TC05445

Appeal number: TC/2016/00941

VALUE ADDED TAX – application to strike out notice of appeal on the basis that no applicable decision has yet been made – Application denied

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) SPORTSDIRECT.COM RETAIL LIMITED **Appellants**
(2) SDI (BROOK EU) LIMITED

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at The Royal Courts of Justice, The Strand, London WC2A 2LL on 10 October 2016

Mr. Jonathan Swift QC for the Appellants

Mr Sarabjit Singh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This decision relates to an application by the Respondents to strike out an appeal made by the Appellants on 12 February 2016 against a decision which the Appellants allege was made by the Respondents in a letter of 14 January 2016 (the "Decision Letter").

The issue

2. Under Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"):

> "The Tribunal must strike-out the whole or a part of the proceedings if the Tribunal –
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
>
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them."

Accordingly, I am required to strike-out the appeal if this Tribunal does not have jurisdiction in relation to it.

3. Under Section 83(1) of the Value Added Tax Act 1994 (the "VATA"), an appeal lies to this Tribunal with respect to (*inter alia*) "the VAT chargeable on the supply of any goods or services" (see Section 83(1)(b) of the VATA).

4. The Appellants allege that, by the Decision Letter, the Respondents made a decision as to the UK VAT chargeable on supplies made by them to consumers belonging in EU member states other than the UK and that they are appealing against that decision.

5. The Respondents say that the Decision Letter should not be construed as making any decision in relation to the UK VAT which is chargeable on supplies of goods by the Appellants. They argue that the Decision Letter should instead be construed instead as reserving the Respondents' position on the treatment of those supplies for UK VAT purposes until the VAT treatment of the supplies in question in other EU member states has been decided.

6. If the Respondents are right, then the Respondents have not made a decision against which an appeal can be made under Section 83(1) of the VATA and I must strike-out this appeal. If the Appellants are right, then I am not required to strike-out this appeal and, although rule 8 of the Tribunal Rules contains provisions which give me a discretion to strike out the appeal if certain conditions are met, the Respondents do not allege that any of those conditions is met in this case. So, if the Appellants are right that the Decision Letter, properly construed, amounts to a decision by the Respondents in relation to the UK VAT which is chargeable on supplies made by the Appellants to consumers belonging in EU member states other than in the UK, this application must fail and the appeal will be allowed to proceed.

7. It follows from the above that the only point which I need to decide is whether the Decision Letter, when construed in the light of all of the relevant surrounding circumstances, contains a decision as to the UK VAT chargeable on the supplies made by the Appellants or said no more than that the Respondents were reserving their position until future information was provided by the Appellants.

The relevant law

8. In order to understand how the present situation has arisen, it is necessary to set out the legislative background to the current dispute.

9. In short, the dispute relates to the application of Articles 32 to 34 of Directive 2006/112/EC (the "Directive") – provisions which cover internet sales made by a taxable person in one EU member state to consumers belonging in another EU member state who are not registered for VAT in that state – and the enactment of those provisions in the UK tax legislation in Section 7(5) of the VATA.

10. The three provisions of the Directive are as follows:

Supply of goods with transport

Article 32

Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins.

However, if dispatch or transport of the goods begins in a third territory or third country, both the place of supply by the importer designated or recognised under Article 201 as liable for payment of VAT and the place of any subsequent supply shall be deemed to be within the Member State of importation of the goods.

Article 33

1. By way of derogation from Article 32, the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends, where the following conditions are met:

   (a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;

   (b) the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier.

2. Where the goods supplied are dispatched or transported from a third territory or a third country and imported by the supplier into a Member State other than that in which dispatch or transport of the goods to the customer ends, they shall be

regarded as having been dispatched or transported from the Member State of importation.

Article 34

1. Provided the following conditions are met, Article 33 shall not apply to supplies of goods all of which are dispatched or transported to the same Member State, where that Member State is the Member State in which dispatch or transport of the goods ends:

   (a) the goods supplied are not products subject to excise duty;

   (b) the total value, exclusive of VAT, of such supplies effected under the conditions laid down in Article 33 within that Member State does not in any one calendar year exceed EUR 100 000 or the equivalent in national currency;

   (c) the total value, exclusive of VAT, of the supplies of goods, other than products subject to excise duty, effected under the conditions laid down in Article 33 within that Member State did not in the previous calendar year exceed EUR 100 000 or the equivalent in national currency.

2. The Member State within the territory of which the goods are located at the time when their dispatch or transport to the customer ends may limit the threshold referred to in paragraph 1 to EUR 35 000 or the equivalent in national currency, where that Member State fears that the threshold of EUR 100 000 might cause serious distortion of competition.

   Member States which exercise the option under the first subparagraph shall take the measures necessary to inform accordingly the competent public authorities in the Member State in which dispatch or transport of the goods begins.

3. The Commission shall present to the Council at the earliest opportunity a report on the operation of the special EUR 35 000 threshold referred to in paragraph 2, accompanied, if necessary, by appropriate proposals.

4. The Member State within the territory of which the goods are located at the time when their dispatch or transport begins shall grant those taxable persons who carry out supplies of goods eligible under paragraph 1 the right to opt for the place of supply to be determined in accordance with Article 33.

   The Member States concerned shall lay down the detailed rules governing the exercise of the option referred to in the first subparagraph, which shall in any event cover two calendar years."

11. It can be seen that, leaving aside for the moment the derogation from Article 33 set out in Article 34 where supplies of goods do not exceed a specified de minimis threshold, the structure of the provisions is to provide that the place of supply will be in the EU member state where the goods are located at the time when the dispatch or transport of the goods to the customer begins unless the goods are "dispatched or transported by or on behalf of the supplier" from an EU member state other than that in which the dispatch or transport of the goods ends, in which case the place of supply will be where the goods are located at the time when the dispatch or transport of the goods to the customer ends.

12. The above provisions of the Directive are reflected in Section 7(5) of the VATA. This provides as follow:-

"Goods whose place of supply is not determined under any of the preceding provisions of this Section and which do not consist in a new means of transport shall be treated as supplied outside the United Kingdom where –

(a) The supply involves the removal of the goods, by or under the direction of the person who supplies them, to another member State;

(b) The person who makes the supply is taxable in another member State; and

(c) provisions of the law of that member State, corresponding, in relation to that member State, to the provisions made by subsection (4) above make that person liable to VAT on the supply;

but this subsection shall not apply in relation to any supply in a case where the liability mentioned in paragraph (c) above depends on the exercise by any person of an option in the United Kingdom corresponding to such an option as is mentioned in paragraph 1(2) of Schedule 2 unless that person has given, and has not withdrawn, a notification to the Commissioners that he wishes his supplies to be treated as taking place outside the United Kingdom where they are supplies in relation to which the other requirements of this subsection are satisfied."

The background to the Decision Letter

13. The Sports Direct group has for some time taken the view that the phrase in Article 33 of the Directive "dispatched or transported by or on behalf of the supplier" (as translated in Section 7(5) of the VATA in the form of the phrase "by or under the direction of the person who supplies [the goods]") is not satisfied in circumstances where one member of a group sells goods over the internet to a customer and the customer is invited either to collect the goods himself/herself or to arrange his/her own transportation or to contract with another member of the group in relation to the transportation. Accordingly, with effect from 1 February 2010, the Sports Direct group put in place such an arrangement and asked the Respondents to confirm that the arrangement would fall outside Article 33, with the result that the relevant goods would be treated as being supplied in the UK and would give rise to UK VAT.

14. The request was made in a letter dated 18 January 2010, and, in response to that letter, Mr Mark Priestley of the Respondents replied on 11 March 2010 to (*inter alia*) the following effect:-

"In this case, Sportsdirect.com is not supplying and delivering; the delivery is undertaken by Etail Services Ltd. It therefore follows that Sportsdirect.com's supplies of goods under these arrangements will be subject to UK VAT at the appropriate rate. However, you ought to contact the other authorities concerned to discuss the set up and confirm that they are satisfied that the supplies do not take place within their jurisdictions."

15. Since receiving that response, the Sports Direct group has been accounting for VAT on cross-border intra-EU internet sales for over six years on the basis that, by ensuring that a group member other than the selling group member is engaged by the consumer to effect the transport of the goods to the consumer, the selling group

member falls outside Article 33 of the Directive and is required to account for UK VAT on the basis that its supplies are made in the UK.

16. By 2015, the Respondents were clearly having second thoughts about the interpretation of the Directive underlying their response of 11 March 2010. The UK therefore submitted a request to the Value Added Tax Committee of the European Commission (the "VAT Committee") in relation to the proper application of Articles 32 to 34 of the Directive in circumstances where the sale of the goods and the transport of the goods were linked – for example because the seller of the goods actively promoted, suggested or recommended the transporter to the consumer - even though the transporter agreed to provide its services to the consumer as opposed to the seller.

17. In its application to the VAT Committee, the UK outlined its view on this subject to be as follows:-

"The UK considers that ultimately the customer is ordering goods from the supplier and wants those goods delivered to him. The arrangements put in place between the two legal entities are merely an alternative way in which the supplier has his goods delivered to the customer. The introduction of a third party for the purposes of delivering the goods does not prevent those goods from being "dispatched or transported by or on behalf of the supplier". Consequently, the UK considers that VAT is due in the Member State of delivery".

18. The UK continued that, although some businesses were using such structures in order to benefit from differences between the applicable rates of VAT in the relevant EU member states, the main motivation for most businesses that opted into these arrangements were "to avoid the very significant burden of potentially having to register for VAT in multiple Member States". It then went on to explain that UK-based sellers were already complaining that competition was being distorted as a result of these arrangements and that the growth of cross-border internet trading meant that more businesses would be likely to be tempted to adopt the same approach, including, perhaps, the bigger operators.

19. In its resulting working paper on the subject, the VAT Committee noted that there were two possible interpretations of the phrase "dispatched or transported by or on behalf of the supplier" in Article 33 of the Directive.

20. The literal interpretation would mean that Article 33 would have no application in circumstances where the contract with the transport company was concluded by the consumer himself and the consumer could take action in relation to the transport only against the transporter and not against the seller. So, on a literal interpretation of Article 33, the structure adopted by the Sports Direct group would mean that Article 33 did not apply and would leave the place of supply of goods sold by the Appellants in these circumstances in the UK.

21. However, the VAT Committee went on to note that a broader interpretation could also be envisaged under which Articles 32 to 34 should be applied in such a way as to achieve the objectives for which they were designed – namely, to ensure that VAT receipts accrue directly to the EU member state of consumption and to prevent

distortions of competition between EU member states. The VAT Committee noted that, on that basis, the words should be construed by reference to the economic reality of the situation and not by adopting the literal approach of looking at the contractual structure. The VAT Committee concluded that, on the broader interpretation, goods could be seen as having been dispatched or transported "on behalf of the supplier" not only in circumstances where the supplier was directly involved in arranging the transport but also in situations where the supplier was "indirectly associated with the transport". It explained that such "indirect involvement" could be considered to be present in circumstances where the supplier was "involved" with the company providing the transport – for example, by actively promoting, suggesting or recommending the transport company to the customer – even though the supplier does not, as such, conclude a contract with the transport company, does not bear the cost of the transportation and does not assume any responsibility for the transportation.

22. So, on the broader interpretation, the structure adopted by the Sports Direct group in these circumstances would fall within Article 33 and that would mean that the place of supply of goods sold by the Appellants would be the EU member state in which the relevant consumer was located.

23. In the guidelines which ensued from the meeting of the VAT Committee, the VAT Committee stated that it "almost unanimously agrees that, for the purposes of Article 33 of VAT Directive, goods shall be considered to have been "dispatched or transported by or on behalf of the supplier" in any cases where the supplier intervenes directly or indirectly in the transport or dispatch of the goods." In other words, the VAT Committee agreed, "almost unanimously", that the broader interpretation of the phrase "dispatched or transported by on or behalf of the supplier" was correct.

The Decision Letter

24. Turning now to the terms of the Decision Letter, the precursor to that letter was a letter dated 28 September 2015 from Sportsdirect.com to Neil Mortimer, the Sports Direct group's Customer Relationship Manager. In that letter, the group outlined certain changes to the arrangements relating to their cross-border internet sales "none of which is material to the present case" and asked the Respondents to "reconfirm that SDI EU should continue to account for UK VAT at the correct rate".

25. The Decision Letter, which was sent in response to the letter of 28 September 2015, was sent by John Eaton, a UK VAT specialist at the Respondents to whom Mr Mortimer had referred the question. The Decision Letter begins by noting that the changes which had been made to the structure and the entities making the sales are not relevant to the point in issue and it then accurately summarises the view of the group to the effect that, as a result of their arrangement, the place of supply of the goods was to be determined under Article 32 and not Article 33 of the Directive and that the supplies were therefore subject to UK VAT. Then, under the heading "Our View", Mr Eaton noted that:-

"Our view on these arrangements and the correct interpretation of Articles 33 and 34 of the Principle VAT Directive and of own implementing provisions has been developing over time. The purported effect of the arrangements appeared contrary to the purpose of the above

provisions, which were introduced in order to maintain the 'destination' principle of taxation within the single market and prevent distortions of competition arising from differences between national VAT rates. In other words, that domestic operators would suffer unfairly if competitors were able to sell into the same market using lower rates of VAT.

As HMRC was not in a position to determine whether other Member States would take the same view, we referred the matter to the EU VAT Committee. Whilst this referral was in progress it was necessary to ensure that the issue did not give rise to either double taxation or non-taxation, contrary to the principle of the effective operation of the EU VAT system.

Our policy on place of supply for retailers using these arrangements to supply goods from the UK was in accordance with Section 7 of the VAT Act 1994 as follows:

- In order for goods to be treated as supplied outside the UK under Section 7(5) (supplies involving the removal of goods, by or under the directions of the person who supplies them, to another Member State), HMRC needs to be satisfied that the condition at 7(5)(c) is met, namely that the provisions in the destination Member State corresponding to those in subsection 7(4) make the supplier liable to VAT on the supply in that Member State.

- Thus, if HMRC had unilaterally applied its view that, on a proper interpretation of the statute, goods supplied under the above arrangements were nonetheless to be regarded as removed "by or under the directions of" the supplier, that would not be sufficient on its own to satisfy all the conditions of Section 7(5).

- If the conditions for applying Section 7(5) are not satisfied (for example because it has not been demonstrated that the supply is liable to VAT in the destination Member State) then Section 7(7) would apply and the goods must be treated as supplied in the UK.

Where, in a case involving arrangements of the kind in question, it was determined by the destination State that a UK retailer's distance sales are liable to VAT in that Member State under that Member State's corresponding provisions HMRC would agree that the place of supply is determined by Section 7(5). Until that determination was made in the relevant Member State HMRC continued to expect UK VAT to be accounted for under Section 7(7).

To this end you will recall that my predecessor advised in his letter of 11 March 2010 that you confirm with the tax authorities in the relevant destination member states whether or not they agree with your analysis concerning the place of supply and this advice has been reiterated to you on several occasions since then both verbally and in correspondence.

The EU VAT Committee considered this issue in its 104th meeting and has now published a guideline which can be found at the internet address below; http://ec.europa.eu/taxation customs/resources/dcouments/taxation/vat/key documents/vat committee/guidelines-vat-committee-meetings en.pdf

Following the publication of this guideline, HMRC has been able to finalise its policy as explained below.

Where a UK business believes that its arrangements fall under the scope of the VAT Committee guideline it should take steps to contact the tax authorities in the Member State of supply with a view to regularising the position in that State.

We will of course consider all claims for refund of UK VAT incorrectly accounted for on such supplies. The usual capping provisions still apply and you must satisfy us that the place of supply is in another Member State. HMRC will not accept claims until the place of supply has been fully established.

Claims for overpaid UK VAT must include the following information which will assist in verifying the place of supply.

The net value of the transactions and the VAT amount concerned by:

- calendar month,

  and

- by the country of supply

HMRC will forward this information to the relevant State under the provisions of Art 13 of Reg 904/2010."

26. Mr Eaton then noted that the group had already submitted claims for repayment of UK VAT in respect of past periods and invited the group to provide the information stipulated above, noting that:

"In the absence of this information we will unable to accept the claims".

27. Finally, under the heading "What to do if you disagree", Mr Eaton stated that, if the Appellants did not agree with his decision, it had a statutory right to ask for his decision to be reviewed or to appeal to an independent tribunal and outlined the procedure under which each of those routes could be pursued.

28. In a telephone call between the parties on 3 February 2016, Mr Justin Barnes, a consultant representing the Appellants, expressed the view that the Decision Letter was not clear (in contrast to Mr Priestley's 2010 decision letter) and that the Appellants needed something to which they could respond.

29. Following that call, Mr Herbert Monteith, the financial controller of Sportsdirect.com, wrote to Mr Mortimer in the following terms:-

"I am sorry to say we are still not sure exactly what has been decided in HMRC's letter.

Am I correct that the decision in the letter is

1) that SDR's European sales do fall within Article 33, and that this has been the position from the time of the delivery arrangements with Etail Services Limited?; and

2) that this conclusion has been reached taking account of the discussions that preceded the VAT Committee's guidance, and in light of the guidance itself?"

30. In response to that email, Mr Mortimer sent an email to Mr Monteith (the "Subsequent Email") in which he stated the following:-

"The questions below are open to interpretation, but the short answer to both of them from me is in the affirmative. With regard to the second question, we have naturally attempted to consider all relevant information available to us.

HMRC recurring advice to Sports Direct over the last five years has been to discuss the arrangements with the relevant fiscal authorities in each relevant EU territory. You will have a better idea than I do, to what extent that has taken place. As I explained on our recent Risk Review call, HMRC is not in a position to rule on whether a supply is liable to taxation in a specific place outside the UK or whether the supplier should be registered for Vat there. That is a matter for the supplier and the other Member State to establish.

I envisage the next step in this matter to be your provision of the information requested by 15 Feb in John Eaton's letter of 14.1.16."

The parties' arguments

31. The Respondents contend that the Decision Letter does not amount to a decision that the place of supply of goods delivered from the UK to customers in other EU member states was those other EU member state and not the UK. They say that, instead, the Decision Letter was merely saying that the place of supply of the goods could be determined only after the application of the relevant provisions of the Directive in each destination EU member state had been determined and that, until that determination had been made, the Respondents would continue to expect UK VAT to be accounted for.

32. If the Respondents are correct in arguing that this how the Decision Letter shall be construed, then its application to strike out this appeal must succeed because this Tribunal's jurisdiction under Section 83 of the VATA encompasses only the determination of the UK VAT chargeable on the supplies and a reply to that effect by the Respondents would not be a decision that no UK VAT was chargeable on the supplies but would instead be a decision that the status of the supplies for UK VAT purposes could not be determined until further information was forthcoming. Whilst a decision of that nature might be subject to challenge under a provision of administrative law, it would not be a decision as to the amount of UK VAT payable in respect of the relevant supplies and could therefore not be the subject of an appeal.

33. In contrast, the Appellants contend that the Decision Letter should be construed as setting out the Respondents' view to the effect that, consistent with the recommendation of the VAT Committee, these supplies should be regarded as being made outside the UK and that the Appellants should provide details of its payments of VAT outside the UK in accordance with that approach before the Respondents would accept claims for a repayment of overpaid UK VAT.

Discussion

34. There are two unusual features of this case which are worth mentioning.

35. The first is that, unlike most appeals to this Tribunal, this is a case where the Appellants are arguing that UK VAT is payable in respect of the relevant supplies

whereas, depending on which view one takes of the Decision Letter, the Respondents are either saying categorically that no UK VAT should be accounted for or saying that whether or not UK VAT should be accounted for is dependent on further information in relation to the VAT position in other EU member states. So it is a case where the taxpayer is trying to pay more UK VAT than the Respondents are presently prepared to accept.

36. A second unusual feature is that each side considers that its interpretation of the Decision Letter is abundantly clear. I regret to say that I do not think that either party is correct in that regard. Indeed, it would seem from the paragraph at the end of the Decision Letter about the procedure for making an appeal that there must have been at least some uncertainty within the Respondents as to whether or not the Decision Letter contained an appealable decision and it would seem from Mr Monteith's e-mail to which the Subsequent Email was a response that there must equally have been some uncertainty within the Sports Direct group as to whether the Decision Letter contained an appealable decision.

37. However, having heard the submissions of both sides and reflected on the terms of the Decision Letter in the light of the original correspondence between the parties in 2010, the UK's view on the relevant provisions of the Directive as put to the VAT Committee by the UK, the recommendations of the VAT Committee and the correspondence which passed between the parties around the time of the Decision Letter, I have concluded that the construction of the Decision Letter proposed by the Appellants is to be preferred and that the Respondents should be regarded as having made a decision to the effect that:

(a) the supplies in question should be regarded as being made in the destination EU member state; and

(b) no refund of UK VAT previously paid would be made until evidence of the VAT paid in each destination member state was provided.

38. My reasons for reaching this conclusion are as follows:

(a) The Decision Letter needs to be construed in context and that context includes the original exchange of correspondence which took place in 2010, the subsequent request made by the UK to, and the recommendations of, the VAT Committee and the correspondence which passed between the parties around the time of the Decision Letter;

(b) I think that there is no doubt that, in the exchange of correspondence which took place in 2010, the Respondents confirmed that the supplies in question would be treated as being made in the UK. To my mind, that is the only possible interpretation of the following sentence in Mr Priestley's letter of 11 March 2010:-

"It therefore follows that Sportsdirect.com's supplies of goods under these arrangements will be subject to VAT at the appropriate rate."

In that letter, Mr Priestley went on to say:-

"However, you ought to contact the other authorities concerned to discuss the set up and confirm that they are satisfied that the supplies do not take place within their jurisdictions."

At the hearing in relation to this application, Mr Singh urged me to interpret that sentence as amounting to a proviso to the previous sentence – that is to say, that Mr Priestley was saying that the arrangements would not be subject to UK VAT at the appropriate rate unless the authorities in the destination EU member states confirmed that they were satisfied that the supplies did not take place within their jurisdiction. I do not read the sentence in that way. Instead, I interpret the sentence as simply warning the group that, in consequence of the fact that the supplies in question were being treated for UK VAT purposes as being made in the UK, it would be advisable for the group to confirm that it did not suffer a double charge to VAT by virtue of being subject to VAT in any destination EU member state as well;

(c) It is quite clear from the submission made by the UK to the VAT Committee that, by 2015, the Respondents were of the view that the broader interpretation of Article 33 was the correct one and therefore that the supplies made in these circumstances should be regarded as being made in the relevant destination EU member state. It is also clear that this view was endorsed "almost unanimously" by the VAT Committee. So, at the time when the Respondents received the Sports Direct group's letter of 28 September 2015 to which the Decision Letter was a response, the Respondents had made it clear that, in their view, supplies made in these circumstances were not made in the UK and this view had been endorsed "almost unanimously" by the VAT Committee;

(d) Turning to the Decision Letter, I agree with Mr Swift that the opening paragraphs of the section headed "Our View" down to the paragraph beginning "Following the publication of this guideline, ……." should be read as a summary of how the Respondents' view of Articles 33 and 34 of the Directive had been developing over time. That section concludes with a reference to the conclusions of the VAT Committee which, as noted above, were that the members of the VAT Committee agreed "almost unanimously" that, in circumstances such as these, supplies should be treated as taking place in the destination EU member state. The clear link in that paragraph to the publication of the guidelines and the Respondents' finalisation of their policy indicates to me that the Respondents were saying that, notwithstanding their previous approach in this area, their policy is now to treat supplies in these circumstances as being made in the destination EU member state in accordance with the view expressed by the VAT Committee;

(e) The next paragraph of the Decision Letter is entirely consistent with that construction because Mr Eaton then urges a UK business with arrangements such as those adopted by the Appellants to "take steps to contact the tax authorities in the Member State of supply with a view to regularising the position in that State." The "Member State of supply" in that sentence is clearly the

destination EU member state and the Respondents were therefore saying in that sentence that, consistent with their view that the supplies in question are being made in the relevant destination EU member state, the Appellants should be taking steps to ensure that they comply with their VAT obligations - or "regularise their position" – in that EU member state;

(f) The remaining paragraphs of the Decision Letter are explaining how the Appellants should go about reclaiming overpaid UK VAT on the basis of the Respondents' policy as just described. The Respondents are pointing out that claims for repayment of the overpaid UK VAT will not be processed until information in relation to the VAT paid in the destination EU member states has been provided;

(g) So, taken as a whole, I consider that the Decision Letter is not saying that the Respondents cannot determine the place of supply until they have received details of how the destination EU member states are applying the provisions of the Directive. Instead, the Decision Letter is saying that the Respondents' policy is to follow the recommendations of the VAT Committee, with the result that supplies should be treated as being made in the destination EU member states and that therefore:-

(i) the Appellants should take steps to ensure that they meet their VAT obligations in the destination EU member states; and

(ii) the Appellants will not be able to recover overpaid UK VAT until they have provided to the Respondents information about the VAT paid in the destination EU member states;

(h) I would add that the paragraph at the end of the Decision Letter, outlining the group's right to have the decision outlined in the letter reviewed by an independent officer of the Respondents or to appeal to this Tribunal is entirely consistent with the construction I have outlined above. Mr Singh said that this paragraph had simply been included in error but, in my view, the paragraph was rightly included at the end of the Decision Letter because that letter did in fact contain a decision;

(i) The above construction of the Decision Letter is reinforced by my construction of the Subsequent Email. In the email from Mr Monteith to which that email was responding, Mr Monteith raised two questions. The first was to ask whether the supplies in question fell within the scope of Article 33 and the second was to ask whether this conclusion had been reached taking account of the discussion that preceded the VAT Committee's guidance and the guidance itself. In response to those two questions, Mr Mortimer stated that "the short answer to both of them from me is in the affirmative". Whilst I agree with Mr Singh that the Subsequent Email itself cannot turn the Decision Letter into a decision if the Decision Letter did not contain a decision in the first place, the Subsequent Email is a helpful aid in interpreting the views of the Respondents as set out in the Decision Letter because it was written very shortly after the Decision Letter and related to the same question. My interpretation of it is that it is entirely consistent with my interpretation of the terms of the Decision Letter; and

(j) I consider that the third paragraph of the Subsequent Email – in which Mr Mortimer states that the Respondents are not in a position to rule on whether the supply is liable to taxation in an EU member state other than the UK – is entirely consistent with my interpretation of the Decision Letter. Mr Mortimer is not saying in that paragraph that the place of supply for UK VAT purposes is dependent on whether or not the supplies are treated by the destination EU member states as taking place in the destination EU member states. He has already said in the preceding paragraph of the Subsequent Email that the Respondents' view of the law is that the supplies should be regarded as fully within Article 33 of the Directive and therefore as being made in the destination EU member states as a matter of UK VAT law. Instead, he is merely pointing out, quite rightly, that the Respondents are not in a position to opine on the application of the relevant provisions of the Directive in each destination EU member state and that the Appellants need to deal with those EU member states directly on that subject. As the Respondents had already made it clear in the Decision Letter that no refund of UK VAT would be forthcoming until evidence of VAT payments in the destination EU member states had been provided, this was simply reiterating that no refund of UK VAT would be made until the relevant information was provided.

39. For the reasons set out above, I must decline to strike out the appeal. I would add that, although it has played no part in my decision – which, as noted above, is based entirely on my construction of the terms of the Decision Letter in context – it seems to me that it would promote a quicker and cheaper resolution of this issue for the appeal to proceed and, if necessary, for a reference to be made to the European Court of Justice on the correct interpretation of Article 33 of the Directive than for the Respondents to await developments in other EU member states. This is a matter which affects all EU member states and I believe that the sooner there is a resolution of the question of whether the "literal interpretation" or the "broader interpretation" of the language in Article 33 is to be preferred, the better it will be for all concerned.

40. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2016