[2016] UK FTT 0645 (TC)

TC05378

Appeal number: TC/2014/01761
TC/2014/01844

VAT – zero rated exports – whether sufficient evidence of removal from UK – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

I C WHOLESALE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN
MR DEREK ROBERTSON

Sitting in public at Manchester on 5 and 6 July 2016

Mr T. Brown, Counsel for the Appellant

Ms L. Wilson Barnes, Counsel for the Respondents

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DECISION

Introduction

1. By Notice of Appeal received on 1 April 2014 the Appellant appealed against the following two decisions of HMRC:

(a) a decision dated 19 July 2012 to raise an assessment in the sum of £76,333 relating to under declared VAT for the period ending 31 January 2012 ("Decision A"); and

(b) a decision dated 25 July 2013 to issue an assessment in the sum of £130,750 relating to under declared VAT for the periods 31 January 2012 (£52,788) and 31 January 2012 (£77,952) ("Decision B").

2. The basis of the decisions was the Appellant's failure to provide satisfactory evidence of the removal of goods from the UK in zero rated transactions where the Appellant purported to sell goods to a single customer based in the EU.

3. The grounds of appeal initially relied upon contended that sufficient evidence had been provided to support the zero rating of the vehicles to the Republic of Ireland.

4. At a hearing originally listed as the substantive hearing date on 29 April 2015 the Appellant applied and was granted permission to amend its grounds of appeal. As a result, the substantive hearing was postponed. The amended grounds advanced were three-fold:

(i) Were the vehicles in the UK at the time of supply by the Appellant to its Irish customers; if not the Appellant alleges that there is no UK VAT due;

(ii) If the vehicles were in the UK at the time of supply by the Appellant, did they leave the UK; if so, the Appellant alleges that the Appellant was entitled to zero-rate the transactions;

(iii) Did the Appellant take all reasonable measures to ensure its transactions were not connected to fraud; if so the Appellant alleges that it should be entitled to zero-rate the transactions.

Legislation

5. The VAT Act 1994 and regulations made thereunder provides, so far as is relevant:

Section 24(2) VAT Act 1994:

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 acquisition by him from another member state of goods.

Section 25(1) VAT Act 1994:

A taxable person shall –
(a) in respect of supplies made by him, and
(b) in respect of the acquisition by him from other member states of any goods, account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provisions for different circumstances.

Section 30(8) VAT Act 1994:

Regulations may provide for the zero rating of supplies of goods, or of such goods as may be specified in the regulations where –
(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member states or that the supply in question involves both –
(i) the removal of goods from the United Kingdom; and
(ii) their acquisition in another member state by a person who is liable for VAT on the acquisition in accordance with the provisions of the law of that member state corresponding, in relation to that member state, to the provisions of section 10; and
(b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.

Regulation 22 of The VAT Regulations (SI 1995/2518):

(1) Every taxable person who makes a supply of goods –
(a) to a person who, at the time of the supply, was registered in another member state and those goods were dispatched or transported to that or another member state…..
shall submit a statement to the Commissioners.
(2) The statement shall -
(a) be made in the form specified in a notice published by the Commissioners
(b) contain, in respect of the EU supplies of goods which have been made within the period in respect of which the statement is made, such information as the Commissioners shall from time to time prescribe, and
(c) contain a declaration that the information provided in the statement is true and complete.

Regulation 134 of The VAT Regulations:

Where the Commissioners are satisfied that –
(a) the supply of goods by a taxable person involves their removal from the United Kingdom,
(b) the supply is to a person taxable in another member State,
(c) the goods have been removed to another member State, and
(d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A of the Act, for VAT to be charged by reference to the

profit margin on supply,
the supply, subject to conditions as they may impose, shall be zero rated.

Notice 725

6. Paragraph 4.3 says that a supply from the UK to a customer in another EC Member State is liable to the zero rate where:

- *You obtain and show on your VAT sales invoice your customer's EC VAT registration number, including the 2-letter country prefix code; and*

- *The goods are sent or transported out of the UK to a destination in another EC Member State; and*

- *You obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out in paragraph 4.4.*

7. Paragraph 5.1 headed "Evidence of Removal" provides that:

A combination of these documents must be used to provide clear evidence that a supply has taken place, and the goods have been removed from the UK:

- *the customer's order (including customer's name, VAT number and delivery address for the goods)*
- *inter-company correspondence*
- *copy sales invoice (including a description of the goods, an invoice number and customer's EC VAT number etc)*
- *advice note*
- *packing list*
- *commercial transport document(s) from the carrier responsible for removing the goods from the UK, for example an International Consignment Note (CMR) fully completed by the consignor, the haulier and signed by receiving consignee*
- *details of insurance or freight charges*
- *bank statements as evidence of payment*
- *receipted copy of the consignment note as evidence of receipt of goods abroad any other documents relevant to the removal of the goods in question which you would normally obtain in the course of your intra-EC business*

8. Paragraph 5.2 which has the force of law provides:

The documents you use as proof of removal must clearly identify the following:

- *the supplier*
- *the consignor (where different from the supplier)*
- *the customer*
- *the goods*
- *an accurate value*
- *the mode of transport and route of movement of the goods, and*

- *the EC destination*

9. Paragraph 5.3 deals specifically with evidence of removal of goods to the ROI across the Irish Land Boundary. It makes clear that evidence should clearly show that the goods have left the UK and recommends that the commercial evidence should include: *"a copy of the carrier's invoice or consignment note, supported by evidence that the goods have been delivered to a destination in the Republic of Ireland (eg a receipted copy of the consignment note)."*

Background

10. Mr Ian Crewe, trading as The Car Partnership was registered for VAT with effect from 19 July 1999. The main business activity was described as *"vehicle consultancy"* and the business was given the trade class code of 4511 *"sale of cars and light motor vehicles."* On 12 October 2001 the Respondents were notified that the business had changed its trading name to I C Wholesale. The Appellant, which is based in Chester, was incorporated on 9 July 2002 and on 25 February 2004 the Respondents received retrospective notification of the change of business from sole proprietor to a limited company. Mr Crewe was appointed as director from 9 July 2002 and is the sole shareholder. Ms Jane Singleton was appointed as company secretary on 9 July 2002.

11. The visiting officer's report dated 12 October 2006 recorded that "He (Mr Crewe) is very keen to get his due diligence checks as thorough as possible and asked for advice in this regard…he realises his industry is infected by fraud and appears to genuinely want to distance himself from any potential wrongdoings by anyone in his supply chain." The visiting officer also noted that the Appellant's records were *"excellent, as good as any I have ever encountered for a motor trade."*

12. At a visit by the Respondents on 16 December 2008 the visiting officer noted the following:

"The basic trade has changed in that wholesaling to a customer A1 Cars, who are based in Romania and Cyprus, has taken off in a big way resulting in the last two repayment returns…Evidence of shipping not held – trader to obtain in the next few days."

13. A letter to Mr Crewe from the Respondents dated 17 December 2008 advised that:

"When selling to customers outside the UK, evidence must be held by you that the goods have been shipped, this is in addition to a basket of other evidence. The deadline is three months from the date of shipment and failure to supply may mean that VAT is payable by you. Please refer to VAT Notices 702 exports and 726 Single Market which can be obtained from the HMRC website."

The transactions

14. Decision A involved the supply of 34 new vehicles which took place in the Appellant's trading period 10/11. The customer in each transaction was A&P Flynn Ltd ("APF") of Dundalk County Louth in the Republic of Ireland which was registered for VAT on 17 August 2010. The vehicles were:

- 13 VWs and 1 Audi purchased from a number of companies in Germany; and
- 20 Ford Focus vehicles purchased from Michael's Autos in Cyprus.

15. The total value of the sales was £458,000.

16. Decision B involved 44 transactions which took place in the Appellant's trading periods 10/11 and 1/12. The customer in each transaction was Kilmac Contracts (IRL) Ltd ("Kilmac") which was registered for VAT in the ROI on 3 March 2006. All of the vehicles were VWs which the Appellant purchased from Continental Cars Ltd in Malta. The total value of the sales was £784,507.92.

Decision A

17. In a telephone conversation on 8 December 2011 HMRC officer Crooks informed Mr Crewe that he would like to see the following documents:

- Sales invoices from the Cypriot and German suppliers;
- Proof of payment by the Appellant to its suppliers and receipt of payment from A&P Flynn;
- Evidence of movement/shipping to and from the UK;
- Evidence of transportation, shipment or confirmation of receipt/transfer of ownership;
- EC sales list or Intrastat declarations.

18. At a visit on 9 December 2011 Mr Crewe told officer Crooks that the vehicles from Cyprus had arrived into the UK at Royal Portbury Dock Bristol. From there they were moved by MVT Hauliers the trading address of which was in County Monaghan, Northern Ireland. The vehicles were moved from Germany to the UK by lorry, which was arranged by the Appellant. Mr Crewe did not know who moved the vehicles to the ROI. Mr Crewe produced 34 sales invoices in response to officer Crooks' request for documents. Mr Crewe subsequently informed officer Crooks on 20 December 2011 that the vehicles were transported to ROI by MVT which had a base in the ROI.

19. Between 9 December 2011 and 8 February 2012 the Respondents were provided with various documents by Mr Crewe as evidence of removal of the vehicles from the UK. The documents provided were as follows:

- A spreadsheet of the Appellant's transactions for September and October 2011 (sent on 4 December 2011);

- Copies of the Appellant's Intrastat returns for August, September and October 2011 (sent on 15 December 2011);

- A copy email between Mr Crewe and "Alan" relating to two VWs and the Audi vehicle (faxed to the Respondents on 15 September 2011);

- Six pages of due diligence (faxed on 15 September 2011). The fax stated *"This fax together with our emails conclude your requests"*;

- Copies of sales invoices to A&P Flynn, copies of supplier invoices, proof of payment, proof of receipt and copies of transport documents/CMR sent by letter on 2 February 2012;

- Two invoices from MVT, two invoices from European Auto Services Ltd and bank reports showing payment to those shipping companies (supplied with a letter dated 14 August 2012 from Howard Worth).

Decision B

20. On 30 July 2012 HMRC officer Saxon requested copies of the transaction documents and the address to which the goods were delivered. On 23 August 2012 Mr Crewe sent officer Saxon invoices from Continental Cars Ltd, invoices to Kilmac from the Appellant, five invoices to the Appellant from MVT and copy bank statements with proof of payment. During its enquiries with Kilmac HMRC was informed by the company that it had no knowledge of nor had it traded with the Appellant.

21. On 13 September 2012 officer Saxon repeated his request for details of the delivery address and requested other information concerning the supply from Malta to the Appellant in the UK and the onward removal of the goods from the UK to ROI. Officer Saxon specifically requested signed delivery notes, date and route of removal and ferry tickets.

22. The following documents were provided by the Appellant:

- Invoices from Continental Cars Ltd to the Appellant (supplied by letter dated 23 August 2012);

- Invoices from the Appellant to Kilmac (supplied by letter dated 23 August 2012);

- Five invoices from MVT to the Appellant (supplied by letter dated 23 August 2012);

- Emails between John at Kilmac and Mr Crewe (supplied by letter dated 23 August 2012);

- Bank statements showing payments in and out (supplied by letter dated 23 August 2012);

- Due diligence information on Kilmac (supplied by letter dated 23 August 2012);

- CMR 13611 which appeared to match the vehicles on MVT invoice 6969 and which shows the consignor as MVT (supplied on 8 November 2012 and re-sent on 12 March 2013);

- CMR 12480 which appeared to match the vehicles on MVT invoice 7116 (supplied on 8 November 2012 and re-sent on 12 March 2013);

- CMR 13750 which appeared to match the vehicles on MVT invoice 6967 (supplied on 8 November 2012 and re-sent on 12 March 2013);

- CMR 13609 which appeared to match the vehicles on MVT invoice 6966 (supplied on 8 November 2012 and re-sent on 12 March 2013);

- Four further CMRs (sent by Howard Worth on 9 September 2013).

The case for the Respondents

23. It was submitted by the Respondents that Decision A was correct and the Appellant has failed to provide satisfactory evidence that the vehicles were removed from the UK. The criterion for zero rating has not therefore been met by the Appellant.

24. In particular the Respondents submit that the two documents provided in relation to the 20 Ford Focus vehicles which purported to be delivery notes do not contain a signature of the dispatcher, the shipper or the recipient which would indicate receipt of the vehicles. The Respondents concluded that this evidence was wholly insufficient to demonstrate that the vehicles were removed from the UK and/or arrived at a destination in ROI. The stamp of the Bristol Port Company on the document does not evidence removal of the vehicles from the UK.

25. The two documents provided by the Appellant in relation to the 14 vehicles supplied from Germany, also said by the Appellant to be "delivery notes" state that the vehicles were collected from Sandwich but bear no signature to show delivery or receipt and no registration number of the transporter.

26. Furthermore the Respondents submit that none of the delivery notes supplied by the Appellant show the identity of the driver of the transporter, none show a date of delivery or bear any indication of actual receipt of the vehicles. The Respondents highlighted the absence of any evidence to indicate who had completed the documents and noted that the stated delivery address is either "MVT Castleblaney, Co Monaghan, Irlande; MVT Castleblaney, Co Monaghan Ireland; MVT Monaghan Ireland; or MVT Castleblaney, Co Monaghan, Eire" none of which are a destination as required under paragraph 4.3 of Notice 725.

27. The Respondents explained that MVT (Motor Vehicle Transportation) is a UK company whose address is County Armagh, whose principal place of business is 205 Castleblaney Road, Keady, County Armagh, and whose telephone and fax numbers are County Armagh numbers. MVT's own documentation makes no reference to a depot in Castleblaney or Eire. Mr Crewe's assertion that MVT has a depot in Catleblaney, County Monaghan was unsupported by evidence nor was any evidence provided to show that the vehicles were delivered to such a destination.

28. HMRC officer Crooks, who was responsible for issuing the appealed decisions, visited Mr Crewe on 9 December 2011. At the meeting Mr Crewe confirmed that two transactions had been undertaken with A&P Flynn. He provided 34 invoices relating to the sales and stated that all of the vehicles involved had landed in the UK before being shipped to Ireland. Mr Crewe was unable to provide specific details, for instance whether the vehicles from Cyprus were shipped in one batch of 20 or two batches of 10. Mr Crewe stated that the vehicles arrived by ferry to Royal Portbury Dock, Bristol where they were then moved by transporter MVT Hauliers in Ireland. Mr Crewe stated that MVT were based in County Monaghan in ROI; Mr Crooks noted that on his return to the office he was unable to locate any MVT premises in ROI and that MVT is a UK VAT registered trader based at Castleblaney Road in County Armagh in Northern Ireland.

29. The Respondents subsequently established that MVT has a diesel yard located just across the Irish land Boundary in County Monaghan, ROI; the yard can be sighted yards away from the PPOB. Photographs were adduced during the hearing to show the yard.

30. Mr Crooks confirmed in evidence that he had not considered the tax point timing issue (i.e. the point at which the supply took place) in respect of the Appellant's purchases as the matter was not raised until shortly before the original hearing date, by which point Mr Crooks no longer worked in the same department. Mr Crooks accepted in evidence that if the consignment note provided by the Appellant was correct, the vehicles were collected from Germany on 24 August 2011. The Appellant had also invoiced for those vehicles on 4 August 2011 and 9 August 2011. Mr Crooks explained that he could not answer the Appellant's argument on the time and place of supply without first researching the point and considering it in detail.

31. Mr Crooks explained his reasons for refusing the Appellant's documents as sufficient evidence of removal from the UK. He stated that the delivery notes produced seemed to him to be akin to a loading manifest; the document was not signed and did not show A & P Flynn receiving the goods or the delivery address. Mr Crooks accepted that money had been received by the Appellant from a bank account named "A & P Flynn" but stated that he had no evidence to demonstrate where the money had come from and no signature showing receipt of the goods. Mr Crooks explained that throughout his enquiries he had only ever identified MVT as having premises in Northern Ireland; he had received no response as to where MVT had a depot and he had only located the diesel yard on google maps after the first hearing. Consequently Mr Crooks had reached the conclusion that documents showing an address in the ROI was insufficient without evidence in support.

32. Mr Crooks accepted that at a visit to the Appellant on 9 December 2011, prior to making his decision, he had noted:

"The vehicles were moved from Germany to the UK by lorry, arranged by ICW. IC said he had no idea who moved them, find out and where shipped to but has since stated that they were moved to MVT, Co Monaghan, Southern Ireland."

33. Mr Crooks also confirmed that Mr Crewe had confirmed this in a telephone call on 20 December 2011, providing the address "MVT, County Monaghan, Southern Ireland." However Mr Crooks highlighted that he had never been provided with details of where the premises were located.

34. In respect of Decision B Mr Crooks explained that, as far as he was aware, his colleague Mr Saxon who had issued the decision was unaware of communications between the Appellant and Kilmac other than the occasional emails provided.

35. Mr Crooks explained that there was a CMR to show that the vehicles had left Malta but the delivery address did not specify Northern or Southern Ireland, instead it stated "Monaghan, Ireland." Mr Crooks accepted that the T2Ls, formal Customs documents from Malta, were stamped to show that the goods had left Malta on 15 November 2011. Mr Crooks also agreed that the date on the Appellant's invoices showed 3 November 2011.

36. At a visit on 31 October 2013 Mr Mone of MVT told HMRC officers that the Appellant would have contacted the company to request that the vehicles be picked up from Sandwich and delivered to MVT in Monaghan. Mr Mone stated that the delivery address was the diesel yard situated just over the border in the ROI. Mr Mone confirmed at the meeting that Mr Crewe had requested that the vehicles from Malta were delivered to the ROI. Mr Crooks explained in cross examination that although MVT gave this information to HMRC there was no evidence to support the assertion that this actually took place.

37. The Respondents highlighted the absence of evidence in relation to all 34 vehicles of ferry tickets, details of port of departure or route taken. In a letter dated 14 August 2012 from the Appellant's representative Howard Worth it was asserted that the vehicles had been delivered to the customer; the Respondents submit that this is incorrect. No purchase invoices from A&P Flynn to the Appellant have been produced and the Appellant's invoices to A&P Flynn do not specify a date or place of delivery. The Respondents further noted that A&P Flynn's registered trade class was "retail sale of textiles in specialised stores." A&P Flynn was de-registered with effect from 7 February 2012.

38. It was submitted by the Respondents that Decision B was correct and the Appellant has failed to provide satisfactory evidence that the vehicles were removed from the UK. The criterion for zero rating has not therefore been met by the Appellant.

39. On 16 January 2012 the ROI Authority provided information which stated that Kilmac had been non-compliant for a number of years. It also stated that the business

activity was *"plastering and building houses."* The company directors were John O'Donnell and Danny O'Donnell.

40. The Respondents highlighted that only four CMRs were provided when there should have been five (one was said to be missing) and that the four were contradictory and inadequate evidence of removal from the UK and/or despatch or delivery to the customer Kilmac or to ROI. The Respondents noted that none of the CMRs produced on 8 November 2012 contained the customer, Kilmac's name. Furthermore two of the CMRs show the consignor as MVT with no mention of Valletta, Malta the pace from which the vehicles were purportedly shipped. There is no mention on the documents of Continental Cars Ltd of Malta, the sender of the goods, and no mention of the Appellant.

41. The CMRs do not show that the vehicles ever entered the UK; two purport to show movement from Valletta to Ireland, one shows Ireland to Ireland and the other shows Valletta to County Armagh in the UK.

42. The Respondents noted that three of the four CMRs do not show any signature in the 'good received' box and the fourth is virtually illegible. None of the CMRs show a destination address, simply "Castleblaney, Southern Ireland."

43. CMR 13609 is dated 26 October 2011, two weeks before the date on the invoice from the Appellant to Kilmac, and it shows the consignor as MVT in Southern Ireland. No consignee or delivery address is shown and the place and date of taking over is "Co Monaghan Ireland 26/10/11"; there is no mention of Valletta. The same CMR was provided to the Respondents by Motorpoint of Derby, a company which had been supplied with all 44 vehicles by Crest Global. That version of the CMR named "Motorpoint, Derby, UK" as consignee and the place for delivery was shown as "Derby, UK."

44. CMR 13750 is undated, bears no receipt, shows no delivery address and states the consignee as "MVT Castleblaney, County Armagh." The place designated for delivery is "Castleblaney." The Respondents submit that the CMR shows that the goods went from Valletta to MVT in County Armagh.

45. CMR 12480 is undated, shows no receipt and no delivery address other than "MVT, Castleblaney, Southern Ireland."

46. CMR 13611 is almost illegible but shows the consignor as MVT. The copy of the document provided by MVT shows the destination address as Motorpoint Derby.

47. The additional four CMRs subsequently provided by the Appellant all showed Continental Cars Ltd as the named consignor, not MVT. They also show the named consignee as the Appellant, not MVT. One CMR document (136422) the Malta office of departure customs stamp was dated 7 December 2011 yet MVT's invoice "ex Malta to Monaghan Ireland" bears the same date. The Respondents submit that the documents do not show the removal of the goods from the UK or their arrival in ROI. No evidence was provided as to the route taken from Malta to Southern Ireland or County Armagh or the dates of shipping.

48. The Appellant provided no evidence of instructions for shipment by Kilmac to the Appellant such as purchase orders. The Respondents highlighted that Kilmac denied carrying out the transactions with the Appellant and noted the due diligence carried out by the Appellant on Kilmac which was limited to obtaining the company's VAT registration and incorporation documents. Mr Crewe named his contact at Kilmac as "John Kilmac" but no such person has ever been a director of the company.

The Appellant's case

49. On behalf of the Appellant it was submitted that the documentary evidence appears to show that at the time the Appellant raised a VAT invoice to its customers for the supplies of the vehicles, the vehicles in question had not arrived in the UK. Mr Brown contended that Section 6(4) VATA 1994 provides that the time of supply is when the person making the supply issues a VAT invoice or receives payment (see *Woolfold Motor Co Ltd* [1983] STC 715)

50. Therefore, the Appellant contended, in applying the place of supply rules set out in Section 7(7) VATA 1994, the place of supply (at the time of supply) was outside the UK and therefore not subject to UK VAT.

51. In oral submissions Mr Brown contended that it is irrelevant to the issues before this Tribunal whether or not the Appellant correctly accounted for VAT outside the UK.

52. We were provided with a schedule prepared on behalf of the Appellant which showed that the place of supply argument was raised in respect of 34 vehicles in Decision A and 31 in Decision B; the remaining 13 vehicles, it was accepted, were not outside the UK at the time of supply.

53. In respect of the vehicles which it was accepted were in the UK at the time of supply, and any which the Tribunal finds were in the UK at the relevant time, it was submitted that the Appellant obtained evidence of removal from the UK which clearly demonstrated that the goods which form the subject of this appeal had been removed from the UK to the ROI.

54. The Appellant used MVT to ship the vehicles to ROI. MVT arranged delivery of the vehicles to its depot in ROI. The customer then arranged how and where the vehicles are to be transported to, in many cases also using MVT. A copy of the delivery note was then attached to the transport invoice raised by MVT and sent to the Appellant.

55. The Appellant summarised the evidence provided to the Respondents in relation to Decisions A and B as follows:

Item	Decision A Transaction	Decision B Transaction
Evidence to confirm address where vehicles	Yes – delivery notes and invoices provided for all	Yes – delivery notes

were delivered to	cars	
Evidence of arrival in UK	Yes – CMRs for vehicles from Germany evidenced, no CMRs for Cyprus transactions as they were purchased as "delivered" to the UK.	Yes
Evidence of payment by the Appellant to suppliers	Yes – copies of invoices and fund transfers for all vehicles were provided	Yes – copies of invoices and payments to suppliers were provided
Evidence of payment to the Appellant from its customers	Yes – evidenced through bank statements and sales invoices	Yes – copies of sales invoices were provided.

56. The Appellant relied on *Teleos and Others v The Commissioners for HM Revenue and Customs ("Teleos")* [2008] STC 706 in support of its case. In *Teleos* the the applicants had provided HMRC with CMRs from their customers as evidence that the goods had been exported. HMRC had accepted that the supplies were zero-rated on the basis of that evidence, but subsequently realised that some of the CMRs were fake and the goods had never left the UK. The applicants were assessed to VAT. Four questions were referred to the CJEU by the High Court (Moses J).

57. The Appellant submitted that it had carried out checks on both suppliers and had used the services of MVT for some time. By acting in good faith the Appellant submitted that it had taken every reasonable precaution to ensure that it did not participate in tax evasion and in the absence of any allegation of fraud it should not be denied the right to zero-rate the transactions.

58. Mr Crewe provided a witness statement and gave oral evidence. He was asked about the Intrastat declarations made by the Appellant for August and September 2011. Mr Crewe thought that the documents would have been prepared by his father who worked for the Appellant at the relevant time. The documents showed that the Appellant had made 34 supplies from the UK to A&P Flynn, the supplies which form the basis of this appeal. Mr Crewe accepted that the supplies were recorded on the Intrastat declarations and that the Appellant's VAT returns similarly showed the transactions as acquisitions and supplies within the EC:

"Q. You haven't explained anywhere why that -- do you say that was an error when those declarations were made?

A. I can't truthfully comment on that because I've never processed personally the IntraStat, I wouldn't know how to do it, and my father would have done this in good faith, thinking that was the way that you would record it in the system. In terms of the

argument of non-sales, at the time that wouldn't have been going through my mind. That argument has since come up with the legal team. I'm not that au fait.

Q. So would it be fair to say that apart from that argument being raised by the legal team, as far as you're concerned, the transactions were being supplied from the UK to the Republic of Ireland until that argument was raised?
A. I can't truthfully answer that because we are a UK company and I bought the cars outside the UK and I've sold them outside the UK. So how you determine if it's sold from the UK, I can't answer that.

Q. Yes, but your VAT returns recorded acquisitions from outside the UK from Member States into the UK and sales from the UK to a Member State.

A. So I would presume that would be how you record it.

Q. It's not a presumption.

A. Well, it is, because I don't do it, I only have to presume, I can't do anything else.

Q. You're giving evidence on behalf of the company, the company has to make sure that its IntraStat declarations are correct and its VAT returns are correct.

A. And it would have been done on good faith on what we thought was right at the time. But the position is still the same: I'm a UK company, I bought from outside the UK and I have sold outside the UK and how we recorded that, we would have believed we've done that in the correct manner.

Q. So is it your position now that those forms are incorrect and always were incorrect?

A. Well, no, because the same argument, I don't know. All I can say is we would have recorded it in good faith in the way that we presumed you would have to record it at the time. So I can't say that they're wrong or they're right."

(Transcript 5 July 2016 page 11)

59. Mr Crewe agreed that the invoice from Auto Weber, one of the German companies which supplied the vehicles, contained the Appellant's VAT number which had been provided by him to ensure that the acquisition did not include VAT. The invoice also contained the statement "Intracommunity delivery" in German which again indicated that the acquisition by the Appellant did not bear VAT.

60. As to where the supply by the Appellant took place the evidence was as follows:

"Q. And I won't take you through all the other invoices, but they're a similar format certainly from this company and I think that declaration or reference to it being an intracommunity delivery or transaction appears on perhaps at least one of the other German supplier's invoices. Do say if you don't understand the concept I'm going to

put to you, but is your position now that because you say the vehicles were not in the UK when they were supplied to A&P Flynn, because of that it wasn't a UK supply, that's your first point, isn't it?
A. Yes, I believe so, yes.
Q. If that is correct, must it not follow that the supply from, in this instance, Auto Weber was from Auto Weber in Germany to IC Wholesale in Germany? If you weren't supplying from the UK, where were you supplying from?
A. Now you're getting into legal carry on.
Q. That's why I did say, do say if you don't understand?
A. When I buy anything anywhere in Europe, well, it may change, but anyway -- because I'm a UK VAT company, they can invoice me zero rate, regardless of where that car goes.
Q. But that's on the basis they're -- that's a supply from Germany to the UK.
A. No, they're just invoicing.
Q. It's not just invoicing, it says it's an intracommunity delivery. If it's a supply from Germany to Germany, it's not, is it?
A. Well, first of all, I wouldn't know what that German thing says. Secondly, they're still entitled to invoice me zero rate.
Q. You say that it's still zero-rated if it's a supply from Germany to Germany?
A. No, I'm saying that ... I don't understand the legal ramifications."

(Transcript 5 July 2016 page 16)

61. Mr Crewe was cross-examined about the due diligence undertaken on the Appellant's trading partners. He explained that verifying VRNs through HMRC took a significant length of time and although attempts had been made prior to the transaction to verify A&P Flynn's VAT number the Appellant had not waited for the outcome of its enquiry before carrying out the transaction:

"Mainly because commercially, I'd have been probably retired by the time the information was coming through. So what we did was we ran two due diligence files, one was what we'd already done previously, which is a copy of VAT registration, copy of certificate of incorporation, most likely a copy of the passport of the director, then called the -- my dad did, the national number. And then while we waited for the verification to come through -- now, I don't know, I'd have to check the dates, whether we sort of said okay, everything seems to be stacking up, we'll start business but no money is going to change hands until it comes through, I'd have to look at the dates, but that is possibly one middle ground that I'd take because an invoice can always be cancelled. Then it came through as being okay anyway. And bear in mind it was logged on the monthly log that I sent to the Revenue, so there's no surprises there that I was dealing -- you know, I was dealing with A&P Flynn, they were in full knowledge of that.

Q. Well, it's not in evidence that there's a copy of a passport or other checks. I think this is all we have in relation to any due diligence on A&P Flynn. Whose passport did you have?

A. Normally, we would have a director's passport.

Q. Whose passport in A&P Flynn did you have?

A. I can't tell you that now."

(Transcript 5 July 2016 page 20)

62. Mr Crewe explained that he believed HMRC carried out due diligence and queried why, if that was not the case, he provided HMRC with information regarding his trading activities.

63. Mr Crewe went on to explain that usually Michael's Autos in Cyprus included shipping to the UK as part of the price for the vehicle; details such as cost and delivery location were not set out in writing because the deals were carried out verbally which is how the motor trade works. The vehicles were then taken to MVT's compound in the ROI and it was up to the customer what then happened to the vehicles:

"Q.Without any reference to where your customer wants them delivered to?

A. Well, the geography of their yard from there, it covers all bases, from there they can go to third party transport companies that cover all the south of Ireland, they can go back into Northern Ireland. It's a hub.

Q. No, no, I think you might be missing the point, Mr Crewe. There's nothing in your evidence or any documents to show that your customer and you ever had any discussions about where either they were to pick the goods up from or where they were to be delivered to.

A. Again, like with Michael's Autos, in our industry a lot of it is then verbally. The deal is done, like Michael said it's shipping to Portbury, it'll be: right, this is the price and I'll deliver them to MVT."

(Transcript 5 July 2016 page 32)

64. Mr Crewe did not accept that there was no secure depot belonging to MVT in the ROI although he explained that he had never been to visit the premises. Photographs produced by HMRC showed the premises to be a diesel yard which HMRC suggested was not secure; Mr Crewe explained that it had been described to him as a secure depot which was covered by MVT's insurance and offered to ask MVT to provide a copy of the insurance policy.

65. As to the Appellant's use of MVT Mr Crewe explained that he believed it was reasonable to entrust transportation of the vehicles to a professional transport company. He stated that MVT would not tell him the routes that the company used in transporting the vehicles. It was put to Mr Crewe that his explanation was at odds with MVT's advertised services which offered to *"provide you with a full progress*

report of the location of your vehicle at any given time…real time notification via e-mail with the following: time and date of vehicle collection, details of any damage, customer signature on collection and delivery…" however he was adamant that MVT had refused to give him such information.

66. Ms Wilson Barnes cross-examined Mr Crewe as to the reliability of documents supplied by him. By way of example the delivery note relating to the eleven VW vehicles showed in the box headed "collected" *"Geoff Fisher, Sandwich. European Autos, Canterbury"*. As to the fact that the document showed two separate entities Mr Crewe explained that European Auto Services is the transport company which used a yard belonging to Geoff Fisher.

67. The invoice from European Auto Services to the Appellant was dated 26 September 2011. Mr Crewe was asked to explain the apparent discrepancy as the invoice for transporting one of the vehicles appeared to predate the delivery which was shown on the CMR as two days earlier:

Q. You'll also see that the invoice is rendered on 26 September. Do you see that?
A. Yes.
Q. If you turn to page 475, that is one of the CMRs which you have produced in relation to the movement of, in this case, one of the VW Tourans. Do you see that?
A. Yes.
Q. And the chassis number which ends 000269. We can trace back to the delivery note we were looking at a short time ago, and the same chassis number appears on the invoice we just looked at a moment ago from European Auto Services.
A. Okay.
Q. At the bottom, that is dated 28 September by the carrier.
A. Okay.
Q. Can you explain how come that post-dates the invoice which is rendered on the 26th, two days earlier, by European Auto Services?
A. I don't see how their invoice has anything to do with ...
Q. Well, European Auto services are apparently the entity that was the carrier.
A. Yes, I know, but when they issued their invoice, I presume they were on the ball that time, I don't know.
Q. What do you mean, "on the ball"? You mean before they'd even moved them?
A. I mean, they're a man and wife firm and maybe she was -- I don't know. It is what it is.
Q. Well, it's two days before they apparently moved them and it says a place different from where they were apparently picked up by MVT.
A. I don't know. I can't -- I don't know. Unless things changed on those particular cars, I don't know if I bought them originally for stock and then I was able to sell them. I don't know. I'd have to go away and look at it more carefully.
Q. This evidence has been in existence for some considerable time, Mr Crewe, and you know that it's critical as to whether the documents can be trusted.
A. Right.
Q. They can't, can they?
A. Um ... Well, in relation to when they've issued the invoice, I can't comment. I really can't comment. I'd have to take them all out in relation to when they were collected

from -- what's this now, 28/09 ... (Pause). I don't know. I don't know, unless it's an error on their invoicing."
(Transcript 5 July 2016 page 57 – 58)

68. As regards Kilmac's denial to HMRC of ever having traded with the Appellant, Mr Crewe stated:

"A. Well, I've obviously been duped because I received the due diligence information on the companies and I've received payment from the companies. So somebody somewhere's set bank accounts up in these companies and I've obviously been duped. And in hindsight, we now know that the Irish had issues with one or both of these companies and the information didn't come down the line.

Q. And you're aware that the Kilmac Contracts – its business was plastering, wasn't it?

A. I don't know.

Q. You don't know. And the director was a Mr O'Donnell, not John Kilmac. You're aware of that perhaps?

A. Again, I don't know.

Q. You referred to your due diligence. What was that exactly?

A. The due diligence is we'd gain copies of the VAT certificate, certificate of incorporation. We'd call the national line. We'd also send all the details through to Special Investigations in Wigan and also on my monthly sheet it would go off to -- well, it was his predecessor, Mr Saxon. So I would have hoped one of those systems would have put a warning shot across my bow."

(Transcript 5 July 2016 page 62)

69. As to the lack of a specified delivery address on the invoices from Continental cars to the Appellant Mr Crewe explained that *"it's not something we do"* (transcript 5 July 2016 page 63). He went on to state:

"A. Continental Cars aren't like Michael's in Cyprus. Nothing will leave until it's paid for and nothing will leave the island until it's paid for. Being again, obviously, a small rock, a lot of the cars are held not at the dealer but at a distribution depot place on the island and the transport is up to me to organise. What they will do is they'll take them down to the port and custom clear them for you. They'll only do that once they're paid and it normally takes them a couple of days to do. So from that, I can then liaise with MVT to say, "I'm paying for X amount of cars, can you pencil me in on a lorry?" because if I know there's no lorries for four weeks, I'm not going to pay X amount and have it stuck out there for a month.

Q. There's no e-mails which refer to any such discussion.

A. Again, it's all phone -- it's all phone calls.

Q. Any reason why none of this is mentioned in your witness statement?
A. All I can say is I wasn't asked."

(Transcript 5 July 2016 page 64)

70. Mr Crewe was asked about CMRs showing the movement of vehicles from Malta. He stated that the documents would have been sent to him by MVT. Mr Crewe accepted that the documents were incorrectly completed, for instance showing MVT in Monaghan as the sender instead of Continental Cars in Malta. Similarly the consignee should have been named as the Appellant yet the documents showed MVT. Mr Crewe agreed that the documents were wrong but stated that he received them after the event.

71. Mr Crewe was questioned about an invoice dated 23 August 2011 which showed a VAT inclusive sale by Contour Hire and Leasing to Crest Global Automotive. It was put to Mr Crewe that the document indicated that the vehicle was in the UK as at 23 August 2011:

"Q…That would rather suggest that that vehicle was in the UK as at 23 August, wouldn't it?

A. No.

Q. You don't think so?

A. I don't see what an invoice has got to do with the locality of a car.

Q. Well, it has VAT on it. That would suggest it's a UK supply, wouldn't it?

A. It will be, but, again, I don't see how that has any relation to the geography of the car.

Q. So are you saying that these invoices show that sales were taking place of these vehicles by Contour Hire and Leasing to Crest Global at a time when the vehicles were still in Malta? Is that your position?

A. I can only guess, but what I'm saying to you is an invoice date has no relevance to where the geography of the car is at all.

Q. Your own invoice, IC Wholesale's invoice to Kilmac, in relation to this vehicle, the one we're looking at on page 1000 was dated 8 September 2011. How do you explain why it was that you could invoice Kilmac for the vehicle which had already been sold some two weeks earlier by Contour to Crest Global?

A. I can't comment on a third party's invoice. All I can say is an invoice date has no relevance to the geography of the car, nor do these have any relevance to me.

Q. They do have relevance to you because they're the same 44 vehicles.

A. But not the invoicing of them, no.

Q. The chassis numbers match, they're the same vehicles.

A. I understand that and I take your word that they all match up. What I'm saying is it has no relevance to me.

Q. It rather suggests that the information in the documents you've produced to show movement of these goods can't be trusted.?

A. Why?

Q. Because we have invoices to show they're in the UK.

A. There's nothing stopping a chassis number changing hands. I have no control over this. This doesn't matter at all to where the car is, at all.

Q. You're not troubled by the fact that someone else seems to be selling the vehicle that you appear to be selling?

A. Well, the cars will go somewhere. It's not that I'm not troubled, I just don't have a position on it."
(Transcript 5 July 2016 page 78)

Discussion and decision

72. We considered all of the oral and documentary evidence before us together with the submissions made on behalf of the parties. We began by reaching our findings of fact as to the chronology of events before applying those facts to the relevant legislative provisions.

73. There were 20 vehicles purchased by the Appellant from Michael's Automotive in Cyprus. The Appellant's purchase invoices were all dated 27 July 2011. The Appellant sold the vehicles to A&P Flynn on sales invoices dated 4 August 2011 save for one vehicle dated 3 August 2011. The Appellant paid its supplier on 8 and 15 August 2011 after receiving payment from the customer on 5 and 12 August 2011. The vehicles were said to have arrived in the UK on 12 August 2011 and were collected from Bristol on 17 August 2011.

74. It is clear that the Appellant's purchase from Michael's Automotive took place before the onward supply. The documents relied upon by the Appellant in support of the arrival date of the goods into the UK were two invoices from Import Clearance Services Ltd. The documents stated: "depart Limassol, arrive Avonmouth" and

showed the date of 12 August 2011 together with costs of disbursements and handling fees.

75. We were not satisfied that this document, the purpose of which was to invoice for import fees rather than confirm departure or arrival dates, was sufficient to prove the date of arrival of the vehicles in the UK. We noted, for instance that the document contained the date 20 September 2011 shown as "job date" with no further explanation and the "Arrival Notice" showed 12 August 2011 as an "ETA" which could not, in our view, be accepted as proof that the goods actually did arrive on that date.

76. The Appellant also relied on two MVT documents, described as delivery notes which showed the vehicles as collected from Portbury Docks. The delivery addresses were shown as: "MVT Castleblaney, Co Monaghan, Irelande" and "MVT Castleblaney, Co. Monaghan, Ireland." The documents are stamped by the Bristol Port Company on 17 August 2011 and the documents themselves are also dated 17 August 2011. We will set out in due course our findings as to the reliability of documents from MVT but on the evidence before us our finding is limited to the fact that the vehicles were at Portbury Docks on 17 August 2011. As to whether the vehicles arrived in the UK on or before that date or left the UK on or after that date we concluded that the documents did not assist and it would be unsafe to read such information into them.

77. The remaining vehicles in Decision A involved VW vehicles and one Audi purchased from a number of different companies in Germany. The documents provided from MVT and described by the Appellant as delivery notes bore the dates 6 September 2011 and 11 October 2011. We found the documents from MVT were unreliable and we did not accept that they were proof as to when the vehicles left Germany or arrived in the UK. The documents were incomplete; the despatch signatures were dated 6 September 2011 and 11 October 2011 but the delivery signature box and date were not filled in.

78. The Appellant also produced CMRs relating to the majority of vehicles from Germany (there were no CMRs relating to the vehicles from Michael's Automotive in Cyprus).We found that these documents were wholly insufficient as proof of either despatch from Germany or arrival into the UK. The documents were all incorrect or incomplete. By way of example numerous documents did not contain a date for taking over carriage of the goods or a stamp to show the goods were received nor did they show the date of arrival of the goods into the UK. The documents were addressed to the Appellant in Chester and made no reference to being delivered to the ROI or an MVT address in the ROI. One document contained the date of 24 August 2011 as that of the goods being taken however there was no signature to confirm receipt of the goods. The CMR relating to one of the VW Touran vehicles showed a signature of carrier dated 28 September 2011 and was stamped as received by the Appellant. However this seemed at odds with an invoice from European Auto Services Ltd (the carrier) which related to the transport of three vehicles (two VW Tourans and one Audi) from Germany to Chester but which was dated 26 September 2011. The invoice suggests that the goods went to the Appellant in Chester and there is nothing on the

face of the documents to support the contention that the goods were transported to the ROI. The quality of the documents viewed both in isolation and as a whole was poor and we were not satisfied that they demonstrated with any reliability when the goods left Germany or arrived in the UK.

79. All of the vehicles in Decision B were purchased from Continental Cars. The Appellant produced T2L documents stamped by Maltese Customs on 15 November 2011, 21 October 2011, 7 December 2011 and one document was illegible. We heard no evidence as to the procedure by which a T2L is or can be obtained. The difficulty with which we were faced is the fact that other documents before us left us without any clear understanding as to where the vehicles were at any specific time. By way of example the Appellant contends that the Appellant's supply of VW Golf chassis number CW087886 took place outside of the UK on 30 September 2011. The T2L document relating to that vehicle is stamped 15 November 2011 which may be indicative of the vehicle being in Malta at that time. However the vehicle was sold on to Contour Hire & Leasing Ltd who invoiced for its sale to Crest Global Automotive UK Ltd on 19 September 2011. The invoice was VAT inclusive which suggests that the supply took place in the UK from which we could infer that the vehicle was in the UK. Mr Crewe provided no cogent evidence as to where the vehicles in question were at any specific point and we did not accept his evidence that an invoice was wholly irrelevant to the locality of a vehicle.

80. We took into account the evidence set out in a visit report by HMRC to Crest Global Automotives UK Ltd on 17 October 2013. The visit report stated that Contour Hire & Leasing Ltd had been dissolved without declaring output tax on VW vehicles and concluded that Crest Global Automotive UK Ltd had participated in an MTIC supply chain. However there was no evidence to suggest that Crest Global Automotive UK Ltd was aware of the alleged fraud by Contour Hire & Leasing Ltd nor did we find that this had any bearing on whether a supply was made or where the relevant vehicles were in the transactions we are concerned with.

81. The MVT transport document which covered a number of the VW Golfs showed a collection address of: *"MVT, 205 Castleblaney Rd, Keady, Ireland"* and a delivery address of *"Motorpoint, Derby, England."* As noted by HMRC Keady is in Northern Ireland. The date of despatch was shown as 31 August 2011 and the delivery signature was dated 2 September 2011. However we found that this contradicted another MVT document which related to the same vehicles and which invoiced for delivery from Malta to Monaghan, Ireland and which declared a delivery date of 2 September 2011. We were left without any cogent evidence or any clear impression as to where the vehicles were and in the absence of any explanation we found that the discrepancies in the documentation undermined their reliability.

82. A second delivery document was barely legible but appeared to show delivery from Co. Armagh to Motorpoint in Derby however we could not make out a date of either despatch or delivery.

83. We considered the CMR documents produced by the Appellant relating to the transport from Malta. The documents were incomplete and incorrect; by way of

example one CMR showed MVT as the sender rather than the Maltese supplier and the delivery address did not specify Northern Ireland or the ROI. Two CMRs were unsigned as the goods having been received. In our view the quality of the documents was poor and woefully insufficient to demonstrate with any reliability when and to where the vehicles were transported.

84. There was no evidence before us showing collection of the vehicles by the customers, insurance of the vehicles while at MVT's premises or details of the route of transportation from the UK.

85. We went on to consider the Appellant's submissions in respect of the place and time of supply and the legislative provisions. We rejected the argument for the following reasons; the Appellant declared its purchases of the vehicles from the EU as a zero rated acquisition and its supply of those goods from the UK to the ROI. The purchase and sale were contained on the IntraStat documents completed by the Appellant and its VAT returns for periods 1 August 2011 to 31 October 2011 and 1 November 2011 to 31 January 2012. VATA 1994 provides:

10 Scope of VAT on acquisitions from member States

(1) VAT shall be charged on any acquisition from another member State of any goods where—

(a) the acquisition is a taxable acquisition and takes place in the United Kingdom;

(b) the acquisition is otherwise than in pursuance of a taxable supply; and

(c) the person who makes the acquisition is a taxable person or the goods are subject to a duty of excise or consist in a new means of transport.

11 Meaning of acquisition of goods from another member State

(1) Subject to the following provisions of this section, references in this Act to the acquisition of goods from another member State shall be construed as references to any acquisition of goods in pursuance of a transaction in relation to which the following conditions are satisfied, that is to say—

(a) the transaction is a supply of goods (including anything treated for the purposes of this Act as a supply of goods); and

(b) the transaction involves the removal of the goods from another member State;

and references in this Act, in relation to such an acquisition, to the supplier shall be construed accordingly.

86. We were satisfied that there was a taxable acquisition which involved the removal of the goods to the UK and which the Appellant then zero rated. We then considered the Appellant's supplies. VATA 1994 provides:

6(7) Where any supply of goods involves both—

(a) the removal of the goods from the United Kingdom; and

(b) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10,

subsections (2), (4) to (6) and (10) to (12) of this section shall not apply and the supply shall be treated for the purposes of this Act as taking place on whichever is the earlier of the days specified in subsection (8) below.

6(8) The days mentioned in subsection (7) above are—

(a) the 15th day of the month following that in which the removal in question takes place; and

(b) the day of the issue, in respect of the supply, of a VAT invoice or of an invoice of such other description as the Commissioners may by regulations prescribe.

…

7(2) Subject to the following provisions of this section, if the supply of any goods does not involve their removal from or to the United Kingdom they shall be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise shall be treated as supplied outside the United Kingdom.

7(7) Goods whose place of supply is not determined under any of the preceding provisions of this section but whose supply involves their removal to or from the United Kingdom shall be treated—

(a) as supplied in the United Kingdom where their supply involves their removal from the United Kingdom without also involving their previous removal to the United Kingdom; and

(b) as supplied outside the United Kingdom in any other case.

87. As is clear from our findings we were not satisfied that the goods were outside the UK at the time of supply and we concluded that the goods were in the UK at the time of supply. If we are incorrect on that point we took the view that section 7(7) VATA 1994 applies; the place of supply cannot be determined under the preceding provisions and the Appellant's supply involved the removal of the goods from the UK. We viewed the Appellant's supply as a separate transaction to its purchase and in the supply relating to the onward sale transaction the goods were not previously removed to the UK.

88. We concluded that the Appellant's submission that its supplies were made from Cyprus, Germany and Malta is, in our view, misconceived. We were satisfied that we

should treat the Appellant's supplies as having taken place after its purchases and from the UK; to treat the supplies otherwise would be contrary to the Appellant's own treatment of the sales. We did not accept Mr Brown's submission that we should effectively disregard the fact that the Appellant would have been obliged to account for the sales in the relevant Member State and did not; the inescapable conclusion we reached is that the Appellant did not account for the sales in the Member States because its onward supplies took place from the UK.

89. We agreed with Ms Wilson Barnes' submission that if we were to accept the Appellant's contention that its supplies were made from Cyprus, Malta and Germany, we would be ignoring the lack of any explanation as to how such supplies could be made in circumstances where the Appellant made and declared acquisitions in respect of the same goods from Member States. Moreover, if the Appellant was wrong to declare acquisitions the supplies from Cyprus, Malta and Germany would have taken place in those countries respectively and VAT should have been charged on the supplies. The fact that the Appellant provided its VAT number to the suppliers in order that the supply could be zero-rated again points to the fact that the onward supply took place, and was intended by the Appellant to take place, in the UK.

90. We were satisfied that our conclusion was reinforced by *Euro Tyre Holding BV v Staatssecretaris van Financien* [2011] All ER (D) 10 (Jan):

"ETH is a Netherlands company whose commercial activity was to supply spare parts for automobiles and other vehicles. During the period from 1 October 1997 to 31 January 1999 ETH sold, on various occasions, consignments of tyres under 'ex warehouse' conditions of supply to two companies established in Belgium, Miroco BVBA and VBS BVBA (respectively 'Miroco' and 'VBS' or, together, 'the purchasers'). Those conditions of supply meant that ETH would deliver the goods to its warehouse in Venlo (Netherlands) and that the transport from the warehouse would be on behalf of and at the risk of the purchasers. When the sales agreements were concluded the purchasers informed ETH that the goods would be transported to Belgium.

ETH issued invoices to the purchasers in respect of those sales which made no mention of VAT. The purchasers paid for the goods before they were delivered.

By its question, the referring court essentially asks whether, when goods are the subject of two successive supplies between different taxable persons acting as such, but of a single intra-Community transport, that transport should be ascribed to the first or second supply, given that that transaction therefore falls within the concept of an intra-Community supply for the purposes of the first subparagraph of Article 28c(A)(a) of the Sixth Directive, read in conjunction with Article 8(1)(a) and (b), the first subparagraph of Article 28a(1)(a), and Article 28b(A)(1) of that directive.

It is apparent from the order for reference that, by that question, the national court seeks to obtain clarification in relation to the answer given by the Court in EMAG Handel Eder. In paragraph 45 of that judgment and in the first subparagraph of paragraph 1 of the operative part thereof, the Court ruled that, where two successive

supplies of the same goods, effected for consideration between taxable persons acting as such, gives rise to a single intra-Community dispatch or a single intra-Community transport of those goods, that dispatch or transport can be ascribed to only one of the two supplies, which alone will be exempted from tax under the first subparagraph of Article 28c(A)(a) of the Sixth Directive. In that connection, the referring court observes that the Court did not specify how one should determine to which of those two supplies the transport should be ascribed.

The case which gave rise to the judgment in EMAG Handel Eder was factually similar to that in the main proceedings. That case concerned two successive supplies of the same goods which had been the subject of a single intra'Community transport. Just as in the main proceedings, the two supplies involved three taxable persons established in two different Member States. However, in that case, the intermediate purchaser had received a request to supply goods from the final purchaser before acquiring those goods from his supplier, while the main proceedings concern a situation in which the intermediate purchaser sells on to the final purchaser the goods that the intermediate purchaser has previously acquired from his supplier and in which no prior order has been placed.

In paragraph 38 of EMAG Handel Eder, the Court held that, even if two successive supplies give rise only to a single movement of goods, they must be regarded as having followed each other in time.
As regards the place of those two supplies, the Court held that, if the first of the two successive supplies is the supply which involves the intra-Community dispatch or transport of goods and which, therefore, has as a corollary an intra' Community acquisition taxed in the Member State of arrival of that dispatch or transport, the second supply is deemed to occur in the place of the intra' Community acquisition preceding it, that is, in the Member State of arrival. Conversely, if the supply involving the intra-Community dispatch or transport of goods is the second of the two successive supplies, the first supply, which, necessarily, occurred before the goods were dispatched or transported, is deemed to occur in the Member State of the departure of that dispatch or transport (EMAG Handel Eder, paragraph 50).

Therefore, only the place of the supply which gives rise to the dispatch or intra' Community transport of goods is determined in accordance with Article 8(1)(a) of the Sixth Directive; that place is deemed to be in the Member State of the departure of that dispatch or transport. The place of the other supply is determined in accordance with Article 8(1)(b) of that directive; that place is deemed to be either in the Member State of departure or in the Member State of arrival of that dispatch or transport, according to whether that supply is the first or the second of the two successive supplies (EMAG Handel Eder, paragraph 51).

Those considerations can be transposed to circumstances such as those of the case in the main proceedings.

In this case, if the purchasers, as the first persons acquiring the goods, expressed their intention to transport the goods to a Member State other than the State of supply and presented their VAT identification number attributed by that other Member State,

ETH was entitled to consider that the transactions that it effected constituted intra-Community supplies.

It is apparent from the documents before the Court that, in the main proceedings, ETH, in classifying its supply as intra-Community and exempting it from VAT, relied on the purchasers' Belgian VAT identification number, verification of which it requested from the Netherlands tax authorities, and on the purchasers' declaration, supplied when the goods were collected from ETH's warehouse, stating that those goods would be transported to Belgium. The question whether ETH fulfilled its obligations relating to evidence and of diligence by acting in that manner is a matter for the referring court to assess on the basis of the conditions laid down in that connection by national law.

In circumstances such as those at issue in the main proceedings, in which the first person acquiring the goods, having obtained the right to dispose of the goods as owner in the Member State of the first supply, expresses his intention to transport those goods to another Member State and presents his VAT identification number attributed by that other State, the intra-Community transport should be ascribed to the first supply, on condition that the right to dispose of the goods as owner has been transferred to the second person acquiring the goods in the Member State of destination of the intra-Community transport. It is for the referring court to establish whether that condition has been fulfilled in the case pending before it."

(emphasis added)

91. Although the facts in *Euro Tyres* are not identical to those in the present appeal, we were nevertheless satisfied that it is relevant to the issue before us and provides helpful guidance. We agreed with HMRC that in considering which supply came first it is clear (and the Appellant accepted) that the purchase invoices from Michael's Automotive in Cyprus in respect of the Ford Focus vehicles all pre-dated the invoices for onward supply. Similarly in respect of Decision B the purchase invoices from Malta pre-dated the sales invoices for onward supply. We were therefore satisfied that the supply to the Appellant took place before the Appellant's onward supply. In respect of the vehicles from Germany the Appellant's sales invoices pre-date the purchase invoices. We accepted HMRC's submission that this does not impact on the fact that the first supply was that from Germany to the UK and the fact that the Appellant provided its VAT number for the purpose of zero rating that intra Community transaction.

92. Having concluded that the goods were in the UK, or are to be treated as being in the UK at the time of the supply under section 7(2) and section 7(7) VATA 1994 we went on to consider the evidence of removal from the UK. We have already set out our findings in respect of the evidence. HMRC submit that there is insufficient proof that the goods said by the Appellant to have been supplied to the ROI were so supplied and furthermore the documents produced by the Appellant do not meet the criterion required for zero rating.

93. For the reasons set out above we found the overall quality of the evidence very poor and unreliable. There was no cogent evidence to show that the vehicles arrived at the MVT diesel yard in the ROI nor any evidence to show the date of arrival at the destination or route taken. We rejected Mr Crewe's evidence that MVT had refused to tell him the details of transportation; first, it contradicts MVT's website which specifically advertised that such information would be provided and second, if as Mr Crewe maintained MVT was a trustworthy and reputable company we concluded that it was simply not credible that such a conversation had taken place. We found Mr Crewe's evidence was undermined by his description of MVT's premises in the ROI as a "depot" when in fact pictures showed it to be no more than a diesel yard. In cross-examination Mr Crewe accepted he had ever visited the premises and we were satisfied that his evidence as to the security in place at the "depot" was unreliable. The Appellant's assertion that the vehicles were delivered to the yard in the ROI was unsupported by documents we would expect to see for instance an insurance policy to cover the vehicles whilst at the yard, customer arrangements to collect the vehicles and confirmation of their arrival at the site. Viewed against the discrepancies in the documents provided by the Appellant, the unreliable nature of the MVT documents and Mr Crewe's evidence which we found vague and unconvincing we found that there remained significant doubt as to whether the vehicles were in fact delivered to the MVT diesel yard in the ROI.

94. We found that the Appellant had not provided satisfactory evidence to demonstrate that the vehicles had been removed from the UK. We concluded that the requirements in VATA s 30(8) and Reg 134 were not met nor were the conditions set out in Notice 725.

95. We considered the Appellant's reliance on *Teleos* in which four questions were referred to the CJEU by Moses J in the High Court. At [68] of its judgment the CJEU stated:

"Article 28c(A)(a) of the Sixth Directive [now rewritten as Article 138(1) of the PVD] is to be interpreted as precluding the competent authorities of the member state of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for VAT on those goods where that evidence is found to be false, without, however, the supplier's involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion."

96. We found that *Teleos* was distinguishable on its facts; the situation in *Teleos* involved a change of position by HMRC who having accepted evidence of export later refused zero-rating (at [16]):

"Initially, the Commissioners accepted those documents as evidence that the goods had been exported from the United Kingdom, so that those supplies were exempt from VAT, by virtue of the zero-rating, and Teleos and others were entitled to be refunded

the input tax paid. However, on subsequent checks, the Commissioners discovered that, in certain cases, the destination stated on the CMR notes was false…"

97. The CJEU held that a supplier who had acted in good faith and submitted evidence establishing at first sight the right to the exemption was only entitled to the exemption if he took every reasonable measure in his power to ensure that the supply did not lead to his participation in tax evasion. It would remain open to the authorities to revisit an assessment if evidence of tax evasion and a failure on the part of the supplier to take every reasonable measure in his power came to their attention. A further distinguishing feature is that in the appeal before us HMRC do not allege fraud; it was not pleaded and Ms Wilson Barnes confirmed it formed no part of HMRC's case. Mr Brown cross-examined as to whether HMRC officer Crooks was alleging that documents such as the CMRs produced by the Appellant were false; Mr Crooks' answer was clear that he made no such allegation.

98. Whilst *Teleos* provides that legal certainty requires that a taxpayer acting in good faith and who takes all reasonable steps to avoid his participation in tax evasion is protected if apparently valid evidence is produced and accepted by HMRC as evidence of export, we found that the facts of *Teleos* did not apply to the appeal before us; there was no allegation or suggestion that the Appellant had participated (even unwittingly) in fraud and HMRC had from the outset refused to accept as sufficient the evidence produced to support the export. We should add that even if we were satisfied that *Teleos* applied to this appeal we found the evidence as to the Appellant's due diligence and measures taken to satisfy himself of the veracity of the transactions was woefully poor. Mr Crewe repeatedly made it clear that he did not concern himself or regard as relevant the details of various aspects of the transactions. Had Mr Crewe taken reasonable precautions in entering the deals he would have found that he was not transacting with Kilmac and that the person he believed to be a director was not a company official or in any way associated with the company. We noted that although Mr Crewe asserted that he had met with his customers he had not visited the company premises nor had he been to MVT's "depot" in the ROI which was in fact no more than a diesel yard. In those circumstances we were not satisfied that the Appellant took every reasonable measure to ensure that the supply did not lead to his participation in tax evasion and on that basis HMRC was entitled to assess for under declared VAT.

99. The appeal is dismissed.

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

JENNIFER DEAN
TRIBUNAL JUDGE

RELEASE DATE: 19 SEPTEMBER 2016