TC04200

Appeal number: TC/2013/03013, TC/2013/03681 & TC/2013/05186

VAT – repayment supplement –- zero-rated export of goods by appellant – acquisition of goods within EU by business establishment of appellant – EU business establishment not registered for VAT at time of acquisition, but registered retrospectively after commencement of inquiry - inquiry by HMRC- preliminary issues – section 79 VAT Act 1994 – regulations 198 and 199 VAT Regulations 1995

FIRST-TIER TRIBUNAL
TAX CHAMBER

GLOBAL FOODS LTD **Appellants**
FORTMOUNT TRADING LTD
HAMMONDS OF KNUTSFORD PLC

- and -

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

TRIBUNAL: JUDGE NICHOLAS ALEKSANDER
MR JOHN COLES

Sitting in public at Bedford Square on 16 September 2012

Joseph Howard, counsel, instructed by Litigaid Law, for the Appellants

Marika Lemos, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

1. A direction was given by the Tribunal by consent on 7 January 2014 for the determination of a number of preliminary issues in three appeals. The same preliminary issues arise in each of three appeals. For convenience, the preliminary issues in the three appeals are being heard together. However, other than in respect of these preliminary issues, the appeals are proceeding separately.

The background facts and issues

2. For the purposes of the preliminary issues, the background facts are not disputed.

3. The Appellants all trade in alcohol. Excise goods held in a bonded warehouse in the UK were exported by each of the Appellants. The goods were sent to a bonded warehouse in the Netherlands, where they formed part of the stock of the relevant Appellant's new Dutch business establishment.

4. None of the Dutch business establishments of the Appellants was registered for VAT purposes in the Netherlands at the time the goods were acquired. However we have been told by the Appellants (and assume for the purposes of the preliminary issue) that the business establishments were required to be registered for VAT in the Netherlands. This is apparently because Dutch VAT law does not have a turnover threshold for registration of traders in excise goods – traders in excise goods are required to be registered for VAT in the Netherlands, no matter how *de minimis* their trading activities.

5. The Appellants were each deemed by paragraph 6, Schedule 4, VAT Act 1994 ("VAT Act") to be making supplies by removing goods from the UK to another EU member state in the course or furtherance of a business ("the self-supply")

6. Each of the Appellants treated the export of goods as being zero-rated, and filed repayment returns on the basis that their input tax exceeded their output tax.

7. It is HMRC's position that the self-supply was zero-rated only if the Dutch business establishments of the Appellants were registered for Dutch VAT purposes. As they were not, HMRC withheld payment of the input tax claimed.

8. Each of the Appellants sought retrospective registration for VAT purposes in the Netherlands. HMRC paid the input tax claimed once the registrations had become effective and had been notified to them.

9. Each of the Appellants now claims repayment supplement in respect of their input VAT claims.

10. The following points are agreed between the parties:

(1) That the removal by the Appellants of goods from the UK to their respective business establishments in the Netherlands constitutes a self-supply (para 6, Sch 4, VAT Act)

(2) That the supplies are treated as taking place in the UK (s7(7)(a) VAT Act)

(3) That unless zero-rated, the supplies are subject to UK VAT at the standard rate (ss 1 and 2 VAT Act)

The preliminary issues

11. For the purposes of the hearing, the parties broke down the preliminary issues into four questions:

> Issue 1: Whether an exporting trader is required to be registered for VAT in the member state to which the goods are exported in order for the supply to be zero-rated under Regulation 134 of the VAT Regulations 1995, or, if different, under Directive 2006/112/EC?
>
> Issue 2: If the answer to the Issue 1 question is "yes", what are the consequences on the validity of the relevant VAT return in which a VAT credit was claimed in respect of the supply to the other member state?
>
> Issue 3: If the answer to the Issue 1 question is "no", having regard to the fact that Issue 1 has yet to be determined by the courts, does an inquiry by HMRC on the basis that the exporting trader was required to be registered in the other member state amount to a reasonable inquiry under Regulation 198(a), VAT Regulation 1995?
>
> Issue 4: If the answer to the Issue 3 question is "yes", how does this affect the determination of the beginning and end dates of the 30 day period in section 79(2A) VAT Act and any period left out of account?

Issue 1

Question

12. Whether an exporting trader is required to be registered for VAT in the member state to which the goods are exported in order for the supply to be zero-rated under Regulation 134 of the VAT Regulations 1995, or, if different, under Directive 2006/112/EC?

The legislation

13. Article 17(1) of EU Council Directive 2006/112/ED ("the Principal VAT Directive") reads as follows:

> 1. The transfer by a taxable person of goods forming part of his business assets to another Member State shall be treated as a supply of goods for consideration.
>
> 'Transfer to another Member State' shall mean the dispatch or transport of movable tangible property by or on behalf of the taxable

person, for the purposes of his business, to a destination outside the territory of the Member State in which the property is located, but within the Community.

14. Article 17(1) has been implemented into UK law by Para 6, Sch 4, VAT Act, which reads as follows:

> (1) Where […] goods forming part of the assets of any business—
>
> (a) are removed from any member State by or under the directions of the person carrying on the business; and
>
> (b) are so removed in the course or furtherance of that business for the purpose of being taken to a place in a member State other than that from which they are removed,
>
> then, whether or not the removal is or is connected with a transaction for a consideration, that is a supply of goods by that person.
>
> (2) Sub-paragraph (1) above does not apply—
>
> (a) to the removal of goods from any member State in the course of their removal from one part of that member State to another part of the same member State; or
>
> (b) to goods which have been removed from a place outside the member States for entry into the territory of the Community and are removed from a member State before the time when any Community customs debt in respect of any Community customs duty on their entry into that territory would be incurred.

15. In order to prevent economic double taxation on goods moving between EU member states, Article 138 of the Principal VAT Directive provides for an exemption as follows:

> 1 Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.
>
> 2 In addition to the supply of goods referred to in paragraph 1, Member States shall exempt the following transactions:
>
> […]
>
> (c) the supply of goods, consisting in a transfer to another Member State, which would have been entitled to exemption under paragraph 1 and points (a) and (b) if it had been made on behalf of another taxable person.

16. The effect of Article 138(2)(c) is to extend the exemption in Article 138(1) (for supplies to third parties) to self-supplies.

17. Article 9(1) of the Principal VAT Directive defines "taxable person" as

> […] any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

18. The Principal VAT Directive does not include any provisions as to the implementation of the exemption for intra-EU supplies. There is no express requirement in the Directive that the person to whom the supply is made (or deemed to be made) should be VAT registered. Instead:

(1) Article 273 of the Principle VAT Directive leaves it to member states to "impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion"; and

(2) The exemption in Article 138 is qualified by the general provisions of Article 131:

> The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

19. The UK has implemented the exemption in Article 138 by providing for intra-EU transfers to be "zero-rated" under Regulation 134 of the VAT Regulations 1995 ("VAT Regulations"), as follows:

> 134 *Supplies to persons taxable in another member State*
>
> Where the Commissioners are satisfied that—
>
> (a) a 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 the supply,
>
> the supply, subject to such conditions as they may impose, shall be zero-rated.

20. HMRC has imposed additional conditions under Regulation 134. These include the conditions set out in paragraph 4.3 of Public Notice 725, the relevant parts of which are as follows

4.3 When can a supply of goods be zero-rated?
The text in this box has the force of law
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 at paragraph 4.4.

You must not zero-rate a sale, even if the goods are subsequently removed to another Member state, if you:

[…]

Paragraph 4.9 covers the checks that you must undertake to make sure that your customer's EC VAT number is valid.

Submissions

21. The answer to Issue 1 turns on the application of Public Notice 725. Both parties agree (as do we) that there is nothing in the Principal VAT Directive or in the VAT Act that requires the trader to be registered for VAT in the destination state. The requirement under Regulation 134(b) is that the supply is "to a person taxable in another member state".

22. There is no definition in the VAT Regulations of "a person taxable in another member state". The only potentially relevant definition is that of "taxable person" in Article 9 of the Principle VAT Directive, and there is no requirement in that definition for the person to be VAT registered. The Appellants note that the VAT Act defines a taxable person for UK VAT purposes as a person who is, or who is required to be, registered for VAT purposes – which clearly shows that a person is a "taxable person" when they are required to be registered as well as when they are actually registered.

23. The Appellants note that the whole scheme of VAT treats a trader as taxable once the registration threshold has been met, irrespective of whether they are actually registered. The Appellants submit that, given the scheme of the VAT, if Regulation 134 was intended to impose a requirement of formal VAT registration, it would have said so in terms. We agree.

24. However parts of paragraph 4.3 of Public Notice 725 have the force of law, as they are the conditions specified by HMRC under Regulation 134 and Section 30(8)(b) VAT Act. The condition we need to consider is the first bullet point ("the first condition"), requiring the customer's VAT number to be shown on VAT sales invoices.

25. Both HMRC and the Appellants agree that the first condition applies to supplies to a third party, and that in the event that the condition was not satisfied, the supply would not be zero-rated under Regulation 134.

26. Difficulties arise, submit the Appellants, in the case of self-supplies. First, submit the Appellants, the taxable person is not making an actual supply, it is only a

deemed supply by virtue of para 4, Sch 6 VAT Act. In the case of deemed supplies, no VAT invoice is issued. If deemed supplies were within the scope of paragraph 4.3 submit the Appellants, the first condition could never be satisfied, as it would be impossible "obtain and show on your VAT sales invoice your customer's EC VAT registration number", as there is no possibility of a VAT invoice being issued. We were referred to an e-mail from HMRC dated 27 April 2012 which confirms that it would be wrong to raise a VAT invoice in the case of the self-supplies, and HMRC confirmed in the course of the hearing that no VAT invoice is issued in connection with a self-supply.

27. The Appellants submit that the first condition is designed to deal with actual supplies, where goods are transferred to a third party in another EU member state. The requirement to provide the customer's VAT registration number is in order to be able to identify the customer, and the member state in which they are registered so that any necessary checks can be carried out. The Appellants submit that there is no need to be able to identify the customer in the case of a self-supply, as the person making the supply is also the customer. The Appellants also note that evidence of the export of the goods is addressed in the other two bullet points.

28. The Appellants submit that the first condition deals with registration numbers, not registration, and that this is illustrated by the example where a trader exports goods to a third party in another member state who is not registered for VAT in that state, but who provides a false registration number. Paragraph 4.10 of Public Notice 725 states:

> **4.10 Will I have to account for VAT if my customer's VAT number turns out to be invalid?** No. But only if you have genuinely done everything you can to check the validity of the VAT number, can demonstrate you have done so, have taken heed of any indications that something might be wrong and have no other reason to suspect the VAT number is invalid.

29. So, even if the customer is not registered for VAT, the Appellants submit that HMRC's view is that the export is nonetheless zero-rated (subject to the trader having undertaken reasonable checks on the customer).

30. The Appellants also submit that the first condition is not a requirement for the protection of VAT in other EU member states, as the condition does not impose a requirement for the provision of the VAT registration number of the customer in the member state in the country of acquisition. This is illustrated in HMRC's internal manuals at VATF44700:

> **VATF44700 - Basic interventions: other interventions: irrecoverable acquisition tax**
>
> **Background - 'X' and Facet BV v Netherlands**
>
> The main issue in the two cases (case reference C-536/08 & C-539/08) was whether acquisition tax could be recovered where goods were acquired in a Member State other than the one in which the customer was VAT registered. Acquisition tax is normally due in the country to

which the goods are delivered. However, if the customer isn't VAT registered in that country, and uses a VAT number from a different Member State (normally its home Member State) to obtain zero-rating, the customer becomes liable to account for acquisition tax in that Member State as well. To avoid double taxation, this latter liability can be adjusted if the trader can prove that acquisition tax was accounted for in the Member State in which the goods were delivered.

The cases before the ECJ concerned Dutch companies that were buying goods from various other Member States and consigning them directly to Spain, using their Dutch VAT registration number to obtain zero-rating. The companies had no presence in Spain themselves, so had accounted for acquisition tax under their Dutch VAT registration, and had simultaneously recovered this as input tax. (The conditions for 'triangulation' were not satisfied, so they could not make use of that simplified procedure.)

The ECJ considered this scenario and decided that the acquisition tax was **irrecoverable**. This is because to allow recovery would defeat the regime's policy objective, i.e. that the place of taxation should be the Member State to which the goods are delivered. If traders could simply account for, and recover, acquisition tax in their own Member State of registration then they would '**no longer have any incentive to establish that the intra-Community acquisition in question had been taxed in the Member State of arrival of the dispatch or transport**.'

Application

The following are two examples of cases in which this judgement may be relevant.

Where goods are dispatched from the UK

Where a UK taxable person dispatches goods to, for example, France, but zero-rates the supply on the basis of a VAT number from its customer in another Member State (for example, Spain). In this situation, the Spanish customer would be liable to account for irrecoverable acquisition tax in Spain, unless it could demonstrate to the Spanish authorities that acquisition tax had been accounted for in France - either by registering in France itself or by complying with the conditions to use the triangulation procedure.

Consideration should be given to notifying the relevant tax authorities of the transaction through mutual assistance procedures (Regulation 2003/1798).

In addition, where such transactions feature in appeals where input tax has been denied using the *Kittel* principle (VATF50000), it may also be worth referring in witness statements to the VAT implications for the customer, which may cast doubt on the commercial credibility of such arrangements.

31. The Appellants also note that HMRC could have required that VAT registration in the destination member state was a condition to zero rating, but did not do so.

32. The validity of the first condition has been upheld by the UK courts in the case of *JP Commodities v HMRC* [2008] STC 816 and by the Court of Justice of the European Union (in relation to an equivalent provision) in *Vogylandische Strassen-, Tief- und Rohrleitungsbau GmbH Rodewisch v Finanzamt Plauen* [2013] STC 198 ("*VSTR*"). In both cases the first condition (or a similar requirement) were held to be valid. However, neither case directly addresses deemed self-supplies.

33. However, HMRC submit that principles can be drawn from the cases which demonstrated that the exporter must have acted in good faith and taken all the measures that could reasonably be expected of him to provide equivalent information to show that the customer is a taxable person.

34. In *VSTR* a German VAT registered trader agreed to sell goods in November 1998 to a US company which was not VAT registered in any member state, although it had a subsidiary in Portugal. The German company asked the US customer for its VAT registration number. The US company responded that it had on-sold the goods to a company in Finland, and provided the Finish company's VAT registration number. The goods were collected from the German trader's premises by a transport company contracted by the US customer in December 1998 and taken by road and by sea to Finland. The relevant German regulations required the trader to include the VAT registration number of the person acquiring the goods in his VAT records. The Court of Justice held that:

> the first subparagraph of art 28c(A)(a) of the Sixth Directive should be interpreted as not precluding the tax authority of a member state from making the exemption from VAT of an intra-Community supply subject to the provision by the supplier of the VAT identification number of the person acquiring the goods, with the proviso that the grant of that exemption should not be refused on the sole ground that that requirement was not fulfilled where the supplier, acting in good faith and having taken all the measures which can reasonably be required of him, is unable to provide that identification number but provides other information which is such as to demonstrate sufficiently that the person acquiring the goods is a taxable person acting as such in the transaction at issue.

35. HMRC submit that the Court's decision recognised the right of EU member states to make zero-rating of exports to other member states conditional upon the provision by the supplier of the VAT registration number of the customer. However the Court recognised that there are some circumstances where this is not possible, and the Court sets out the parameters within which tax authorities may accept evidence other than the customer's VAT registration number. However, this only applies if the supplier:

> (a) Acting in good faith is unable to provide the VAT registration number, notwithstanding having taken all measures which can be reasonably be required of him; and
>
> (b) The supplier instead provides other information demonstrating that the customer is a taxable person acting as such in the transaction in issue.

36. HMRC submit that this is not the position of the Appellants. Until the Appellants became VAT registered in the Netherlands, there was no objective evidence that VAT would be paid either in the Netherlands or in the member state of final consumption. Unlike *VSTR*, these appeals are, according to HMRC, examples of a case where failing to apply the first condition "would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied" (*VSTR* at para 46).

37. HMRC further submit that the first condition applies to self-supplies – notwithstanding that no VAT invoice is produced. Paragraph 4.3 of Public Notice 725 needs to be read in the context of the whole notice, including those parts that do not have the force of law. In particular paragraph 9 deals with transfers of own goods between member states:

> **9. Transfers of own goods between Member States**
>
> **9.1 What is the position if I transfer of my own goods?**
>
> A transfer of your own goods from one Member State to another within the same legal entity, for example between branches of the same company, is deemed to be a supply of goods for VAT purposes.
>
> **9.2 Is the supply liable to VAT?**
>
> The transfer of your own goods is liable to VAT in the same way as other intra-EC supplies of goods described in this notice.
>
> **9.3 Can the supply be zero-rated?**
>
> The supply may be zero-rated subject to the conditions in paragraph 4.3.
>
> **9.4 Is acquisition tax due?**
>
> You will normally be liable to account for acquisition VAT in the Member State to which the goods are transferred.
>
> **9.5 Registering for VAT in the Member State to which the goods are sent**
>
> You may need to be registered for VAT in the Member State to which the goods were dispatched in order to meet your obligations to account for acquisition tax and also to account for VAT if you subsequently supply the goods there. You will also be able to use that VAT registration number to support zero-rating of the deemed supply in the UK (see paragraph 4.3).
>
> **9.6 What do I do if I am not registered in the Member State to which the goods are sent?**
>
> If you are not registered for VAT in the Member State to which you transfer your own goods, you should treat the supply as a domestic supply (see paragraph 6.1). You must account for VAT on the transfer at the appropriate UK rate.

38. Given that paragraphs 9.3 and 9.5 cross refer to paragraph 4.3, HMRC submit that paragraph 4.3 is intended to apply to self-supplies, and therefore also requires

registration abroad by the Appellants. HMRC submit that the first condition would be otiose in respect of self-supplies unless it imposed a condition as to registration (as opposed to a condition as to production of a VAT invoice), and it should therefore be construed as having done so.

39. HMRC submit that in the case of a self-supply, it can only be possible for a trader to show that he has "taken all the measures which can be reasonably required of him" if he obtains a VAT registration number in the member state in which the goods are acquired. This is because it is the only objective way of proving his intention to make taxable supplies in that state. The alternative would be to require HMRC to make inquiries to determine the intention of the trader, which would be contrary to the objectives of the common system of VAT in the EU of ensuring legal certainty and facilitating the measures necessary for the application of VAT having regard (save in exceptional cases) to the objective character of the transaction concerned (see the decision of the ECJ in *R (oao Teleos) v HMRC* [2008] STC 706 at para 39).

40. We were referred by the parties to the decision of the VAT and Duties Tribunal in *Centrax v HMCE* (VAT Decision 15743, July 1998), and in particular paragraphs [44] to [64]:

> 44. Mr Ratcliffe's submission on this issue centred on Article 28c(A)(d) which provides for mandatory exemption subject to conditions for those deemed supplies under Article 28a(5)(d) which would fall under Article 28c(A)(a) if they had been made on behalf of another taxable person. Mr Harris accepted that if the conditions had been satisfied the exemption would apply. This accords with the view expressed in *Farmer and Lyal* at page 146, although the authors do not consider the conditions. I observe that in order to read grammatically the word "benefit" in Article 28c(A)(d) clearly should be "would benefit", the French version being "bénéficieraient", the subjunctive.
>
> 45. The Commissioners' case was that the relevant conditions were contained in paragraph 2.4 of Notice 725 read with paragraph 2.2 and that these were not complied with in the periods in dispute because not being registered in Italy the Appellant did not show a "customer's" VAT registration number in Italy.
>
> 46. I observe at this point that section 30(8) applies to supplies and Schedule 4, paragraph 6 provides that the removal to another member state "is a supply". The acquisition under section 30(8)(a)(ii) must be a deemed acquisition since section 10(1)(b) refers to an acquisition "otherwise than in pursuance of a taxable supply". Similarly the supply referred to in regulation 134 includes a supply within Schedule 4, paragraph 6.
>
> 47. Paragraph 2.2 of Notice 725 does not itself cover a removal of goods remaining the property of the UK trader; it applies to supplies to customers.
>
> 48. Paragraph 2.4 does apply to removal of own goods. The imposition of conditions in relation to own goods can only be in the middle paragraph of paragraph 2.4.

> "You may therefore need to be registered for VAT in that country in order to meet your obligations there, and to use your overseas VAT registration number to support zero-rating of the deemed supply when the goods leave the UK. You must of course fulfil all the other conditions for zero-rating (as set out in paragraph 2(2)(a) above). Otherwise you will be required to account for VAT in the UK on the transfer."

I would observe that this is a somewhat oblique method of imposing conditions and that it does not contain the reference to "the force of law" which comes in paragraph 2.2. The word "may" is inappropriate for the imposition of a condition. However Mr Ratcliffe did not suggest that it was not a condition; his case was that it was invalid.

49. Mr Ratcliffe submitted that the condition that the Appellant should be registered in Italy was not reasonable and was not authorised by Article 28c(A). He said that if the Commissioners were able to levy VAT in the UK without zero-rating and without a right of deduction such VAT would be borne by the ultimate consumer in Italy in addition to the VAT paid there; this conflicted with paragraph 19 of the judgment in *Elida Gibbs Ltd v Customs and Excise Commissioners* (Case C-317/94) [1996] STC 1387 where it was said,

> "The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently, the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him.

He relied on *Garage Molenheide BVBA and Others v Belgium* (Case C-286/94 and joined cases) [1998] STC 126 which concerned the right of the tax authorities to retain disputed input tax pending hearing of the substantive appeal without authorisation under Article 27, referring in particular to paragraphs 42 and 45 to 48 of the judgment. He said that measures to preserve the rights of the Treasury "must not go further than is necessary for that purpose" (paragraph 47) and must not "undermine the principles of the common system of VAT" (paragraph 48). He said that nothing in the Sixth Directive permitted the imposition of a self-supply charge without a right to deduct.

50. He accepted that the Appellant was entitled to recover input tax in the UK on manufacturing or acquiring the spare parts in question as attributable to the taxable supply in Italy.

51. Mr Ratcliffe said that the UK was entitled to require evidence that the goods had been removed to Italy and entitled to use the mutual assistance procedures to inform the Italian authorities. However to levy tax in the circumstances was disproportionate since the Appellant had been unable to comply with the conditions.

52. Mr Ratcliffe also cited the following authorities: *Rompelman v Minister Van Financiën* (Case 208/83) [1985] ECR 655 at 6634; *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* (Case 15/81) [1982] ECR 1409, 1417 and

1425; *EC Commission v France* (Case 50/87) [1988] ECR 4797 at paragraphs 15, 17 and 22 of the judgment; *BP Supergas v Greece* (Case C-62193) [1995] STC 805 at paragraphs 17, 18 and 22 of the judgment; *EC Commission v Belgium* (Case 324/82) [1984] ECR 1861 and *Jeunehomme v Belgium* (Case 123187) [1988] ECR 4517.

53. Mr Ratcliffe also advanced submissions based on Article 28c(B)(c) which he subsequently did not pursue.

54. Mr Harris said that no question of double tax arose if the trader moving its own goods registered in Italy. The requirement that the Appellant should provide an Italian VAT number was a condition laid down to prevent any "evasion, avoidance or abuse" within Article 28c(A). He said that there was no suggestion the Appellant was engaged in any impropriety. The UK was however entitled to lay down conditions to ensure the integrity of the single market VAT system. The conditions permitted under Article 28c(A) were not confined to UK tax.

55. He said that there is an express requirement under Article 22.6(b) that suppliers of goods falling within Article 28c(A)(d) must when filling in their recapitulative statements give the identification for VAT purposes of the person acquiring the goods. The obligation of the Appellant to register in Italy was thus impliedly contained in Article 22(6).

56. Mr Harris said that the condition was manifestly not disproportionate because it was directly designed to support the single-market system. The condition was no more than what was required under Article 22(6).

57. Mr Ratcliffe replied that Article 22(6) did not require registration in terms. There were specific regulations regarding failure to comply with the EC Sales Listing requirements. It was not proportionate to deny zero-rating in order to enforce those requirements. He said that in Italy it was not possible to register retrospectively and a nil net return was not accepted.

58. He said that the conditions must ensure "the correct and straightforward application of the exemptions"; the condition of registration ran counter to this. The conditions did more than cure the mischief.

59. Article 28c(A) obliges Member States to lay down conditions "for the purpose of ensuring the correct and straightforward application of the exemptions … and preventing any evasion, avoidance or abuse."

60. It is in the nature of a condition that if it is not satisfied the provision which is subject to that condition, here the exemptions, will not apply. I do not see how such a consequence can be attacked as disproportionate provided the condition is authorised.

61. The primary purpose of the conditions under Article 28c(A) is to ensure "the correct and straightforward application of the exemptions." The exemptions in question do not contain an express requirement that the acquirer of own goods be registered in the country of arrival. No doubt the acquirer will normally be liable to be registered and will

> normally be registered. However such obligation is independent of the provisions of Article 28c(A). Furthermore the acquirer may be under the registration limit in the country of arrival.
>
> 62. Mr Harris relied on the provisions of Article 22(6)(b) obliging taxable persons to submit a recapitulative statement of the acquirers of goods under Article 28c(A)(d) setting out the VAT number of the acquirer in the other Member State. I do not however interpret that as an implied requirement that the acquirer must be registered in that other Member State in order for Article 28c(A)(d) to apply. It seems to me that Article 22(6)(b) only applies if he is so registered.
>
> 63. Mr Harris submitted that the conditions were for "preventing any evasion, avoidance or abuse." In my judgment however such evasion, avoidance or abuse must be in connection with the application of the exemptions under Article 28c(A). It does not seem to me that the conditions can be used as a method of enforcing the registration requirements in the other Member State. It does not seem to me that the conditions can be used merely to ensure the integrity of the single market. A fortiori this must be the case when registration may not be obligatory in the other Member State. Conditions under Article 28c(A) may not in my judgment be imposed to counteract the fact that registration may not be obligatory in another Member State. The integrity of the single market is the responsibility of the Commission.
>
> 64. I conclude that the condition of registration is incompatible with the Sixth Directive and must be disapplied. The Appellant therefore succeeds on this ground also.

41. The Appellants rely on *Centrax* (in particular paragraph [47]) in support of their submission that the first condition cannot apply to self-supplies.

42. HMRC note that as the export in *Centrax* was found not to be a self-supply, the comments made by the Tribunal in that case in relation to self-supplies are *obiter dicta*, and in any event the decision is not binding on us.

43. But HMRC go on to submit that the decision in *Centrax* is founded on a mistake. Paragraph [47] states:

> Paragraph 2.2 [*now paragraph 4.3*] of Notice 725 does not itself cover a removal of goods remaining the property of the UK trader; it applies to supplies to customers

44. No reasons are given for this statement, and HMRC submit that the statement is incorrect. HMRC submit that paragraph 4.3 of Public Notice 725 must be read in the context of its purpose of ensuring the correct and straightforward application of the exemption and preventing evasion and avoidance. HMRC submit that these concerns apply equally to self-supplies. Moreover, the Chairman's conclusion contradicts (what is now) paragraph 9.3 of Public Notice 725 and is in significant tension with (what is now) paragraph 9.5.

45. HMRC drew our attention to paragraph [48] of *Centrax* where a reference is made to paragraph 2.4 (the predecessor to paragraph 9.5). HMRC comment that

rather than treating it as supplementing and modifying (then) paragraph 2.2, it was construed by the Tribunal as an alternative condition. HMRC submit that this is wrong, and that (what is now) paragraph 4.3 cannot be interpreted in a vacuum, but should be construed in the context of the whole of the Public Notice, including paragraph 9. The lack of mandatory (force of law) language in paragraph 9.5, submit HMRC, is a red herring, as the paragraph is concerned with all intra-EU self-supplies, not just zero-rated supplies. The first sentence merely reflects that, as far as UK law is concerned, registering in the member state of acquisition is not mandatory, although the law of the member state may require it. The second sentence of paragraph 9.5 makes it clear that registration abroad is, however, a pre-requisite to zero rating the export, in order to comply with the requirement of paragraph 4.3.

Answer

46. In relation to Issue 1, we agree with the Appellants, and hold that the Exporting Trader is not required to be registered in the other member state.

47. The difficulty with HMRC's case is that the first condition requires a VAT invoice and a VAT registration number. As VAT invoices are not issued in the case of self-supplies, the condition can never be satisfied in the case of a self-supply in the terms expressed.

48. HMRC relies upon case law and a contextual reading of Public Notice 725 to give the first condition a broader interpretation – namely that the trader must be registered in another member state.

49. The case law cited to us by HMRC in support of their argument does not deal with self-supplies.

50. We agree with the Appellants' submissions that requiring registration of the taxpayer in the other member state is irrelevant to ensuring the correct and straightforward application of the exemption and preventing evasion and avoidance. This is because the identity of the person acquiring the goods in the other member state is self-evident, given that this is a self-supply. Evidencing the export of the goods is addressed by the other conditions.

51. To the extent that general principles can be drawn from the case law, we consider that requiring registration in another member state stretches the jurisprudence too far. *VSTR* dealt with the circumstances where a trader was not able to satisfy the condition (in that case – obtaining and recording the VAT registration number of the customer). The ECJ decided that VAT exemption was available, even though the trader could not meet the requirement of the domestic regulations, providing he had done all that could reasonably be required to provide information demonstrating that the customer is a taxable person acting as such. Thus the jurisprudence of the Court overrode the express requirement of domestic law.

52. However, in this case, we construe the first condition as being irrelevant to self-supplies. This is not a case where the law imposes an impossible requirement for the

relief, rather this is a case where the law does not impose a requirement. We agree with the Tribunal in *Centrax* that the first condition does not apply to self-supplies.

53. The basis of our reasoning is the express reference to the VAT invoice. And VAT invoices are not issued for self-supplies. This reference has statutory force. We note that paragraph 9 refers back to paragraph 4.3, but paragraph 9 does not have statutory effect. Guidance cannot amend the law.

54. We are also troubled by HMRC's interpretation requiring registration of the trader in the other member state. This is not a requirement of the Principal VAT Directive, which only requires that the acquisition is by a taxable person. To require more goes beyond the limits of the Directive, and is therefore contrary to EU law – and on this point we agree with the Tribunal in *Centrax*.

55. Even if we are wrong in this analysis, and the first condition does apply to the Appellants, we would find that the principles in *VSTR* would apply. The requirement imposed under the Principal VAT Directive is that the Appellant is a taxable person, not that it is VAT registered. Assuming that Dutch law required the Appellants to register their Dutch business establishments with effect from the acquisition of the imported goods, the Appellants' Dutch business establishments were taxable persons. So no additional measures would be needed for them to establish their status as taxable persons in the Netherlands, and they would satisfy the criteria established in the VSTR case.

Issue 2

Question

56. If the answer to the Issue 1 question is "yes", what are the consequences on the validity of the relevant VAT return in which a VAT credit was claimed in respect of the supply to the other member state?

Answer

57. Having answered the question in Issue 1 "no", the question in Issue 2 does not need to be considered further.

Issue 3

Question

58. If the answer to the Issue 1 question is "no", having regard to the fact that Issue 1 has yet to be determined by the courts, does an inquiry by HMRC on the basis that the exporting trader was required to be registered in the other member state amount to a reasonable inquiry under Regulation 198(a), VAT Regulation 1995?

Submissions

59. In essence we are asked to consider whether it was reasonable for HMRC to open an inquiry into the Appellants' VAT returns.

60. The Appellants did not really engage with the question as drafted. Rather the Appellants' submissions addressed repayment supplement, and the fairness of being kept out of their repayment without financial compensation. The Appellants submit that the VAT repayment supplement regime is compensatory in nature, and intended to compensate taxpayers from being kept out of their money, and reflects the principle of fiscal neutrality. In essence they say, it is unfair that the Appellants bear the cost of HMRC's mistaken interpretation of the law. The Appellants acknowledge that when the repayment supplement was originally enacted, it may have been penal – but since it now can only be claimed as an alternative to interest, it is compensatory.

61. HMRC submit that it was reasonable for them to make inquiries as to whether the supplies were standard rated, and were therefore within s79(3) VAT Act and Regulations 198 and 199 VAT Regulations. This is because at the time the inquiry was started, the decision in the High Court in *JP Commodities* (confirming the validity of a registration requirement for zero rating) was binding on HMRC, and *VSTR* (which, arguably, defined the circumstances in which a registration requirement might not be valid) had yet to be decided.

62. We were referred to the decision of the VAT Tribunal in *Cellular Solutions (T Wells) Ltd HMCE* (VAT Decision 19903, November 2006) at [19]

> […] it seems obvious to us that whether something is reasonable has to be decided in the light of the then knowledge. The fact that the then knowledge of the law turned out to be wrong does not retrospectively make Customs' action unreasonable. There is nothing inconsistent about being wrong and reasonable.

63. HMRC submit that this interpretation is consistent with the purpose of the repayment supplement regime – that is to dis-incentivise undue delay by HMRC – it is not the purpose of the regime to penalise HMRC from taking reasonable, but ultimately wrong, views of the law.

64. To the extent that it is relevant, HMRC submit that the purpose of the VAT repayment supplement regime is penal in nature. It is a whip to prompt compliance by HMRC, in the same way that default surcharge is a whip to prompt compliance by traders. It is not intended to be compensatory – it was always open to the Appellants to claim interest on general EU principles. Lawrence Collins LJ in *HMRC v Royal Society for the Prevention of Cruelty to Animals* [2008] STC 885 said:

> Repayment supplement is not interest, i.e. not payment for the use of the money, but is a punitive measure intended as a "spur to efficiency on the part of the Commissioners" (*Customs and Excise Comrs v L Rowland and Co (Retail) Ltd* [1992] STC 647 at 652) and "to encourage prompt payment by the Commissioners" (*R on the application of Mobile Export 365 Ltd v Revenue and Customs Comrs* [2006] STC 1069 at [24]). Repayment supplement is the *quid pro quo*

> for the taxpayer facing a surcharge for late payment of tax due. It is a penalty paid by the Commissioners to mark their unsatisfactory slow handling of the taxpayer's claim. It is not a windfall.

Answer

65. We find that an inquiry by HMRC on the basis that the exporting trader was required to be registered in the other member state amounted to a reasonable inquiry under Regulation 198(a), VAT Regulation 1995. We make this finding given the uncertain state of the law at the time the inquiries were made. Merely because HMRC were found to have interpreted the law incorrectly does not render their inquiries unreasonable.

66. To the extent that it is relevant, we find that the purpose of repayment supplement is not compensatory, but punitive (although of course the supplement will have some compensatory effect). As the repayment supplement does not provide an amount of interest at a rate that is commensurate with the loss of the use of the unpaid repayment, it clearly cannot have been intended to have a compensatory purpose. The fact that taxpayers cannot claim both interest and repayment supplement does not alter this analysis.

Issue 4

Question

67. If the answer to the Issue 3 question is "yes", how does this affect the determination of the beginning and end dates of the 30 day period in section 79(2A) VAT Act and any period left out of account?

Legislation

68. The difficulty highlighted in Issue 4 is the inconsistency in the language used in s79 VAT Act and Regulation 198, VAT Regulations.

69. Repayment supplement is governed by s79 VAT Act. The broad scheme of repayment supplement is that the supplement is payable if HMRC take more than 30 calendar days to authorise a repayment of VAT. However the repayment supplement clock is stopped to take account of inquiries by HMRC into the VAT return or claim for repayment.

70. Section 79(3) and (4) deal with the period for which the clock is stopped:

> (3) Regulations may provide that, in computing the period of 30 days referred to in subsection (2A) above, there shall be left out of account periods determined in accordance with the regulations and referable to—
>
> (a) the raising and answering of any reasonable inquiry relating to the requisite return or claim,

[…]

(4) In determining for the purposes of regulations under subsection (3) above whether any period is referable to the raising and answering of such an inquiry as is mentioned in that subsection, there shall be taken to be so referable any period which—

(a) begins with the date on which the Commissioners first consider it necessary to make such an inquiry, and

(b) ends with the date on which the Commissioners—

(i) satisfy themselves that they have received a complete answer to the inquiry, or

(ii) determine not to make the inquiry or, if they have made it, not to pursue it further,

but excluding so much of that period as may be prescribed; and it is immaterial whether any inquiry is in fact made or whether it is or might have been made of the person or body making the requisite return or claim or of an authorised person or of some other person.

71. Regulation 198 and 199, VAT Regulations were made under section 79(3). They read as follows:

198 Computation of period

In computing the period of 30 days referred to in section 79(2)(b) of the Act, periods referable to the following matters shall be left out of account—

(a) the raising and answering of any reasonable inquiry relating to the requisite return or claim,

(b) the correction by the Commissioners of any errors or omissions in that requisite return or claim, and

(c) in any case to which section 79(1)(a) of the Act applies, the following matters, namely—

(i) any such continuing failure to submit returns as is referred to in section 25(5) of the Act, and

(ii) compliance with any such condition as is referred to in paragraph 4(1) of Schedule 11 to the Act.

199 Duration of period

For the purpose of determining the duration of the periods referred to in regulation 198, the following rules shall apply—

(a) in the case of the period mentioned in regulation 198(a), it shall be taken to have begun on the date when the Commissioners first raised the inquiry and it shall be taken to have ended on the date when they received a complete answer to their inquiry;

(b) in the case of the period mentioned in regulation 198(b), it shall be taken to have begun on the date when the error or omission first came to the notice of the Commissioners and it shall be taken to have ended on the date when the error or omission was corrected by them;

(c) in the case of the period mentioned in regulation 198(c)(i), it shall be determined in accordance with a certificate of the Commissioners under paragraph 14(1)(b) of Schedule 11 to the Act;

(d) in the case of the period mentioned in regulation 198(c)(ii), it shall be taken to have begun on the date of the service of the written notice of the Commissioners which required the production of documents or the giving of security, and it shall be taken to have ended on the date when they received the required documents or the required security.

72. The language of the statute is expressed subjectively, whereas the language used in the Regulations is objective. We were told that the inconsistency arose as a result of the amendments made by the Finance Act 1992 in order to partially reverse the decision of the High Court in *HMCE v L Rowland & Co (Retail) Ltd* [1992] STC 647 – however the Regulations were never amended to reflect these changes (see *Alliance and Leicester v HMRC* (VAT Decision 20094, March 2007 at [19] to [21]).

Submissions

73. HMRC submit that as the Regulations are enacted pursuant to powers in the statute, the provisions of s79(4) must take precedence (see *Alliance and Leicester* at [19], *Cellular Solutions* at [8] and *S&I Electronics plc v HMRC* (VAT Decision 20078, March 2007 at [36] and *Raptor v HMRC* [2010] UKFTT 620 at [62]).

74. In practice s79(4)(b)(i) will usually prescribe a later date than Regulation 199(a), because HMRC will generally only be satisfied that they have received a full answer at some point after having actually received the answer.

75. HMRC state that they will treat their inquiries on zero rating as raised the day after the date of the first letter inquiring about why the Appellants treated the disputed supplies as zero-rated. This was not challenged by the Appellants.

76. The Appellants submit that the clock restarts at the earliest point when HMRC could have accepted that the Appellants arguments that the returns were correct.

77. HMRC submit that the inquiries ended for the purposes of s79(4)(b)(i) when HMRC satisfied themselves that they had received complete answers – namely when HMRC were satisfied that the Appellants were in fact registered for VAT in the Netherlands.

Answer

78. Section 79(4)(a) refers to the date on which HMRC first consider it necessary to make such an inquiry – which would occur before any letter raising the inquiry with the Appellants is posted. Regulation 199(a) refers to the date on which the inquiry was first raised. Assuming that HMRC's letter was posted on the date of the letter, and was sent by first class post, the approach taken by HMRC is consistent with Regulation 199(a).

79. As regards the point at which the clock restarts, we consider that both submissions are wrong, and we agree with the VAT and Duties Tribunal in *Alliance and Leicester* (which was followed by this Tribunal in *Raptor*):

> 21. It is important also to bear in mind both the purpose of section 79, and the words actually used. The section allows the Commissioners 30 days in order to process repayment claims, before any penalty (in the shape of a supplement) becomes due. The suspension of the running of time afforded by subsection (4) relates to the raising and answering of an inquiry; the section states clearly that the suspension ends when the Commissioners have received a complete answer to the inquiry, and not when they are satisfied that the return is correct. I echo the comment of Auld J in Rowland & Co that an inquiry is a "question or questions put to the taxpayer for him to answer" and does not warrant any wider construction. Thus the suspension does not extend to the consideration of the material provided in answer to the inquiry—that is to be accomplished within the 30 day period. In other words, a distinction must be drawn between the inquiry itself, the raising and answering of a question or questions, and the examination of the answer or answers.
>
> […]
>
> 23. […] Although the section indicates that the date re-starts when the Commissioners "satisfy themselves that they have received a complete answer to the inquiry" in my view that means no more than that they are given sufficient time to ensure that what has been provided is that which was requested. It would be wholly contrary to the spirit of section 79 if the Commissioners were allowed the entire period from deciding that it would be desirable to ask a question, through the putting of the question, perhaps a week later, the receipt of the answer and the consideration of the answer, at leisure, some time later.

80. In other words, the pausing of the repayment supplement clock does not continue for the time taken for the consideration of the material provided in answer to the inquiry – that consideration has to be undertaken within the 30 day period. Thus the clock restarts when HMRC were satisfied that complete answers had been given by the Appellants to their questions – not when they had completed their analysis of those answers.

Conclusions

81. We answer the questions raised in the preliminary issues as follows:

Issue 1:

82. Question. Whether an exporting trader is required to be registered for VAT in the member state to which the goods are exported in order for the supply to be zero-rated under Regulation 134 of the VAT Regulations 1995, or, if different, under Directive 2006/112/EC?

83. Answer: Yes. The exporting trader **is not** required to be registered for VAT in the member state to which the goods are exported in order for the supply to be zero-rated under Regulation 134 of the VAT Regulations 1995, or, if different, under Directive 2006/112/EC?

Issue 2:

84. Question: If the answer to the Issue 1 question is "yes", what are the consequences on the validity of the relevant VAT return in which a VAT credit was claimed in respect of the supply to the other member state?

85. Answer: As the answer to the Issue 1 question is "no", we have not addressed this issue.

Issue 3:

86. Question: If the answer to the Issue 1 question is "no", having regard to the fact that Issue 1 has yet to be determined by the courts, does an inquiry by HMRC on the basis that the exporting trader was required to be registered in the other member state amount to a reasonable inquiry under Regulation 198(a), VAT Regulation 1995?

87. Answer: Yes. An inquiry by HMRC on the basis that the exporting trader was required to be registered in the other member state amounted to a reasonable inquiry under Regulation 198(a), VAT Regulation 1995.

Issue 4:

88. Question: If the answer to the Issue 3 question is "yes", how does this affect the determination of the beginning and end dates of the 30 day period in section 79(2A) VAT Act and any period left out of account?

89. Answer: The beginning date is the date when the letters raising the inquiries were received by the Appellants. The end date is the date when HMRC were satisfied that complete answers had been given by the Appellants to their questions.

Appeal rights

90. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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 Tribunal hereby directs that the 56 days within which a party may send or deliver an application for permission to appeal against a decision that disposes of a preliminary issue shall run from the date of the decision that disposes of all issues in the proceedings. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 22 December 2014

Cases referred to in skeletons but not mentioned in this decision:

Optigen Ltd v HMRC [2006] STC 419
Collee v Finanzamt Linburg an der Lahn [2008] STC 757
HMRC v Our Communications Ltd [2013] UKUT 0595