[2017] UKUT 0327 (TCC)

Appeal number: UT/2017/0018

PROCEDURE – application to strike out appellants' appeal for lack of jurisdiction – whether HMRC had made an appealable decision – FTT refusal to strike out – whether FTT erred in law – whether decision of FTT should be set aside

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE TIMOTHY HERRINGTON

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 19 July 2017

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

Jonathan Swift QC, instructed by RPC, for the Respondents

DECISION

1. This is the appeal of HMRC from the decision of the First-tier Tribunal (Judge Tony Beare) ("FTT") by which the FTT dismissed the application of HMRC to strike out the appeal of the taxpayers on the ground that there was no appealable matter before the FTT.

2. The FTT found that a letter from HMRC to the taxpayers (to which we shall refer compendiously as Sports Direct) dated 14 January 2016 ("the January 2016 letter") contained a decision appealable to the FTT under s 83(1)(b) of the Value Added Tax Act 1994 ("VATA"). It is from that decision that HMRC appeal on a question of law, with permission of Judge Beare.

Background

3. In order to appreciate the significance or otherwise of the January 2016 letter, it is necessary for us, as it was for the FTT, to consider the background and the events which led to that letter.

4. The issue concerns the application of Articles 32 to 34 of the Principal VAT Directive (2006/112/EC) ("the Directive"), which set out provisions covering, amongst other things, internet sales made by a taxable person in one EU member state to consumers belonging in another EU member state who are not registered for VAT in that state, and the enactment of those provisions into domestic UK law by s 7(5) VATA.

The underlying law

5. The relevant provisions of the Directive are contained in Title V (Place of taxable transactions), Chapter 1 (Place of supply of goods) in Section 1:

> "*Supply of goods with transport*
>
> **Article 32**
>
> Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins.
>
> However, if dispatch or transport of the goods begins in a third territory or third country, both the place of supply by the importer designated or recognised under Article 201 as liable for payment of VAT and the place of any subsequent supply shall be deemed to be within the Member State of importation of the goods.
>
> **Article 33**
>
> 1. By way of derogation from Article 32, the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the

goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends, where the following conditions are met:

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

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

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

Article 34

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

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

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

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

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

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

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

4. The Member State within the territory of which the goods are located at the time when their dispatch or transport begins shall grant

> those taxable persons who carry out supplies of goods eligible under paragraph 1 the right to opt for the place of supply to be determined in accordance with Article 33.
>
> The Member States concerned shall lay down the detailed rules governing the exercise of the option referred to in the first subparagraph, which shall in any event cover two calendar years."

6. Subject to Article 34, the general structure of these provisions is to provide that the place of supply of goods which are dispatched or transported depends on whether the goods are "dispatched or transported by or on behalf of the supplier" from an EU member state other than that in which the dispatch or transport ends. If they are so dispatched or transported, the place of supply is generally where the goods are located at the time when the dispatch or transport of the goods to the customer ends; that is termed "distance selling". If not, the place of supply is where such dispatch or transport begins. That is subject to a *de minimis* exception in Article 34 where in certain circumstances and where certain thresholds are not exceeded, the place of supply will be in the place where the transport or dispatch of the goods begins, irrespective of the nature of the transport arrangements.

7. These provisions of the Directive have been implemented into UK law by s 7(5) VATA:

> "Goods whose place of supply is not determined under any of the preceding provisions of this Section and which do not consist in a new means of transport shall be treated as supplied outside the United Kingdom where –
>
> (a) the supply involves the removal of the goods, by or under the direction of the person who supplies them, to another member State;
>
> (b) the person who makes the supply is taxable in another member State; and
>
> (c) provisions of the law of that member State, corresponding, in relation to that member State, to the provisions made by subsection (4) above make that person liable to VAT on the supply;
>
> but this subsection shall not apply in relation to any supply in a case where the liability mentioned in paragraph (c) above depends on the exercise by any person of an option in the United Kingdom corresponding to such an option as is mentioned in paragraph 1(2) of Schedule 2 unless that person has given, and has not withdrawn, a notification to the Commissioners that he wishes his supplies to be treated as taking place outside the United Kingdom where they are supplies in relation to which the other requirements of this subsection are satisfied."

8. For completeness, we should refer to two other provisions within s 7 VATA. The first is s 7(4), which is the corollary to s 7(5) as regards distance selling from other EU member states into the UK, and has the effect that, where an EU supplier is liable to be registered in the UK, distance sales into the UK from another member state are treated as supplied in the UK. (The UK has adopted the higher of the two

financial thresholds in Article 34, expressed in sterling terms as £70,000.) Section 7(4) provides:

> "Goods whose place of supply is not determined under any of the preceding provisions of this section shall be treated as supplied in the United Kingdom where—
>
> (a) the supply involves the removal of the goods to the United Kingdom by or under the directions of the person who supplies them;
>
> (b) the supply 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;
>
> (c) the supplier—
>
> (i) is liable to be registered under Schedule 2; or
>
> (ii) would be so liable if he were not already registered under this Act or liable to be registered under Schedule 1 or 1A; and
>
> (d) the supply is neither a supply of goods consisting in a new means of transport nor 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."

9. The second is s 7(7), which relevantly applies to treat the UK as the place of supply of goods removed from the UK in circumstances where s 7(5) does not apply:

> "Goods whose place of supply is not determined under any of the preceding provisions of this section but whose supply involves their removal to or from the United Kingdom shall be treated—
>
> (a) as supplied in the United Kingdom where their supply involves their removal from the United Kingdom without also involving their previous removal to the United Kingdom; and
>
> (b) as supplied outside the United Kingdom in any other case."

The initial correspondence

10. With that introduction to the legal background, we turn to the context in which the January 2016 letter came to be written.

11. Distance selling is, of course, very relevant to internet sales, and thus very material in the context of Sports Direct's business. To obtain confirmation of the VAT position consequent upon certain changes it was making to its distribution and fulfilment services, Sports Direct wrote to HMRC on 18 January 2010. The question was whether, given the structural changes that were being made, UK VAT would continue to be due on sales of goods by Sports Direct (at that time specifically Sportsdirect.com) to its customers in other EU member states.

12. The January 2010 letter explained that, as from 1 February 2010, fulfilment services would no longer be carried out by Sportsdirect.com, but by a separate subsidiary (outside of Sports Direct's VAT group), Etail Services Limited ("Etail").

The essence of the new arrangements was that the customer would be provided by Sports Direct with a number of collection or delivery options, namely collection by the customer from a UK warehouse, delivery of the goods to a UK address and contracting directly with Etail for international shipping. In each case, confirmation was sought that there would be a single supply of goods by Sports Direct subject to UK VAT. In the case of delivery by Etail, the letter expressed Sports Direct's view that Etail would make a separately contracted supply of delivery services, and that the distance selling rules would not apply, because Sports Direct would be making no supply of delivered goods.

13. In their reply of 11 March 2010, HMRC agreed that, because Sports Direct would not be both supplying and delivering (the delivery being undertaken by Etail), that would not constitute distance selling, and accordingly the arrangements would be subject to UK VAT. The letter continued, however:

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

14. Following that response, as the FTT recorded at [15] of its decision, Sports Direct accounted for VAT on cross-border intra-EU sales on the basis that, by ensuring that a group member (but one outside the VAT group registration) other than the selling group member was engaged to effect the transport of the goods to the consumer, the selling group member would fall outside Article 33 of the Directive and would be required to account for UK VAT on the basis that its supplies were made in the UK.

The EU VAT Committee

15. That remained the position until 2015. At that stage, the UK (along with Belgium) had noted that, in circumstances where distance selling was relevant, some business arrangements had been put in place so as to separate the goods from their transport and delivery with a view, so it was considered, to avoiding accounting and paying VAT in the member state of destination of the goods. The UK (and, separately, Belgium) submitted a request to the Value Added Tax Committee of the European Commission ("the VAT Committee") regarding distance sales of goods and, in particular, regarding the place of supply of sales for which the cross-border transport of the goods to the consumer is ensured not directly by the supplier but by a third party.

16. Although it involves quoting somewhat extensively from the FTT's decision, we can do no better than refer to the summary it provided, at [17] to [23], of the UK's request and of the resultant guidelines provided by the VAT Committee:

> "17. In its application to the VAT Committee, the UK outlined its view on this subject to be as follows:-
>
> 'The UK considers that ultimately the customer is ordering goods from the supplier and wants those goods delivered to him. The arrangements put in place between the two legal entities are merely an alternative

way in which the supplier has his goods delivered to the customer. The introduction of a third party for the purposes of delivering the goods does not prevent those goods from being 'dispatched or transported by or on behalf of the supplier'. Consequently, the UK considers that VAT is due in the Member State of delivery'.

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

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

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

21. However, the VAT Committee went on to note that a broader interpretation could also be envisaged under which Articles 32 to 34 should be applied in such a way as to achieve the objectives for which they were designed – namely, to ensure that VAT receipts accrue directly to the EU member state of consumption and to prevent distortions of competition between EU member states. The VAT Committee noted that, on that basis, the words should be construed by reference to the economic reality of the situation and not by adopting the literal approach of looking at the contractual structure. The VAT Committee concluded that, on the broader interpretation, goods could be seen as having been dispatched or transported 'on behalf of the supplier' not only in circumstances where the supplier was directly involved in arranging the transport but also in situations where the supplier was 'indirectly associated with the transport'. It explained that such 'indirect involvement' could be considered to be present in circumstances where the supplier was 'involved' with the company providing the transport – for example, by actively promoting, suggesting or recommending the transport company to the customer – even though the supplier does not, as such, conclude a contract with the transport company, does not bear the cost of the transportation and does not assume any responsibility for the transportation.

> 22. So, on the broader interpretation, the structure adopted by the Sports Direct group in these circumstances would fall within Article 33 and that would mean that the place of supply of goods sold by the Appellants would be the EU member state in which the relevant consumer was located.
>
> 23. In the guidelines which ensued from the meeting of the VAT Committee, the VAT Committee stated that it 'almost unanimously agrees that, for the purposes of Article 33 of VAT Directive, goods shall be considered to have been 'dispatched or transported by or on behalf of the supplier' in any cases where the supplier intervenes directly or indirectly in the transport or dispatch of the goods.' In other words, the VAT Committee agreed, 'almost unanimously', that the broader interpretation of the phrase 'dispatched or transported by on or behalf of the supplier' was correct."

The January 2016 letter

17. We turn now to the January 2016 letter. On 28 September 2015, Mr Herbie Monteith, the financial controller of Sports Direct, wrote to Mr Neil Mortimer of HMRC, the Sports Direct Group's Customer Relationship Manager, with a copy to Mr John Eaton, an HMRC VAT specialist. The purpose of the letter was to inform Mr Mortimer and Mr Eaton, and through them HMRC, of certain changes to Sports Direct's online sales model, with effect from 20 February 2015.

18. The structural changes involved the establishment of three new companies to make supplies to customers purchasing goods online from Sports Direct's websites, depending on whether those customers were in the UK, other EU member states or the rest of the world. So far as material to this appeal, in relation to online retail sales to EU customers, the company with which those customers would contract was SDI (Brook EU) Limited ("SDI EU"), one of the Respondents to this appeal. SDI EU would not offer international delivery services; customers could choose to contract separately with a separate third party delivery company, Barlin Delivery Limited ("Barlin"). The Barlin arrangement replaced the similar arrangements with Etail.

19. In its letter, Sports Direct expressed the view that the VAT position in respect of sales to non-UK addresses would remain the same. Specifically in relation to SDI EU, it was said that no distance sales were made as there were no delivered goods. Confirmation was sought that SDI EU should continue to account for UK VAT.

20. The January 2016 letter, which was from Mr Eaton to Mr Monteith, was written in reply to Sports Direct's letter of 28 September 2015. The letter records the view of Sports Direct, essentially that where the removal of the goods is made at the direction of the customer who makes a separate purchase of delivery services from a separate entity, the supply of goods is made in the UK (with consequent liability to UK VAT) and that Article 33 of the Directive regarding distance sales does not apply. Then, under the heading "Our View", Mr Eaton wrote:

> "Our view on these arrangements and the correct interpretation of Articles 33 and 34 of the Principle [sic.] VAT Directive and of own

implementing provisions has been developing over time. The purported effect of the arrangements appeared contrary to the purpose of the above provisions, which were introduced in order to maintain the 'destination' principle of taxation within the single market and prevent distortions of competition arising from differences between national VAT rates. In other words, that domestic operators would suffer unfairly if competitors were able to sell into the same market using lower rates of VAT.

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

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

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

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

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

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

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

> The EU VAT Committee considered this issue in its 104th meeting and has now published a guideline which can be found at the internet address below;
>
> http://ec.europa.eu/taxation_customs/resources/dcouments/taxation/vat/key_documents/vat_committee/guidelines-vat-committee-meetings_en.pdf
>
> Following the publication of this guideline, HMRC has been able to finalise its policy as explained below.
>
> Where a UK business believes that its arrangements fall under the scope of the VAT Committee guideline it should take steps to contact the tax authorities in the Member State of supply with a view to regularising the position in that State.
>
> We will of course consider all claims for refund of UK VAT incorrectly accounted for on such supplies. The usual capping provisions still apply and you must satisfy us that the place of supply is in another Member State. HMRC will not accept claims until the place of supply has been fully established.
>
> Claims for overpaid UK VAT must include the following information which will assist in verifying the place of supply.
>
> The net value of the transactions and the VAT amount concerned by:
>
> - calendar month,
>
> and
>
> - by the country of supply
>
> HMRC will forward this information to the relevant State under the provisions of Art 13 of Reg 904/2010."

21. Mr Eaton went on to note, under the heading "What happens next", that the Sports Direct group had already submitted (what were protective) claims for repayment of UK VAT in respect of past periods, and he invited Shop Direct to provide the information stipulated above by 15 February 2016, noting that: "In the absence of this information we will be unable to accept the claims". No such information has been provided.

22. Finally, under the heading "What to do if you disagree", Mr Eaton stated that, if Shop Direct did not agree with his decision, it had a statutory right to ask for the decision to be reviewed or a right to appeal to the FTT. Mr Eaton outlined the procedure whereby each of those routes could be pursued.

23. There followed a telephone conference call on 3 February 2016. Those present on the call were Mr Mortimer of HMRC and for Sports Direct its acting CFO, Mr Matthew Pearson, Mr Monteith and a consultant, Mr Justin Barnes. On that call, Mr Barnes expressed the view that the January 2016 letter had not provided a "clear decision", and that something was needed that Sports Direct could respond to. Mr Mortimer in turn stressed the importance of the revised EU Guidelines and their impact on HMRC's declared policy. HMRC were not in a position to rule on a supply in a non-UK territory, but would be liaising with EU colleagues.

24. After that call, on 9 February 2016 Mr Monteith wrote by email to Mr Mortimer, again with a copy to Mr Eaton. He said:

> "I am sorry to say we are still not sure exactly what has been decided in HMRC's letter.
>
> Am I correct that the decision in the letter is
>
> 1) that SDR's European sales do fall within Article 33, and that this has been the position from the time of the delivery arrangements with Etail Services Limited?; and
>
> 2) that this conclusion has been reached taking account of the discussions that preceded the VAT Committee's guidance, and in light of the guidance itself?"

25. The email response of Mr Mortimer to Mr Monteith on 11 February 2016, copied to Mr Eaton, was:

> "The questions below are open to interpretation, but the short answer to both of them from me is in the affirmative. With regard to the second question, we have naturally attempted to consider all relevant information available to us.
>
> HMRC recurring advice to Sports Direct over the last five years has been to discuss the arrangements with the relevant fiscal authorities in each relevant EU territory. You will have a better idea than I do, to what extent that has taken place. As I explained on our recent Risk Review call, HMRC is not in a position to rule on whether a supply is liable to taxation in a specific place outside the UK or whether the supplier should be registered for Vat there. That is a matter for the supplier and the other Member State to establish.
>
> I envisage the next step in this matter to be your provision of the information requested by 15 Feb in John Eaton's letter of 14.1.16."

26. Sports Direct gave notice to the FTT of its appeal on 12 February 2016. In its appeal, it characterised the decision under appeal as having been contained in the January 2016 letter and as having been:

> "… that when the Appellants sell goods to customers located in Member States of the European Union ('EU') other than the United Kingdom (the 'Relevant Sales'), Article 33 of Council Directive 2006/112/EC (the 'Principal VAT Directive') is engaged and the place of supply for those sales is not the UK but the Member State of the customer."

The FTT's decision

27. On the application by HMRC to strike out Sports Direct's appeal for lack of an appealable decision, and thus for lack of jurisdiction under s 83 VATA, the FTT concluded that the January 2016 letter had given rise to an appealable decision, and that accordingly the appeal would not be struck out. It found, at [37], that HMRC should be regarded as having made a decision to the effect that:

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

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

28. At [38], the FTT gave its reasons for reaching this conclusion. It had regard to the history of the correspondence, and to what it regarded as the confirmation of the place of supply being in the UK which had been provided in 2010. It found, at [38](c) and (d), that the submission made by the UK to the VAT Committee confirmed that HMRC's view was that the broader interpretation of Article 33 was the correct one, and that was the view of HMRC at the time they were responding to Sports Direct's letter of 28 September 2015.

29. With regard to the January 2016 letter itself, the FTT construed this as a statement by HMRC that, notwithstanding their previous approach in this area, their policy was now to treat supplies in the circumstances described by Sports Direct as being made in the destination EU member state in accordance with the (almost unanimous) view expressed by the VAT Committee. The FTT regarded HMRC's urging of Sports Direct to take steps to contact the tax authorities in the *member state of supply* with a view to regularising the position in that state as consistent with that construction. Regularising the position was taken by the FTT as referring to compliance with VAT obligations in the destination state.

30. The FTT regarded the remaining paragraphs of the January 2016 letter as simply explaining how Sports Direct should go about reclaiming overpaid UK VAT on the basis of HMRC's policy. That required that information in relation to VAT paid in the destination state be provided before claims would be processed.

31. At [38](g), the FTT summarised its conclusion in the following way:

> "So, taken as a whole, I consider that the Decision Letter [that is to say, the January 2016 letter] is not saying that the Respondents cannot determine the place of supply until they have received details of how the destination EU member states are applying the provisions of the Directive. Instead, the Decision Letter is saying that the Respondents' policy is to follow the recommendations of the VAT Committee, with the result that supplies should be treated as being made in the destination EU member states and that therefore:-
>
> (i) the Appellants should take steps to ensure that they meet their VAT obligations in the destination EU member states; and
>
> (ii) the Appellants will not be able to recover overpaid UK VAT until they have provided to the Respondents information about the VAT paid in the destination EU member states"

32. The FTT noted, although it did not form part of its reasoning, that the January 2016 letter had rightly included notice of Sports Direct's review and appeal rights. It also regarded its construction of the January 2016 letter as having been supported by the subsequent email of 11 February 2016 from Mr Mortimer to Mr Monteith, whilst

acknowledging that that email could not convert the January 2016 letter into a decision if it was not one in itself.

HMRC's grounds of appeal

33. Two grounds of appeal from the FTT's decision are made. The first (Ground 1) is that the FTT failed to direct itself to whether HMRC had decided that all the requirements of s 7(5) VATA had been met. The second (Ground 2) is that the FTT erred in concluding, at [37](b), that HMRC had decided that no refund of UK VAT previously paid would be made until evidence of the VAT paid in each destination state was provided.

Discussion

34. For HMRC, Mr Singh submitted that, if the FTT had properly directed itself to whether HMRC had decided that all the requirements of s 7(5) VATA, it could not have concluded, as it had, that HMRC had decided that the supplies in question should be regarded as being made in the destination EU member state. The FTT's finding, at [38](c) to (d), that HMRC had decided that, in the circumstances described by Sports Direct, the goods were "dispatched or transported by or on behalf of the supplier" could mean no more than that the requirement of s 7(5)(a) (by which, as the FTT had found at [13], Article 33 had been implemented into UK law, translated as "by or under the direction of the person who supplies [the goods]") had been met. That would not, argued Mr Singh, have been enough for HMRC to have decided that the place of supply was outside the UK, as it would have been necessary for HMRC to have been satisfied that *all* the requirements of s 7(5) had been met, including in particular s 7(5)(c).

35. Mr Singh submitted that the January 2016 letter made it clear that HMRC, far from making a decision as to the place of supply in the case of Sports Direct, were positively declining to find that s 7(5)(c) was met until they knew what the position was in the destination states concerned. In support of this submission, he pointed to three elements of the January 2016 letter:

(1) The first element was that contained in the second bullet point in the description of HMRC's policy. There HMRC had explained that a unilateral application by HMRC of their view that the goods were to be regarded as removed "by or under the directions of" the supplier would not be sufficient on its own to satisfy all the conditions of s 7(5). That, Mr Singh argued, clearly indicated that the application of that view would not be sufficient to decide that the place of supply was outside the UK.

(2) The second element was HMRC's statement that it was *only where*, in a case involving arrangements of the kind in question, the destination state had determined that a UK retailer's distance sales were liable to VAT in that state under that member state's corresponding provisions (in other words that s 7(5)(c) was satisfied) that HMRC would agree that the place of supply was determined by s 7(5). Otherwise, the default provision of s 7(7) would apply,

namely that the supply would be treated as taking place in the UK, and UK VAT would have to be accounted for accordingly.

(3) The third element was the description of HMRC's policy following the publication of the VAT Committee's guidelines. That policy was described as being that a UK business that believed its arrangements fell within the scope of the guidelines (in other words, that as a result of the broader interpretation Article 33 would apply so that the place of supply would be in the destination state, and not in the state of origin), that business should contact the tax authorities of that state to regularise the position in that state. Claims for refund of UK VAT would be considered, subject to the usual capping rules, but only *if* HMRC were satisfied that the place of supply was in the other member state. The letter stated that: "HMRC will not accept claims *until* the place of supply has been fully established."

36. For Sports Direct, Mr Swift supported the conclusions reached by the FTT. He argued that the FTT had, for the reasons it gave at [38] of its decision, correctly considered the effect of the January 2016 letter in the context in which it had been written. HMRC had set out their new policy consequent upon the guidelines of the VAT Committee, had advised that businesses which considered that their arrangements fell within the scope of the guidelines should regularise their positions in the destination states, and had explained how Sports Direct should go about reclaiming VAT overpaid in the UK. That, submitted Mr Swift, was a clear statement that Sports Direct's internet sales were sales made in the destination state, in accordance with the view of the VAT Committee.

37. Mr Swift argued that it was immaterial that the January 2016 letter did not address separately the three conditions in s 7(5) VATA. The letter plainly set out HMRC's view that any arrangement falling within the VAT Committee's guidelines would not be chargeable to VAT in the UK (in other words that s 7(5) would apply to such arrangements). He submitted that this conclusion was underlined by the following four matters:

(1) First, the January 2016 letter was in response to that of Sports Direct dated 28 September 2015, which had sought confirmation that its modified internet sales arrangements remained within the scope of Article 33 of the Directive.

(2) Secondly, the starting point for HMRC's comments on those arrangements was that their view on them, and on the correct interpretation of Articles 32 and 33, had been developing over time, that the "purported effect" of the arrangements appeared contrary to those Articles, and that HMRC had referred the matter to the VAT Committee. HMRC then set out the policy that had been adopted in light of the Committee's guidance. Each of these matters, argued Mr Swift, was a clear indication that HMRC had reconsidered the view they had previously expressed, in the letter of 11 March 2010, as to the place of supply.

(3) Thirdly, HMRC clearly accept that the VAT Committee guidelines represent a correct interpretation of the meaning and effect of the expression "dispatched or transported by or on behalf of the supplier" in Article 33.

(4) Fourthly, given the breadth of the VAT Committee's guidance, the only possible conclusion to be drawn from the January 2016 letter is that HMRC have concluded that Sports Direct's arrangements for internet sales fall within the scope of that guidance such that Article 33(1) applies to them, and the UK is not the place of supply. This, submitted Mr Swift, is demonstrated by:

(a) There is no reason for HMRC to have stated that where a case falls within the VAT Committee's guidelines a UK business should contact the tax authorities in the destination state with a view to regularising the position in that state if the policy is not being applied to Sports Direct.

(b) It would be irrelevant to Sports Direct to advise it of HMRC's policy to repay overpaid UK VAT and to ask Sports Direct to provide the necessary information unless it had been decided that the UK was not the place of supply.

(c) HMRC informed Sports Direct of the statutory right of appeal.

38. Having considered the January 2016 letter in its context, and having regard to the conclusions reached by the FTT and the respective submissions of the parties, we have concluded that the FTT was wrong to have decided that HMRC had decided that the supplies in question should be regarded as being made in the destination EU member state.

39. The starting point in interpreting the letter is the Directive. As we have described, in the case of the supply of goods with transport, the structure of the Directive is to distinguish cases in which the supply is to be treated as taking place in the member state of origin from those where the supply is regarded as taking place in the destination state. That distinction is provided by Article 33 where, by way of derogation from the normal rule in Article 32, the distinction depends on whether the goods are "dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends". In that case, Article 33 applies and the place of supply is deemed to be the destination state.

40. That is not, however, the end of the story. Article 33 is itself subject to Article 34, which provides that in the cases where the conditions of that Article are met, Article 33 does not apply. The result in such cases is that Article 32 applies and the place of supply is in the state of origin, notwithstanding that the goods have been dispatched or transported by or on behalf of the supplier. In those circumstances, the distinction drawn between Article 32 and Article 33 becomes immaterial. Article 33 is not determinative.

41. In our judgment, the January 2016 letter went no further than to set out HMRC's view that, to the extent Article 33 was applicable, it would have the effect that the place of supply in the case of Sports Direct's arrangements would be in the destination EU member state, but that was subject to Article 34. If the conditions of Article 34 were met, with the result that the place of supply could not be in the destination state, then it would be in the UK. We do not agree with the FTT that HMRC's request for information with respect to the position in the destination state was confined to verifying refund claims; it was part and parcel of the determination of

the place of supply itself, as demonstrated by the reference to claims only being accepted if and when the place of supply had been established, and that the information would "assist in verifying the place of supply".

42. Mr Swift's support of the FTT's decision was necessarily focused on the proposition that HMRC had decided that Sports Direct's arrangements fell within the scope of the derogation in Article 33. We accept that. But that of itself would not be sufficient to determine the place of supply. To do so would require consideration whether the conditions of Article 34 were met. Unless or until that were done, no definitive conclusion could have been reached on the application of Article 33, and consequently no definitive conclusion on the place of supply as between the origin state (in this case, the UK) and the destination state (another EU member state). The January 2016 letter cannot be construed as having set aside any requirement to consider Article 34, or as having assumed that it did not apply. To the contrary, it is clear that the liability position in the destination state was to the forefront of the view expressed by HMRC, and that the final decision as to the place of supply was dependent on resolution of that question.

43. We agree therefore with Mr Singh that, translated into domestic terms, the decision of HMRC was confined to determining that s 7(5)(a) VATA was satisfied, but that no view was expressed as to satisfaction of s 7(5)(c) in particular. We do not accept the argument of Mr Swift that the letter announced a change in HMRC policy from one governed by all of the conditions in s 7 VATA to one where, following the guidelines of the VAT Committee, the question of the place of supply could be determined solely by reference to the broader interpretation of Article 33. It is clear that neither under s 7, nor under the Directive, could that question be determined without reference to Article 34 and s 7(5)(c).

44. We consider, therefore that the FTT made an error of law when it decided that the January 2016 letter was a decision of HMRC that, in the circumstances described by Sports Direct, the supplies in question should be regarded as being made in the destination state. It was equally erroneous to have concluded that the evidential requirements with respect to the destination state were confined in their relevance to the refund of UK VAT, and were not an integral element of the decision as to place of supply.

45. That does not, however, resolve this appeal in HMRC's favour. It is necessary for us to consider whether, having regard to our own conclusions, the result is that the January 2016 letter does or does not contain an appealable decision which falls within the jurisdiction of the FTT.

46. The relevant provision with respect to jurisdiction is that in s 83(1)(b) VATA:

> "… an appeal shall lie to the tribunal with respect to any of the following matters:
>
> (b) the VAT chargeable on the supply of any goods or services …"

47. It is clear that appeals are not confined to cases where HMRC have decided the precise amount of VAT to be charged. Cases may proceed on questions of principle

which are related to the chargeability of VAT, such as questions as to the nature of a particular class of supply and whether those supplies are standard-rated, exempt or zero-rate. Section 83(1)(b) cannot therefore be construed narrowly; it must be construed broadly so as to encompass any issue between a taxpayer and HMRC, in respect of which HMRC has made a decision, which is material to the chargeability of the taxpayer to VAT.

48. We have decided that HMRC did not in this case, by the January 2016 letter, make a decision that the place of supply of the goods in question was in the destination state. For the reasons we have given, the January 2016 letter was not so unequivocal. But where it was unequivocal, in our judgment, was in saying that, subject only to Article 34 (in respect of which further information would be required), HMRC's decided view, in reliance on the guidelines issued by the VAT Committee, was that Article 33 applied. That therefore was a decision that, unless the conditions in Article 34 were shown to have been met, the place of supply would be in the destination state and not in the UK.

49. Although HMRC's view on the place of supply could not be finalised until the question of the possible application of Article 34 in relation to individual destination states had been resolved, the same cannot be said for the view taken on the meaning of Article 33. An Article in the Directive will have an autonomous meaning; it will not be possible for that meaning to differ depending on the view taken by individual states, whether those states are states of origin or destination states. It is of course, important, as Mr Singh emphasised, that double taxation (in both the origin and destination state) is avoided, and double non-taxation. But that would only arise were the meaning attributed to the relevant provisions to depend on domestic interpretation. In case of doubt or conflict in this respect, such matters can be resolved by a reference to the Court of Justice of the European Union ("CJEU"). Furthermore, in this case, and prior to any definitive ruling of the CJEU, there is little prospect of different approaches being taken by individual states, given the near unanimity of the VAT Committee.

50. HMRC made a decision with respect to Article 33, subject only to the possible application of Article 34 in an individual case. That is a decision that is material to the chargeability of Sports Direct to VAT. If it is correct, then except to the extent that the conditions of Article 34 might be met in relation to Sports Direct in any particular member state into which distance sales are made, the place of supply will be in the destination state and not in the UK. By contrast, and the case which Sports Direct wishes to put, if HMRC's view is wrong, and Article 33 does not apply, then the place of supply will be in the UK irrespective of any application or otherwise of Article 34 (or s 7(5)(c)), and the issue of place of supply will be determined.

51. Such a decision is in our view within the range of appealable decisions which can fall within the jurisdiction of the FTT under s 83(1)(b). It gives rise to an issue the outcome of which will have a direct bearing on the chargeability of Sports Direct to VAT in respect of its internet sales. Either Sports Direct's case will succeed, in which case it will continue in all cases to be subject to UK VAT (and will not be subject to VAT in the various destination states), or HMRC's case will be successful,

in which case the place of supply will be the destination state, except only for those cases (if any) which would meet the Article 34 conditions, where the supplies into a particular member state fall under the relevant threshold applied by that state.

52. It is not necessary, in our judgment, that HMRC should have definitively determined that the place of supply is or is not in the UK before the FTT's jurisdiction can arise. Section 83 does not require that all questions relevant to chargeability should have been determined before an appeal will lie to the tribunal. An appeal may be made against a decision on a substantive element which goes to chargeability that is capable of being determined without reference to other elements. That is particularly the case where the determination on an appeal of that particular element is capable, depending on the outcome, of being determinative of the whole question of chargeability.

53. That, in our view, for the reasons we have set out, is the position in this case. For those reasons, which are different from those given by the FTT, we reach the same conclusion as the FTT did. The FTT has jurisdiction with respect to the decision of HMRC in the January 2016 letter, namely as to the application to Sports Direct's internet sales to other member states of Article 33 of the Directive, subject only to cases where the conditions of Article 34 are met. It follows that the FTT was right to refuse HMRC's application to strike out Sports Direct's appeal. Thus, although we have concluded the FTT's own decision contained errors of law, we do not in this case set aside that decision.

Decision

54. We dismiss HMRC's appeal.

Reference to the CJEU

55. Prospectively on the dismissal of HMRC's appeal, Sports Direct urged that this Tribunal should make an order for reference to the CJEU in relation to the dispute in the underlying proceedings concerning the meaning of Articles 32 and 33 of the Directive. A draft order for reference was filed by Sports Direct in support of that application, which was opposed by HMRC.

56. In the course of oral submissions on this aspect of the hearing, we drew attention to what we considered was a fundamental question of jurisdiction. We referred to Article 267 of the Consolidated Version of the Treaty on the Functioning of the European Union (1 December 2009; OJ C83, 30 March 2010, p 47), which relevantly provides:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon …"

57. In order to make a reference, it is a necessary requirement, before questions are considered as to the appropriateness of a reference in any particular case, for the relevant tribunal to consider that a decision on the question is necessary to enable it to give judgment. As we discussed with the parties, it is self-evidently the case that it is unnecessary on the present appeal, which is confined to the prior question of the jurisdiction of the FTT and the striking out of the appeal to it, for this Tribunal to resolve the questions of EU law on the substantive issue that would be sought to be raised in any reference. Indeed, it is axiomatic that the question whether a reference should be made could only arise after the decision in this appeal had been reached.

58. On instruction, Mr Swift was disposed not to pursue the application for a reference. We think he was right not to do so, given the clear terms of Article 267. Any question of an order for reference will be one to be addressed by the FTT on the resumption of the appeal in that tribunal. We say nothing more on that subject.

UPPER TRIBUNAL JUDGE ROGER BERNER
UPPER TRIBUNAL JUDGE TIMOTHY HERRINGTON

RELEASE DATE: 11 August 2017