TC01872

Appeal number: TC/2011/01242

VAT – motor vehicle import from Germany – double VAT payment claim – UK VAT refund sought on insolvency of German supplier – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr RICHARD MUNDAY **Appellant**

- and -

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

TRIBUNAL: JUDGE MANUELL
Mrs C de ALBUQUERQUE

Sitting in public at 45 Bedford Square London WC1 3DN on 9 December 2011

The Appellant in person

Mrs C Payne-Dwyer and Mr J Holl, Presenting Officers, for the Respondents

DECISION

1. The appellant challenges the decision of HMRC communicated by letter dated 29 September 2010 whereby HMRC refused to refund him VAT of £4,170.00 charged at 15% of the declared purchase price and paid in the United Kingdom on a motor vehicle imported from and purchased in Germany, where VAT of €5,915.55 charged at 19% of the purchase price had already been paid. HMRC's decision was maintained in the review letter dated 17 January 2011.

2. The appeal raises issues of EU law. A bundle of relevant documents was produced by HMRC, accompanied by a bundle of authorities. The appellant prepared a written summary of his case. The appellant gave evidence and was cross-examined.

3. The essential facts were not in dispute and we accordingly find as follows. The appellant is retired and resident in the United Kingdom. He is not registered for VAT, ie, is a non taxable purchaser. He and his wife holiday in Germany. They decided to purchase a motor home in Germany for such use there. As the motor home would be used mainly in Germany, it was advantageous to have a left hand drive vehicle. The vehicle was, however, to be kept in the United Kingdom when not in holiday use abroad. The appellant purchased the motor home, a Ford Hobby T555FS, from a German company, Hammoudah Freizeit AG of Wuppertal, with whom he had previously dealt satisfactorily. The full price paid on 16 December 2009 was €36900.00 which at the exchange rate then current was £33094.17. The rate of VAT (Mwst) in Germany was 19%. The appellant imported the motor home to the United Kingdom on 23 December 2009. The motor home was soon duly registered in the United Kingdom, but there was some difficulty in completing the correct VAT forms because of confusion at the DVLA. The correct form (VAT 415) was completed by the end of April 2010 and VAT of £4170.00 at 15% was paid on 4 May 2010. No late payment penalty was levied. (The United Kingdom VAT was calculated in accordance with the exchange rate on 4 May 2010.) The appellant then applied for the German VAT to be refunded by Hammoudah Freizeit AG, but was told that this was impossible because the German company had gone into liquidation by order of the Wuppertal insolvency court on 18 June 2010. Since then the appellant has made considerable efforts to resolve the situation, but the German tax authority has been unresponsive. By letter dated 12 August 2010 he requested a refund of the United Kingdom VAT he had from HMRC, which was refused, leading to the present appeal.

4. The appellant's main contention is that payment of VAT twice within the European Union is contrary to EU law, and also contrary to the Convention for the Avoidance of Double Taxation between the United Kingdom and Germany. The appellant also contended that an extra statutory concession should be granted to him.

5. Mr Holl for HMRC submitted that the appellant had not informed himself sufficiently in advance of the required procedures for the import of a motor vehicle (a new means of transport ("NMT") from another member state. That was shown by the time lapse between December 2009 and April 2010 before the United Kingdom VAT

was finally paid. The reality was that the refund of VAT was due from the German tax authorities and not HMRC. That was the system in place and it worked in practice. The fact that the German supplier had entered liquidation before it could process the refund due to the appellant was unfortunate, but it created no obligation on HMRC. There had to be a mechanism for recovery in Germany which it was for the appellant to operate.

6. The appellant submitted that he was the innocent victim and HMRC ought to help him obtain a refund from Germany. There had been a consultation paper published by the European Commission on 5 January 2007, circulated in connection with a plan to introduce a mechanism for eliminating double imposition of VAT in individual cases. There had been a similar consultation in 2004. The principle was clear.

7. At the conclusion of the hearing the Tribunal were concerned that there remained questions which neither party had been able to answer and which might bear on the issues. The Tribunal made directions by consent that HMRC should file further submissions on the following issues by 4.00pm on 12 January 2012:

(i) What procedure if any exists within HMRC to refund VAT paid in the United Kingdom on the acquisition of an NMT where the United Kingdom supplier enters liquidation prior to refunding the non taxable purchaser who is domiciled in another member state and has to pay that member state's VAT and has paid it; ie, the reverse of the facts in the present appeal?

(ii) Does HMRC have a procedure for requesting the German tax authorities to refund German VAT to a United Kingdom non-taxable purchaser resident in the United Kingdom on an NMT purchased in Germany and imported into the United Kingdom and United Kingdom has been paid, ie, to avoid double payment of VAT?

(iii) Comment on the issue raised by the appellant that he has been subject to double taxation on VAT charged to him in Germany and in the United Kingdom.

8. HMRC responded by letter dated 12 January 2012 as follows:

"(i) This question addresses a mirror-image situation where a non-taxable resident of another member state purchases an NMT and takes it back to their country of residence. Again the legal position is that the supply is zero rated in the United Kingdom and taxed in the other member state. If it transpired that VAT was wrongly charged in the United Kingdom and paid to HMRC as output tax, and the purchaser had been charged VAT in the member state of intended consumption, HMRC might exercise its discretion in such circumstances and consider refunding that amount to the purchaser if the supplier was in liquidation and had not done so.

"This is considered on a case by case basis, and of course HMRC cannot compel another tax authority to adopt a similar position. However HMRC is not aware of the situation having ever arisen in the United Kingdom and there may be questions to be addressed regarding the law relating to insolvency/liquidation and whether any VAT

refund may be proper to the creditors as a class and not an individual. HMRC would need to seek legal advice on the matter in the event that it arose.

"(ii) No formal reciprocal arrangements exist because the procedures for the acquisition of an NMT are well established and if they are followed the issue of double taxation does not arise. Consequently there is no mechanism agreed at EU level to address the situation the Tax Tribunal is presently being asked to consider.

"We know that Mr Munday has received a communication from the administrator of the motor home supplier about his interests as a creditor. The difficulty here is while it appears that German VAT has been charged, we do not know whether it has been accounted for to the German tax authorities. It is unlikely that the German Tax authorities will consider making a refund to Mr Munday if they themselves have not received payment. However, HMRC has approached them informally by letter dated 6 January 2012 to explain that VAT has been correctly charged here, and there is the possibility it may also have been incorrectly charged in Germany.

"(iii) We [HMRC] understand that Mr Munday is aggrieved that having been billed for VAT both in Germany and here in the United Kingdom he has become the victim of double taxation. Normally when goods are bought in another EU member state by a non-taxable United Kingdom resident and removed to the United Kingdom by the customer VAT is paid in that member state of supply and there is no liability to pay VAT in the United Kingdom when the goods are brought here. However, there is a mandatory special scheme for NMT contained in EU VAT legislation and enacted into national law. This deems the place of taxation to be in the member state where the person intends to use the NMT, and not the member state where the NMT is purchased (supplied).

"If the legal provisions are followed, double taxation does not arise. The NMT is properly taxed in the member state of destination (intended use), not the member state of origin. However, it is possible that when a United Kingdom resident non-taxable person purchases an NMT in some member states the supplier may charge VAT and that this is the normal procedure for motor dealers in Germany. This protects the supplier's position, so that if the NMT is not removed from the country and the supplier than has a liability to account for the VAT to the national authorities, there are sufficient funds to pay the amount due.

"Once the purchaser provides the supplier with evidence that the vehicle has been registered in the United Kingdom and United Kingdom VAT has been paid the German VAT will be refunded. In the United Kingdom the DVLA want vehicles to be registered before VAT is paid. HMRC does no more than to make the observation that by the time Mr Munday notified HMRC and paid the VAT due in the United Kingdom, the supplier was around two weeks away from formal insolvency."

HMRC drew the Tribunal's attention to an unpublished summary decision of the Tribunal, *Davison* (MAN/2008/1494), handed down in November 2011, concerning the import of motor vehicles from Germany to a taxable person in the United Kingdom. There the Tribunal found that any redress for double taxation lay against

the German supplier or the German tax authorities. HMRC accepted that the decision in *Davison* was informative only and that the facts were distinguishable, not least because Mr Munday was not a taxable person.

9. In the light of HMRC's full and constructive response to the Tribunal's questions, the Tribunal considered whether it should reconvene the hearing in order for the appellant to submit any further arguments. Had the appellant been represented, or was himself legally qualified, the Tribunal might have done so. But it seemed to the Tribunal that to have reconvened in this appeal would have caused unwanted delay, expense and inconvenience to both parties. The appellant and HMRC had engaged in detailed correspondence for several months before the hearing, during which the relevant issues had been fully aired. It seemed to the Tribunal that the issues for its decision were now clear and that it was very unlikely that the appellant could assist its deliberation further.

10. HMRC's response to the facts, and its helpful voluntary approach to the German tax authority seeking assistance on the appellant's behalf, reflect the natural sympathy towards the seriously out of pocket appellant which the facts of this appeal evoke. The Tribunal need not hide its own sympathy. The appellant's decision to purchase a motor home in Germany was a sensible and practical one. That an established supplier of a satisfactory product should collapse into liquidation within a few months was hardly reasonably foreseeable. The Tribunal accepts that the appellant managed the bureaucracy of NMT import to the United Kingdom as well as it is reasonable to expect of anyone doing it for the first time and he is not open to criticism. The Tribunal would have preferred to have been able to allow this appeal, and regrets that it cannot.

11. While the Tribunal accepts that as a fundamental principle of EU law VAT should be paid once only in respect of the same supply of taxable goods or services, it seems to the Tribunal that, just as the Tribunal found in *Davison* (above), the problem of double payment which the appellant faces can only be resolved in Germany. The appellant has had to pay twice but that is a temporary situation in the sense that he has a legal entitlement to a refund in the member state of purchase. This situation arises from the mandatory special scheme which applies to motor vehicles or NMTs purchased within the EU, which is an exception to the origin principle described at paragraph 8 (iii) above in HMRC's response to the Tribunal's directions. The United Kingdom's double taxation treaty with Germany is aimed towards direct taxes such as income and capital gains taxes, and cannot assist the appellant: see, eg, The Double Taxation Relief (Taxes On Income) (Federal Republic of Germany) Order 1971 SI 1971 No 874. VAT is a creature of EU law and has been the subject of various EU directives. The current consolidated or main directive is known as Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, the VAT Directive. This was a recast of the Sixth Directive, 77/388/EEC. The fact that no current directive is capable of resolving appellant's situation by any means other than by his claiming in Germany is indicated by the fact of no less than two recent EU consultations, neither of which has so far led to any change in the law. (The appellant raised certain peripheral matters in his Notice of Appeal but he accepted that none of these was of continuing relevance.) The Tribunal has no power in law to order

that HMRC should grant the appellant any extra statutory concession. The appellant has been unable to establish any grounds for the Tribunal to find that HMRC's decision dated 27 September 2010 was wrong in law. The appellant is a creditor for the unrefunded VAT in the German supplier's liquidation, and must look to Germany for relief. The appeal must accordingly be dismissed.

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.

TRIBUNAL JUDGE MANUELL

RELEASE DATE: 29 February 2012