



TC05150

Appeal number: TC/2014/06274

VAT – whether car sold for consideration where car agreed to be sold but returned to seller-whether supply, whether tax point arisen, whether penalty due for inaccurate return – No – Appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JAPAN MPV MOTORS LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE GETHING
MEMBER Mr NIGEL COLLARD**

**Sitting in public at Birmingham Employment Tribunal, Tax, Centre City Tower
5-7 Hill Street, Birmingham, West Midlands, B5 4UU on Friday 27 May 2016**

The Appellant was not present and not represented

**Mr Barry Sellers presenting officer of HM Revenue and Customs, the
Respondents**

DECISION

1. The appellant Japan MPV Motors Limited (Japan MPV) agreed to sell a car to a company by the name of Avocet Hardware (UK) Limited ("Avocet") for £7,200 in September 2013. The car was a Nissan with registration BAO2 AWP (referred to below as the "Nissan AWP"). The consideration was paid in two instalments on 6th and 18 September 2013. The Nissan AWP was returned on 2nd October 2013. Avocet was not happy with the car. The consideration was not returned to Avocet. It was agreed that Japan MPV would supply a replacement vehicle once a suitable car had been identified or refund the consideration. A suitable car was supplied to Avocet in September 2014, a Nissan with registration BW54 YJE (referred to below as the Nissan YJE).
2. The issue in this case is whether out-put tax in respect of the £7,200 paid in September 2013 ought to have been included in the VAT return for Japan MPV for the period ended 31st October 2013 and whether a penalty was due to be paid by Japan MPV for failure to do so.
3. The VAT in dispute is £1,200 and the associated penalty at 22.5% is £270.
4. Penalties for careless preparation of the VAT return had been assessed on Japan MPV for the quarter ended 31st July 2013 for potential loss of revenue as a result of the improper application of the second hand goods margin scheme which improper use is not disputed and for failure to record input tax on £600 commission which is not disputed. The penalty is £141.30.
5. Penalties for careless preparation of the VAT return had been assessed on Japan MPV for the period ended 31st October 2013 of £346.72 for potential loss of revenue of £1,200 relating to the sale of the Nissan AWP and the balance related to the improper application of the second hand goods scheme. The penalty for the application of the second hand goods scheme is not disputed. The penalty referable to the failure to report the output tax in respect of the Nissan AWP is £270.
6. This appeal is against the decision of HMRC to amend the returns of Japan MPV for the quarters ended July 2013 and 31 October 2013 to correct the perceived failures mentioned in paragraphs 2 and 3 above which decision was upheld on a review by Mr David Appleyard on 31 October 2014.

The Evidence

7. Mr Lee Walters the officer of HMRC gave evidence under oath. He made the following statements:
 - (1) During a visit to the premises of Japan MPV in February 2014. He recalled that the company had about 30 cars in stock most of which had been imported from Japan, but others had been acquired from third parties. Japan MPV bought

second hand vehicles repaired or improved them and sought to sell them at a profit. He spoke to the director through an interpreter but the conversation was curtailed as the director had to return to work. Mr Lee then inspected the books with the company's agent.

5 (2) Mr Walters noticed that the second hand goods scheme had been incorrectly applied to cars imported from Japan. It is a requirement of the scheme that the seller should be a taxable person.

(3) Mr Walters looked at the bank statements and found two items not reflected in the VAT return. The first was £600 received by way commission earned on a sale of a car for a third party and £7,200 which had been received from Avocet for the Nissan AWP. He had not managed to get any more information from the director or his agent about the receipt of £7,200 during his visit.

10 (4) Mr Walters recalls seeing a copy invoice in respect of the sale of Nissan AWP for £7,200 with the words "CUSTOMER GAVE CAR BACK" but does not recall whether the invoice also had the words "credit note" written on the invoice.

(5) Mr Walters did not ask to see the car which had been returned.

(6) Mr Walters subsequently spoke by telephone to Geoffrey Lee, the financial controller and company secretary of Eliza Tinsley Ltd a sister company of Avocet, who confirmed that the car had been returned by Avocet and that Avocet was owed £7,200 by Japan MPV which it was hoped would be used to buy a suitable car. This was followed up by a letter from Mr Lee. Mr Walters recalls that Mr Lee had said no credit note had been received by Avocet.

(7) Mr Walters did not doubt that the car had been returned. He would have expected the consideration to be returned to the customer where goods are found to be defective or otherwise not satisfactory.

(8) In relation to credit notes, Mr Walters advised us that a credit note would be needed to be reflected in Japan MPV's VAT return for a period in which the car was returned if the sale of the car had occurred in an earlier period. If goods are sold and returned in a single period there would be nothing to reflect in the return.

8. We read the witness statements of Kamran Tabassum a director of Japan MPV who confirms that:

(1) Japan MPV agreed to sell the Nissan AWP to Avocet for £7,200 paid in two instalments in September 2013.

(2) Avocet was not happy with the car and returned it within three weeks.

(3) Japan MPV accepted the Nissan AWP back as stock. He endorsed the invoice with the words, "Customer returned vehicle for full refund. When I have sold the car I will refund the customer".

40 (4) The Nissan AWP was sold for £6,300 in April 2014 to a third party.

(5) Avocet bought the Nissan YJE in September 2014.

(6) In the trial bundle were the accounts of Japan PMV for the period 31 October 2014. The liability to pay £7,200 to Avocet was recorded as a liability of Japan MPV in its accounts.

(7) Japan PMV issued a credit note to Avocet on 2 October 2013.

5 (8) In the trial bundle there were:

(a) A photocopy of an invoice dated 2 October 2013 for the sale of the Nissan AWP which has words set out above pertaining to return and refund in full which will be paid when the car is sold.

10 (b) An email from Avocet dated 25 June 2014 confirming that the Nissan AWP was returned because Avocet were not happy with it and that either the cash will be returned in full or another car will be bought.

15 (c) An letter from Eliza Tinsley Ltd dated January 2016 confirming that the £7,200 due to be repaid upon the return of the Nissan AWP was recorded as a debtor in the accounts of Avocet during the period from the return of Nissan AWP until Avocet bought the Nissan YJE.

(d) A photocopy of an invoice relating to the sale dated 15th April 2014 of the Nissan AWP to a third party for £6,300.

20 (e) A photocopy of an invoice addressed to Avocet for the sale of Nissan YJE for £7,200 dated 9 September 2014 for which no further cash payment was received.

(f) A photocopy of a communication from DVLA dated 9 October 2014 confirming that Japan MPV was no longer the owner of Nissan YJE

Findings of Fact

9. We find as a fact that:

25 (1) Japan MPV agreed to sell the Nissan AWP to Avocet for £7,200 in September 2013. Avocet made the payment by bank transfer.

(2) Avocet was unhappy with the Nissan AWP and returned the car.

(3) Japan MPV agreed to take the car back for a full refund to be paid when the car was sold.

30 (4) Japan MPV had a liability to repay the purchase price and recorded that fact in its accounts for the period ended 31 October 2013.

(5) Avocet agreed to buy the Nissan YJE in 2014 for £7,200 and the obligation to pay the sale price was set off against the liability of Japan MPV to pay Avocet £7,200.

35 **The legislation**

10. Value added tax Act 1994 (the VATA)

4 Scope of VAT on taxable supplies

"VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him."

5 Meaning of Supply

5 (1)...

(2) Subject to

(a) **"supply"** in this Act includes all forms of supply, but not anything done otherwise than for a consideration."

10 **6 Time of Supply**

(1) The provisions of this section shall apply, subject to sections 18, 18B and 18C, for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.

15 (2) Subject to subsections (4) to (14) below, a supply of goods shall be treated as taking place—

(a) if the goods are to be removed, at the time of the removal;

(b) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied;

20 (c) if the goods (being sent or taken on approval or sale or return or similar terms) are removed before it is known whether a supply will take place, at the time when it becomes certain that the supply has taken place or, if sooner, 12 months after the removal.

(3)

25 (4) If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.

30 (15) In this Act "VAT invoice" means such an invoice as is required under paragraph 2A of Schedule 11, or would be so required if the person to whom the supply is made were a person to whom such an invoice should be issued."

24 Input tax and output tax

"(1)...

(2) Subject to the following provisions of this section, “output tax”, in relation to a taxable person, means VAT on supplies which he makes or on the acquisition by him from another member State of goods (including VAT which is also to be counted as input tax by virtue of subsection (1)(b) above).”

5 **Schedule 24 to Finance Act 2007**

"1—

(1) A penalty is payable by a person (P) where—

- (a) P gives HMRC a document of a kind listed in the Table below, and
- (b) Conditions 1 and 2 are satisfied.

10 (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

- (a) an understatement of a liability to tax,
- (b) a false or inflated statement of a loss ..., or
- (c) a false or inflated claim to repayment of tax.

15 (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax	Document
VAT	VAT return under regulations made under Para 2 of Schedule 11 to VAT Act 1994
VAT	Return, statement or declaration in connection with a claim
VAT	Return under a special scheme
All taxes	Any document likely to be relied upon by HMRC to determine, without further enquiry, a question about- <ul style="list-style-type: none"> a)P's liability to tax b)Payments by P by way of or in connection with tax, c)Any other payment by P (including penalties), or d)Repayments, or any other kind of payment or credit

3—

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

- 5 (a) “careless” if the inaccuracy is due to failure by P to take reasonable care,
- (b) “deliberate but not concealed” if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
- (c) “deliberate and concealed” if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).
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(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P—

- (a) discovered the inaccuracy at some later time, and
- 15 (b) did not take reasonable steps to inform HMRC.

Part 2 - Amount of Penalty

Standard Amount

4-

- 20 (1) This paragraph sets out the penalty liable under paragraph 1.
- (2) If the inaccuracy is in category 1, the penalty is-
- a. For careless action, 30% of the potential lost revenue,
- b. ...

4A

- 25 (1) An inaccuracy is in category 1 if—

- a. It involves a domestic matter

(5) An inaccuracy involves a domestic matter if it results in a potential loss of revenue that is charged on or by reference to anything not mentioned in sun-paragraph (4)(a) to (d)[which deals with offshore matters].

Potential lost revenue : normal rule

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- (1) "The potential lost revenue in respect of an inaccuracy in a document ...or a failure to notify an under assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

REDUCTIONS FOR DISCLOSURE

9

(A1) Paragraph 10 provides for reductions in penalties under Paragraphs 1,1A and 2 where a person discloses an inaccuracy.... .

- 10 (1) A person discloses an inaccuracy, by

- a. Telling HMRC about it,
- b. Giving HMRC reasonable help in quantifying the inaccuracy,
- c. Allowing HMRC access to records for the purpose of ensuring the inaccuracy ... is fully corrected.

15 10

(1) If a person who would otherwise be liable to a penalty of a percentage that is below in column 1 of the table (a standard percentage) has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

- 20 (2) But the standard percentage may not be reduced below the minimum shown for it-

- a. In the case of a prompted disclosure, in column 2 of the Table, and
- b. In the case of unprompted disclosure, in column 3 of the Table."

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	15%	0%
45%	22.5%	0%

25

HMRC's case

11. HMRC's case is that a payment was received by Japan MPV from Avocet by bank transfer in September 2013. That is evidence that Japan MPV made a supply. It is the time of the supply and therefore it follows that VAT was due on the supply of the Nissan AWP for £7,200.
12. The sale of Nissan AWP had not been included in the VAT return for the period ended 31 October 2013.
13. HMRC note there was no refund of the £7,200.
14. HMRC did not accept the invoice on which the words "credit note" were written were sufficient to constitute a valid credit note for VAT purposes.
15. HMRC have seen no evidence of the sale of the Nissan AWP to another customer other than the invoice of April 2014.
16. In consequence VAT is due in respect of the supply of Nissan AWP for £7,200 and a penalty is due for inaccurate completion of the VAT return. HMRC had assessed Japan MPV's conduct as careless. As there were errors in the returns for two consecutive periods and there was no possibility of delaying or deferring the penalty as Japan MPV had ceased to be liable to register for VAT the percentage penalty was assessed at 22.5%.

Japan MPV's case

17. Japan MPV was not represented at the hearing but had provided written representations. Its case is essentially that the VAT in respect of the transaction involving the Nissan AWP in September 2013 was cancelled in October 2013 when the vehicle was returned. Japan MPV owed Avocet the consideration which would be paid when the Nissan AWP was sold or if Avocet bought another car. In consequence no VAT was due.

Our decision

18. As a matter of the law of contract an agreement for the sale of goods can be terminated by the purchaser of the goods if the goods are defective or if there is a breach of a condition or if the parties otherwise agree.
19. We consider that the agreement between Japan MPV and Avocet in September 2013 was an agreement for the sale of goods namely the Nissan AWP for consideration of £7,200.
20. The contract was however terminated when Avocet, being unhappy with the vehicle, returned it to Japan MPV and Japan MPV agreed to take back the vehicle and refund Avocet in full. The payment would be made when the Japan MPV re-sold the vehicle to a third party. Mr Walters, in evidence, confirmed that he was content and

HMRC were content that the Nissan AWP had been returned by Avocet to Japan MPV.

21. We consider that VAT is a tax on turn-over generated from the sale of goods (or services) in the course of a business for a consideration. Where there is a contract for the sale of goods but that contract is terminated and the goods are returned upon an acknowledgment that the consideration be repaid there has been no sale. There has been no turnover of stock. There is no consideration on which VAT can be charged. We consider that Section 5 VATA must be construed purposively. It identifies the transaction on which VAT is to be charged. That transaction is a "supply" which is any sale of goods (or services) for a consideration. Where the purchaser of goods returns the goods due to dissatisfaction and the seller agrees to repay the consideration there has been no sale and there can be no supply. There can therefore be no liability to pay VAT in respect of the £7,200.

22. We consider that the lack of evidence (other than an invoice) for the sale of the Nissan AWP in April 2014 to a third party is not relevant to the issue of whether there was a supply in September 2013 to Avocet.

23. We do not accept HMRC's assertion that the mere fact that there was evidence of payment to Japan MPV in September 2013 causes that to be the date of a supply, when subsequently the contract for the sale was terminated by the return of the goods and the agreement to repay the consideration. Mr Walters said in evidence that during his visit to the premises of Japan MPV he recalled seeing a copy of the invoice annotated to the effect that the Nissan AWP had been returned. As mentioned above Mr Walters said he was content and HMRC were content that the Nissan AWP had been returned by Avocet to Japan MPV.

24. HMRC assert that there was no evidence of the payment being returned to Avocet and in consequence the date of the payment by Avocet was the date of the supply. Japan MPV does not assert it had repaid the £7,200. It asserts only that it agreed to repay and had a liability to repay on 2 October 2013. This is recorded by a manuscript statement on an invoice which Mr Walters recalled seeing during his visit. The lack of evidence of actual repayment is not therefore relevant to the issue. Further we reject the argument because for there to be a time of supply there has to be a supply of goods. The goods had been returned. The seller had agreed to repay. The original agreement was at an end. There was no longer a payment which was consideration for the sale of goods which is a pre-requisite to applying sections 4, 5 and 6 VATA.

25. In light of Mr Walter's acceptance that where a sale agreement is made and terminated in a single VAT period there is no requirement for the VAT return for that quarter to include the out-put tax on the sale and the credit in respect of the cancelled sale, HMRC accept that a return would be an accurate return.

26. The background records may be incomplete but Mr Walters indicated HMRC did not seek penalties for inaccurate records where the return was in fact accurate. It is therefore immaterial in assessing Japan MPV's liability to tax and penalties that

HMRC would not accept that the October 2nd document recording the return of the Nissan AWP and bearing the words credit note was insufficient to constitute a credit note.

5 27. We find that the contract was entered into on 18th September 2013 and cancelled on 2 October 2013 and as both of the events would have been covered by the VAT return for the quarter ended 31 October 2013, the absence of a valid credit note cannot cause there to have been any error or omission in relation to the VAT return for that quarter.

10 28. In the absence of any inaccuracy in the VAT return for the quarter ended 31st October 2013 in relation to the Nissan AWP there can be no liability for a penalty in respect of it. Accordingly, we allow the appeal in relation to the liability to pay VAT of £1,200 in respect of the alleged supply of the Nissan AWP to Avocet in 2013 and in relation to the imposition of a penalty for filing an inaccurate return in respect of it for the period ended 31 October 2013 in respect of it.

15 29. The letter from HMRC to Japan MPV concerning penalties dated 25 September 2014 indicates that for the period ended 31st October 2013 there was potential lost revenue of £1,541. The potential lost revenue for any quarter is the lost VAT that would have been paid but for the careless error. As £1,200 of the £1,541.00 was referable to the VAT in respect of the supply of the Nissan AWP which we consider is
20 not payable the potential lost revenue for the quarter is reduced to £341 which relates to the undisputed misapplication of the second-hand goods scheme. The associated penalty payable at 22.5% (which is the assessed rate taking into account disclosure) would be £76.72.

25 30. For the quarter ended 31st July 2013 the potential lost revenue of £628.00 also relates to the undisputed mis-application of the second hand goods scheme. The associated penalty would be £141.30. The total penalty payable for the errors in the two quarters is reduced to £218.02.

30 31. Mr Walters indicated that in accordance with HMRC practice set out in paragraph 2.5 of the "VAT Notice 700/42: misdeclaration penalty and repeated misdeclaration penalty" the penalty would fall below the *de minimis* threshold of £300 penalty or £1,000 *de minimis* level of potential lost revenue. We expect that HMRC will operate that practice in this case and in consequence reduce the outstanding penalty for both periods to zero.

35 This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which
40 accompanies and forms part of this decision notice.

HEATHER GETHING

TRIBUNAL JUDGE

RELEASE DATE: 06 JUNE 2016