



TC05551

Appeal number: TC/2015/05095

VAT – Registration – supplies from other member states (Schedule 2 VATA 1994)- whether HMRC correct to refuse cancellation of registration – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Authentik Language Learning Resources Ltd (in liquidation) Appellant

- and -

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

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
 CELINE CORRIGAN FCA**

Sitting in public at the Royal Courts of Justice, Belfast on 29 November 2016

**Dr Sean Devitt, former director of the appellant company, for the Appellant's
liquidator (Irish Liquidations Limited c/o Ms Flavien Kiely)**

Dermot Ryder, HMRC Officer, for the Respondents

DECISION

Introduction

5 1. The appellant was a company based in the Republic of Ireland which supplied foreign language learning materials (magazines and audio media which used authentic foreign language excerpts) domestically and abroad to the UK, primarily to schools. It was registered for VAT in 1993 on the basis of a new regime for certain cross-border supplies (commonly referred to as the distance selling regulations). The appellant
10 charged VAT on its supplies of cassettes /CDs. However, some many years later in 2012 following a clarification sought from HMRC by the appellant, HMRC characterised the appellant's supply of magazine and CDs as a single supply whose predominant supply was an educational magazine and therefore zero-rated. Following an error notification return going back four years HMRC refunded an amount in
15 respect of the VAT that had been accounted for on the CDs but in response to the appellant's argument that it should never have been registered for VAT in the first place refused to cancel the registration.

2. The appellant appeals against HMRC's decision to refuse cancellation of VAT registration back to 1 January 1993 in the expectation that this would provide a
20 foundation for a refund of the considerable amount of VAT that was accounted for in the period 1 January 1993 to 2012 which could then be used to increase the amount available to creditors in the appellant's insolvency.

Evidence, Facts and Background

3. The appellant was a limited company set up by two academics, one of whom
25 was Dr Devitt with Trinity College as its shareholder. It was incorporated on 21 October 1986 and had evolved out of a research project on language learning materials. As well as presenting the appellant's case Dr Devitt gave oral evidence (which HMRC had the opportunity to cross-examine). We found Dr Devitt to be an open and helpful witness who readily answered the tribunal's questions but who
30 understandably was not able to provide significant details about events which happened over two decades ago and was hampered, despite his best efforts, with the patchy availability of documentary evidence of what had gone on around the period of the appellant's UK VAT registration.

4. The appellant supplied language learning resources – in particular packages of
35 foreign language learning materials, books, cassettes and later CDs domestically and then to the UK. It was a pioneer in the contextual use of authentic near contemporaneous foreign media excerpts in foreign language teaching.

5. On 17 December 1992 HMCE received Form VAT 1 (VAT Application for
Registration) dated 23 November 1992 from the appellant's advisor at the time (Price
40 Waterhouse). Section 14 which was entitled "intending registrations" included the box "No taxable supplies made yet", which was ticked. It was stated that the expected

annual value of taxable supplies was £100,000 and that the expected date of first taxable supply was 1 January 1993. The “compulsory registrations” and “voluntary registrations” section of the form were not completed but were struck through.

5 6. From later correspondence from Price Waterhouse to HMCE dated 1 February 1993 it appears that HMCE had sought further information in a letter dated 13 January 1993. PW responded in a letter dated 1 February 1993:

10 “Our client is engaged in the supply of language learning material, including newspapers and cassettes, primarily to schools. It is based in the Republic of Ireland and the UK VAT registration is required in respect of its distance sales to UK customers.”

15 7. The letter confirmed the appellant was already engaged in the supply and delivery of goods to UK unregistered customers, and commented that it was difficult to accurately assess projected UK taxable turnover as while it was stated that only sales to unregistered UK customers were within the charge to UK VAT and that most were not VAT registered many were in the process of registering. It was suggested that annual UK taxable supplies would be about £100,000 (sterling).

8. The appellant was registered for VAT on 22 April 1993 with an effective date of registration of 1 January 1993. The nature of the business was described as the supply of Educational Magazines and CDs.

20 9. Dr Devitt said the conclusion came as a surprise to him and his fellow director but they accepted the advice. VAT was charged at standard rate on the cassettes and CDs supplied. It was not clear upon what basis the appellant had proceeded to charge VAT on cassettes / CDs and in particular whether this was following specific advice or whether the appellant had applied the treatment because of the conclusion that the appellant was to be registered for VAT (i.e. that the appellant had inferred from the conclusion that it was to be registered for VAT and perhaps the reference in the registration form estimating annual “taxable” supplies to be £100,000 in the UK, that the supplies it made were chargeable to standard rate VAT and had not appreciated the possibility that the supplies could trigger liability to registration even if they were zero-rated).

35 10. The appellant’s sales to the UK increased gradually over time and by 1993 it was making fairly significant sales. In 1993 the VAT amount paid (which would have been on the cassette / CD element) was £62,240 – this indicated a turnover amount in respect of the cassette / CD element of £355,657 grossing up from the rate of 17.5% that would have applied at the time.

40 11. The appellant continued to operate in much the same manner and some many years later discussions with the Irish tax authority in relation to its domestic VAT treatment resulted in a decision in 2011 whereby the appellant was told by them to rate the CD the same lower rate as the magazine. In June 2012 the Irish Revenue further decided that the full package of magazine and CD and workbook should be considered a book and therefore should have been rated at 0%. These decisions prompted the appellant to investigate whether it was correct to have charged VAT on

CDs as they had done and to suggest to HMRC that the CDs were to be charged at zero rate.

12. A “clearance application” in regards to liability of the business supplies was submitted by the appellant to HMRC in an e-mail dated 29 May 2012. Following the provision of further documentation by the appellant HMRC initially came to the view on 24 July 2012 that there were multiple supplies of magazine, CD and licence. The appellant requested a review and in a letter of 21 August 2012 determined that there was a single supply of magazine, CD and licence, that the magazine was the predominant item which meant the single supply was zero-rated.

13. On 22 January 2013 HMRC received the appellant’s Notification of errors form from the appellant and on 12 February 2013 VAT totalling £56,294 for the 09/08 to 09/12 (a time period which reflected the “four year cap” set out in s80(4) VATA 1994) was repaid to the appellant.

14. In an e-mail dated 17 April 2015 the appellant set out the view that HMRC had decided the appellant “was not liable for VAT and by implication never had been” and that “the initial decision was flawed...”.

15. HMRC’s letter of 23 April treated this argument as an appeal against the VAT registration of the appellant. It made the point that the VAT registration was issued in good faith under Schedule 2 VATA 1994, further to the application the appellant’s adviser’s had submitted (as described above) and that no concern had been expressed as to the VAT liability of the appellant’s product. After recounting the details and of the appellant’s 2012 clearance application the letter went on to state:

“Unfortunately retrospective exemption cannot be approved when you are already registered for VAT. HMRC has the discretion to allow retrospective exemption from registration but only where the entity is not already VAT registered. For example if there is a requirement to register for VAT as the value of zero rated supplies has exceeded the VAT threshold and the entity has submitted an application belatedly. I would therefore consider that the cancellation of your registration is not appropriate and cannot be granted retrospectively.”

16. In an e-mail dated 15 May 2015 Dr Devitt requested a review. From what we can see of his e-mail (the copy in the bundle was unfortunately complete) he was concerned to know why the issue of VAT being imposed on educational material had not been raised by HMRC before the VAT registration had been finalised.

17. HMRC’s review letter of 23 July 2015 referred to distance-selling and the provisions of Schedule 2 VATA, and that the definition of “relevant supplies” would include both standard rated and zero-rated supplies. The officer identified that paragraph 6(2) of Schedule 2 enabled a registration to be cancelled with effect from the date of the admission to the register but went on to state:

“However it is clear in this case that Authentik was making relevant supplies prior to being registered for VAT and has continued to do so. I

am therefore satisfied that the registration is not considered to be invalid as defined above.”

18. Referring to HMRC’s guidance (VATREG41600) the officer noted that there was no provision within Schedule 2 for exemption from registration where the supplies were all subject to the zero rate of VAT.

Law

19. Schedule 2 of the Value Added Tax Act 1994 (“VATA 1994”) (formerly Schedule 1A of the predecessor 1983 VAT Act) deals with the situations where a person either becomes liable for UK VAT registration or is entitled to request UK VAT registration in respect of supplies from other member states. It is referred by HMRC as covering “distance-selling” although that term is not used in the legislation. The relevant provisions are excerpted in the annex to this decision. Liability in respect of registration arises either in relation to supplies of goods which are subject to a duty of excise (which is not relevant on the facts of this appeal), or in relation to “relevant supplies” as defined in paragraph 10. For the purpose of this decision the relevant conditions to note are (subparagraph (a) – the supply involves a removal of goods to the United Kingdom (subparagraph (c)), the supply was a transaction in pursuance of which goods were acquired in the United Kingdom from another member state by a person who was not a taxable person (d) the supply was made on or after 1 January 1993 and e) the supply was not an “exempt supply”.

20. Paragraphs 1(1) and 1(2) set out the circumstances where the person is liable to registration. In the case of sub-paragraph 1 this is where the relevant supplies exceed a specified threshold (at time relevant to the facts of this appeal in 1993 this was £36,600). In relation to relevant supplies below the threshold sub-paragraph 2 in broad terms imposes liability where the person makes a relevant supply and has opted under the member state’s law where they are taxable to treat the supply as taking place outside that member state (“option”).

21. Paragraph 4 enables HMRC to register a person who although not liable to registered wants to be registered on the basis of an intention to exercise the option and to make relevant supplies. Paragraph 6 provides for cancellation of registration. Paragraph 6(2) allows HMRC to cancel the registration from the day on which the person was registered if HMRC are satisfied the person was not liable to be registered under Schedule 2. If the person had requested registration under paragraph 4 then HMRC may cancel the registration if they are satisfied that the person did not have the intention by reference to which they were registered (i.e. the intention to exercise the option and to make relevant supplies).

22. While there are exemption from registration provisions at paragraph 14 of Schedule 1 VATA 1994 in relation to zero-rated supplies those only apply to registrations made under that schedule and not registrations under Schedule 2.

Discussion

23. The issue under appeal is HMRC's refusal to cancel the registration and its refusal to cancel it retrospectively from the date of the appellant was first registered, 1 January 1993. As we explain below the appellant's interest is not in the registration decision per se but in what opportunities for improving the position of its creditors in the liquidation there might be if the conclusion was reached that the appellant ought not to have been registered.

24. Dr Devitt's submissions revealed that he had been assuming that if a supply was zero rated then it would be treated as exempt and would not count towards being a "relevant supply". At the hearing following explanation of the difference between zero-rating and exempt supplies he accepted the two were not equivalent and sensibly in our view did not pursue this line of argument. The definition of "relevant supply" in paragraph 10(e) of Schedule 2 specifically excludes exempt supplies and it is clear from the distinction drawn in the VAT legislation (s30 and s31 VATA 1994) that the term "exempt supply" does not cover supplies which are zero rated. The issue of the appellant's supplies being determined to be zero rated would not affect the appellant's liability or entitlement to registration.

25. On the specific issue of whether HMRC were wrong to refuse cancellation, and in particular wrong to refuse cancellation as from the date of registration, our conclusion, for the reasons explained below, is that their conclusion was correct, although not for the reasons they gave. The officer's decision that the appellant was making "relevant supplies" prior to being registered was incorrect in so far as it referred to supplies made before 1 January 1993 given the definition of "relevant supplies" specifically refers to supplies made after that date. However to the extent the appellant was making such supplies after 1 January 1993 but before 22 April 1993 on the evidence before us it seemed more likely than not that by the date of registration (22 April 1993) the appellant's post 1 January 1993 supplies had already exceeded the annual threshold of £36,600 for relevant supplies and that the appellant was therefore liable to be registered. This is on the basis that the VAT amount paid in 1993/4 indicated UK annual turnover which exceeded £355,657, and taking account 1) that turnover of sales to the UK had increased gradually over time from preceding years 2) that the VAT paid figure only represented the CD / cassette element of the supplies and so the full amount of turnover that would count towards the threshold would have been greater.

26. Even if that were not the case, given the basis on which registration was sought it is possible that the appellant, even if it was liable to be registered was seeking voluntary registration on the basis of its intended supplies. Under the cancellation provisions for voluntary registrations (paragraph 6(2)) it would need to be shown that the appellant did *not* have the intention by reference to which it was registered. The intention would have had to have included an intention to make relevant supplies and there is nothing to suggest that, contrary to what was stated in Price Waterhouse's letter, there was not an intention to make such supplies thereby enabling the condition for cancellation back to the date of registration to be fulfilled.

27. While we also considered various further arguments Dr Devitt made on behalf of the appellant they do not unfortunately appear to us to take its case further. In relation to the argument that the particular attributes of the appellant as a body set up under the auspices of a university and as an academic research company meant it ought not to have been registered, Schedule 2 refers simply to a “person” being liable or entitled to become registered and is not further qualified. There was no clear basis identified to us on which to come to the view that the appellant, who was a limited company in Ireland selling products to customers both domestically and abroad, was not a “person” making “relevant supplies”. The fact that there appear to have been discussions with the Irish tax authorities about the correct VAT treatment of its domestic supplies in Ireland is consistent with the appellant’s business activities being within the scope of the VAT system. In its written submissions in advance of the hearing but which were not developed at the hearing the appellant made the rather adventurous argument that although it produced magazines, cassettes and CDs these were of little value in themselves, rather what the appellant was supplying was a philosophy based on various language learning principles. We have no reason to doubt, especially given the academic origins of the company, that such principles underpinned the appellant’s offering, but this feature in no way detracts from the fact that the appellant supplied goods in the form of magazines and CDs to its customers which amounted to supplies of goods for VAT purposes.

28. *The underlying motivation for the appeal:* Dr Devitt confirmed at the hearing that the nature of what the appellant had supplied at the time the ruling was given in 2012 had not significantly changed from what the appellant supplied back in 1993. It would follow from that fact that HMRC’s analysis, that the package the appellant provided was a single supply which was zero-rated, ought, on the face of it, to apply equally to the prior periods. We can see that the appellant liquidator, wishing to maximise returns to creditors might want to explore any avenue that would result in recovery of the standard rate VAT that was paid in addition to the amounts that have already been recovered.

29. How it came to pass that the cassettes / CDs had VAT charged on them we do not know. The appellant acted on advice but it remained unclear to us whether the appellant had acted on specific advice to charge VAT or whether, following VAT registration, it had assumed from that, that its supplies were subject to VAT. There was mention of regulations regarding mechanical recordings but again it is unclear what those were and they were not before us. The issue would in any event have no bearing on the question of registration as, whether the supplies were standard-rated or zero-rated, they would still count as “relevant supplies” and count towards the registration threshold.

30. As indicated at the hearing we should add that even if the appellant had been successful in its argument that HMRC ought not to have refused the cancellation of registration, it is not at all clear how this conclusion would result in additional repayments to deliver the hoped for outcome of reducing the amount owing to creditors in the appellant’s insolvency in the context of this appeal in relation to registration, or indeed in other proceedings, (at least those which would be available before this tribunal at this point in time). Even if a repayment from HMRC was

sought under s80 VATA 1994, and if refused appealed to the tribunal, the appellant would still need to surmount the four year statutory bar on repayments from HMRC set out in s80(4) and that obstacle would operate whether the VAT registration had been cancelled or upheld.

5 *Conclusion*

31. HMRC's conclusion, that the appellant's request for cancellation of registration as from the date of registration should be refused, was correct for the reasons explained above. The appellant's appeal is dismissed.

10 32. 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)"
15 which accompanies and forms part of this decision notice.

**SWAMI RAGHAVAN
TRIBUNAL JUDGE**

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RELEASE DATE: 13 DECEMBER 2016

Annex

Schedule 2 VATA 1994

Registration in respect of supplies from other member states

5

Liability to be registered

1--

(1) A person who--

(a) is not registered under this Act; and

10 (b) is not liable to be registered under Schedule 1 or 1A,

becomes liable to be registered under this Schedule on any day if, in the period beginning with 1st January of the year in which that day falls, that person has made relevant supplies whose value exceeds [£70,000][£36,600 in 1993].

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(2) A person who is not registered or liable to be registered as mentioned in sub-paragraph (1)(a) and (b) above becomes liable to be registered under this Schedule where--

(a) that person has exercised any option, in accordance with the law of any other member State where he is taxable, for treating relevant supplies made by him as taking place outside that member State;

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(b) the supplies to which the option relates involve the removal of goods from that member State and, apart from the exercise of the option, would be treated, in accordance with the law of that member State, as taking place in that member State; and

(c) that person makes a relevant supply at a time when the option is in force in relation to him.

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(3) A person who is not registered or liable to be registered as mentioned in sub-paragraph (1)(a) and (b) above becomes liable to be registered under this Schedule if he makes a supply in relation to which the following conditions are satisfied, that is to say--

(a) it is a supply of goods subject to a duty of excise;

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(b) it involves the removal of the goods to the United Kingdom by or under the directions of the person making the supply;

(c) it is a transaction in pursuance of which the goods are acquired in the United Kingdom from another member State by a person who is not a taxable person;

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(d) it is made on or after 1st January 1993 and in the course or furtherance of a business carried on by the supplier; and

(e) it is not anything which is treated as a supply for the purposes of this Act by virtue only of paragraph 5(1) or 6 of Schedule 4.

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(4) A person shall be treated as having become liable to be registered under this Schedule at any time when he would have become so liable under the preceding provisions of this paragraph but for any registration which is subsequently cancelled under paragraph 6(2) below, paragraph 13(3) of Schedule 1, paragraph 11 of Schedule 1A, paragraph 6(3) of Schedule 3 or paragraph 6(2) of Schedule 3A.

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(5) A person shall not cease to be liable to be registered under this Schedule except in accordance with paragraph 2 below.

(6) In determining for the purposes of this paragraph the value of any relevant supplies, so much of the consideration for any supply as represents any liability of the supplier, under the law of another member State, for VAT on that supply shall be disregarded.

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...

(7) For the purposes of sub-paragraphs (1) and (2) above supplies to which section 18B(4) (last acquisition or supply of goods before removal from fiscal warehousing) applies shall be disregarded.

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2--

(1) Subject to sub-paragraph (2) below, a person who has become liable to be registered under this Schedule shall cease to be so liable if at any time--

(a) the relevant supplies made by him in the year ending with 31st December last before that time did not have a value exceeding £70,000 and did not include any supply in relation to which the conditions mentioned in paragraph 1(3) above were satisfied; and

5 (b) the Commissioners are satisfied that the value of his relevant supplies in the year immediately following that year will not exceed £70,000 and that those supplies will not include a supply in relation to which those conditions are satisfied.

(2) A person shall not cease to be liable to be registered under this Schedule at any time when such an option as is mentioned in paragraph 1(2) above is in force in relation to him.

10

Notification of liability and registration

3--

15 (1) A person who becomes liable to be registered under this Schedule shall notify the Commissioners of the liability within the period of 30 days after the day on which the liability arises.

(2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the day on which the liability arose or from such earlier time as may be agreed between them and him.

20

Request to be registered

4--

(1) Where a person who is not liable to be registered under this Act and is not already so registered--

25 (a) satisfies the Commissioners that he intends--

(i) to exercise an option such as is mentioned in paragraph 1(2) above and, from a specified date, to make relevant supplies to which that option will relate;

(ii) from a specified date to make relevant supplies to which any such option that he has exercised will relate; or

30 (iii) from a specified date to make supplies in relation to which the conditions mentioned in paragraph 1(3) above will be satisfied; and

(b) requests to be registered under this Schedule,

35 the Commissioners may, subject to such conditions as they think fit to impose, register him with effect from such date as may be agreed between them and him.

(2) Conditions imposed under sub-paragraph (1) above--

(a) may be so imposed wholly or partly by reference to, or without reference to, any conditions prescribed for the purposes of this paragraph; and

40 (b) may, whenever imposed, be subsequently varied by the Commissioners.

(3) Where a person who is entitled to be registered under paragraph 9 or 10 of Schedule 1 requests registration under this paragraph, he shall be registered under that Schedule, and not under this Schedule.

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Notification of matters affecting continuance of registration

5--

50 (1) Any person registered under this Schedule who ceases to be registrable under this Act shall notify the Commissioners of that fact within 30 days of the day on which he does so.

(2) A person registered under paragraph 4 above by reference to any intention of his to exercise any option or to make supplies of any description shall notify the Commissioners within 30 days of exercising that option or, as the case may be, of the first occasion after his registration when he makes such a supply, that he has exercised the option or made such a supply.

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(3) A person who has exercised such an option as is mentioned in paragraph 1(2) above which, as a consequence of its revocation or otherwise, ceases to have effect in relation to any relevant supplies by

him shall notify the Commissioners, within 30 days of the option's ceasing so to have effect, that it has done so.

(4) For the purposes of this paragraph, a person ceases to be registrable under this Act where--

5 (a) he ceases to be a person who would be liable or entitled to be registered under this Act if his registration and any enactment preventing a person from being liable to be registered under different provisions at the same time were disregarded; or

(b) in the case of a person who (having been registered under paragraph 4 above) has not been such a person during the period of his registration, he ceases to have any such intention as is mentioned in sub-paragraph (1)(a) of that paragraph.

10

Cancellation of registration

6--

15 (1) Subject to paragraph 7 below, where a person registered under this Schedule satisfies the Commissioners that he is not liable to be so registered, they shall, if he so requests, cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him.

(2) Where the Commissioners are satisfied that, on the day on which a person was registered under this Schedule, he--

20 (a) was not liable to be registered under this Schedule; and

(b) in the case of a person registered under paragraph 4 above, did not have the intention by reference to which he was registered,

they may cancel his registration with effect from that day.

25 (3) Subject to paragraph 7 below, where the Commissioners are satisfied that a person who has been registered under paragraph 4 above and is not for the time being liable to be registered under this Schedule--

30 (a) has not, by the date specified in his request to be registered, begun to make relevant supplies, exercised the option in question or, as the case may be, begun to make supplies in relation to which the conditions mentioned in paragraph 1(3) above are satisfied; or

(b) has contravened any condition of his registration,

they may cancel his registration with effect from the date so specified or, as the case may be, the date of the contravention or from such later date as may be agreed between them and him.

35

Conditions of cancellation

7--

40 (1) The Commissioners shall not, under paragraph 6(1) above, cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement to be registered under this Act.

(2) The Commissioners shall not, under paragraph 6(3) above, cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under this Act.

45 (3) The registration of a person who has exercised such an option as is mentioned in paragraph 1(2) above shall not be cancelled with effect from any time before the 1st January which is, or next follows, the second anniversary of the date on which his registration took effect.

50 (4) In determining for the purposes of this paragraph whether a person would be subject to a requirement, or entitled, to be registered at any time, so much of any provision of this Act as prevents a person from becoming liable or entitled to be registered when he is already registered or when he is so liable under any other provision shall be disregarded.

10

For the purposes of this Schedule a supply of goods is a relevant supply where--

55 (a) the supply involves the removal of the goods to the United Kingdom by or under the directions of the person making the supply;

(b) the supply does not involve the installation or assembly of the goods at a place in the United Kingdom;

(c) the supply is a transaction in pursuance of which goods are acquired in the United Kingdom from another member State by a person who is not a taxable person;

5 (d) the supply is made on or after 1st January 1993 and in the course or furtherance of a business carried on by the supplier; and

(e) the supply is neither an exempt supply nor a supply of goods which are subject to a duty of excise or consist in a new means of transport and is not anything which is treated as a supply for the purposes of this Act by virtue only of paragraph 5(1) or 6 of Schedule 4.

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