Mr Haslen would not have known about this. He had access to the margin scheme wording in Notice 718 which was given to him by Ms
15 Bruce.

165. On the balance of probabilities we find the tampering was done by the appellant or if it was done by someone else that the appellant knew the invoices were tampered with subsequent to his receipt of the invoices. In relation to the Emile Gebben invoices the tampering included blacking out text which stated that the goods were
20 sold as new. The appellant submitted copies of invoices which he knew had been tampered with to HMRC.

Appellant's arguments – reasons why we do not accept them

166. The appellant argues that if he was going to tamper with the invoices he would not have put them on invoices for goods which were obviously not second hand such
25 as the clothing and accessories and would not have put them on when the wording was not mandatory. It was clear to us that the tampering was a “botch job”. It was done in an unsophisticated way to a whole bunch of invoices in bulk. The argument, if it had any merit, would apply equally as to why it would not make sense for the Danish or Dutch trader to have put invoice notations on in this way. It also suggests
30 that the tampering was not done by someone with any sophisticated knowledge of VAT.

167. We do not accept there are significant differences in the way the second hand margin scheme wording looks as the appellant suggests. On the contrary the wording on the Emile Gebben invoices appears identical as does the wording on the Action
35 Sport invoices. As between the wording on the Emile Gebben and Action Sport invoices the wording appears similar but not identical. Arguing in the alternative the appellant says he is computer illiterate and would not have been able to incorporate the same font type. We did not receive sufficient evidence before us on which to make any finding on the appellant's computing ability. But in any event it was not clear to
40 us that the notations had been imprinted by means of a computer as opposed to manually on a word processor or typewriter or that the consistency of the imprinted

font type to that of the invoice font type was so similar so as to have required any special skill.

168. The appellant argues the motorcycles were second-hand. The fact that Ms Bruce says she saw a second hand motorcycle at the appellant's premises does not help with the s73 assessment. Nor does it necessarily show the motor cycle was bought second hand. The other explanation is that it could have been bought new, used for demonstration and therefore appear second hand.

169. In relation to the appellant's argument that price variations indicate the motorcycles that were bought were second-hand, because of the inaccuracies noted at [34] to [36] above we are cautious about placing any significant weight on the appellant's table. We accept though there are some price variations across time and across supplier.

170. But, we cannot see that they are of such a degree that they lead to a finding that the motorcycles which were sold were of different conditions. This is particularly the case when the one invoice which does show an ex demonstrator model makes special mention of this and the price is significantly different (as compared with the price variations elsewhere) from the same model which is not noted on the invoice as being ex-demonstrator.

171. The size of the appellant's profit margin does not establish there was no point in the appellant seeking, as HMRC allege, to treat its supplies as if they were made under the second hand margin scheme in order to undercut competitors. There was a commercial motive to treat supplies as supplies made under the second hand margin scheme even though they were not. The fact that it turns out the expected returns of acting in that way do not materialise in an obviously successful way does not mean there was no such motive. In any case the level of profit should not be taken at face value because through the operation of the scheme a business that might otherwise have been loss-making was instead able to turn a profit.

Evidence of Mr Haslen which we do not accept

172. Given our concerns as to the reliability of Mr Haslen's evidence, we have difficulties accepting other parts of his evidence where this is not corroborated with documentary evidence. This means we do not accept the evidence that motorcycles were allocated categories 1 to 10 as there was nothing in any of the documentary evidence which we were shown which supported this.

173. Also we do not accept that Mr Haslen's recollection that he was not present on the premises of Tower Moto X when the VAT assurance officer visited on 4 April 2001. Given the length of time over which Mr Haslen makes his recollection and our concerns over the reliability of his evidence, we prefer the near contemporaneous note of the officer's record of 4 April 2001 which records that Mr Haslen was spoken to by the officer.

Evasive act

174. The act of tampering with the invoices to delete references to new goods and to include second hand margin wording purporting to be put on by the Danish and Dutch traders, and in any case the act of submitting copies of the Action Sport and Emile Gebben invoices to HMRC knowing the invoices had been tampered with after their receipt, in order to seek to persuade HMRC the motorcycles were bought from a supplier operating the second hand margin scheme were acts done for the purpose of evading output tax on the full value amount when the motorcycles were sold on to the appellant's customers. We therefore find the requirement in s60(1)(a) VATA to be satisfied.

Dishonest act

175. We received extensive submissions from HMRC as to the authorities on what needs to be shown to show "dishonesty" and on the nature of the test being partially objective and partially subjective (*R v Ghosh* [1982] 2 All ER 689, *Mullarkey and others v Broad and another* [2007] EWHC 3400 (Ch), *Barlow Clowes International Ltd. v Eurotrust International Ltd.* [2005] UKPC 37).

176. From these authorities we extract the following propositions. First, we must consider whether what the appellant did was dishonest according to the ordinary standards of reasonable and honest people. Then we must consider whether the appellant must have realised that what he was doing was dishonest by those standards.

177. In relation to the first question, tampering with invoices, or submitting them to HMRC knowing that they had been tampered with, in order to persuade HMRC to apply a treatment which allows the trader to charge less output tax than was due and therefore to be more competitive is clearly in our view conduct which would be dishonest according to the ordinary standards of reasonable and honest people.

178. In relation to the second question, in tampering with the invoices so that additional wording was included purporting to be from another trader when that was not the case, and blocking out text which suggested the goods were sold new, or in submitting such invoices to HMRC knowing the invoices had been tampered with, the appellant must have realised that what he was doing was dishonest by the standards of ordinary and honest people.

179. We have considered the relevance of the appellant's arguments as to the motorcycles being second hand. We discuss these at [108] (in relation to the customer declarations), [168] (in relation to Ms Bruce seeing a second hand motorcycle, and at [169] (in relation to price variations). With the exception of the Action sport motorcycle where the invoice notes that it is "S/H ex-demonstator" we are not persuaded that the motorcycles that were sold to the appellant were second hand. In any case the fact that one of the motorcycles was second hand, and even if the others were too, would not affect our conclusion on dishonesty. Even if the motorcycles were second hand, or even if the appellant genuinely thought that the goods were second hand, and the appellant thought this was enough to satisfy the second hand margin scheme requirements, tampering with invoices to add Danish and Dutch

5 notations to make it look like the Danish and Dutch traders had put these on and
blacking out wording on the Dutch trader's invoices which suggested motorcycles
were sold new, or submitting such invoices to HMRC knowing they had been
tampered with after their receipt with a view to persuading them that output tax
should be calculated on the margin scheme basis would be dishonest according to the
standards of reasonable and honest people. They are also actions which the appellant
must have realised were dishonest.

10 180. In drawing the above conclusions we do not think there is any issue that the
level of Mr Haslen's knowledge of VAT affairs and the second hand margin scheme
is such that he must not have realised that tampering with invoices or submitting
invoices he knew were tampered with was dishonest.

15 181. To the extent there was a dispute as to whether Mr Haslen was present at
HMRC's meeting with Tower Moto X when he was in partnership with Mr Potts on 4
April 2001, we explain above why we prefer the documentary evidence suggesting he
was there and was spoken to about the second margin scheme. But, even if he was
not there this would not change our view that the appellant must have known that
tampering with the invoices or allowing them to be submitted knowing they had been
tampered with after receipt was conduct which was dishonest according to the
standards of ordinary and honest people.

20 182. For the purposes of s60(1)(b) VATA 1994 the act of tampering with invoices or
submitting copies of invoices to HMRC knowing the invoices had been tampered
with so as to include second hand margin scheme wording and so as to delete wording
which indicated the goods were sold new was conduct which involved dishonesty.
The actions were designed to persuade HMRC that the sellers had put a margin
25 scheme notation on their invoices and the goods had been bought under the second
hand margin scheme when they had not.

183. We therefore find s60(1)(b) VATA to be satisfied.

Mitigation

30 184. HMRC explained a 30% reduction was given on the penalty due to the
appellant's cooperation in his attending two meetings with them. The maximum
reduction of 40% for co-operation was not given as there was not full and prompt co-
operation.

35 185. Ms Luk says that on 10 June 2009 she wrote to Mr Copeland to propose a
meeting on 15 July 2009 but no response was received. She says that on 22 July 2009
she offered a further meeting for 4 September 2009 but that again no response was
received.

186. Mr Haslen took issue with this. He says he answered the questions put to him at
the second meeting and he gave signed statements from customers declaring they had
bought the goods second hand but no-one had contacted him following that. Also,

until responses had been received from HMRC in relation to certain questions his accountant had asked there would have been no point in having the meeting.

5 187. We note that the appellant's agent Mr Copeland did respond to Ms Luk's letter of 10 June 2009 in a letter dated 6 July 2009 and that he did set out the basis on which it was suggested any meeting be deferred. Ms Luk responded to this letter in her letter of 22 July 2009. She gave a revised deadline for the appellant to send in a statement of assets, liabilities and business interests of 24 August 2009 as well as offering a further meeting on 4 September 2009. Ms Luk did not receive a response and no meeting took place.

10 188. Although an explanation was given as to why the first of the proposed meetings offered did not take place we were not satisfied that there was an explanation for why no response had been received from the appellant or his agent in relation to Ms Luk's 22 July 2009 letter. That an explanation was given for the first offered meeting does not alter our view that a 30% reduction was appropriate given there was some co-
15 operation but not full co-operation. No reduction was given under the heading in HMRC's policy for early and truthful explanation.

189. We see no reason to change the mitigation percentage of 30% assessed by HMRC.

Conclusion

20 190. We dismiss the appellant's appeals. The assessment under s73 VATA and the s60 penalty are upheld.

191. 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
25 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.

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**SWAMI RAGHAVAN
TRIBUNAL JUDGE**

RELEASE DATE: 13 November 2013

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