[2018] UKUT 0203 (TCC)
Appeal number: UT/2017/0044

VAT – place of supply – whether the place of supply by appellant of vehicles purchased by appellant from other Member States of the EU was in the UK or outside the UK – whether intra-Community transport ascribed to appellant's supply – no – held, place of acquisition and supply by appellant was in the UK – Principal VAT Directive, arts 31, 32 and 40 – EMAG, Euro Tyre and VSTR (CJEU) – VATA 1994, s 7(2), (7) and 13(3)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

I C WHOLESALE LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE ROTH
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 1 May 2018

Tim Brown, instructed by BDO LLP, for the Appellant

Lucy Wilson-Barnes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. With permission of this tribunal (Judge Herrington), the appellant, I C Wholesale Limited ("ICW"), appeals from the decision of the First-tier Tribunal (Judge Jennifer Dean and Mr Derek Robertson) ("FTT") released on 19 September 2016. By that decision, the FTT dismissed the appeals by ICW against two decisions of HMRC raising assessments to VAT on the basis that ICW had failed to provide satisfactory evidence of the removal of goods (motor vehicles) from the UK so that the supplies might be zero-rated.

2. In the event, as the FTT recorded at [4] of its decision, the appeals before it raised three issues:

(1) Were the vehicles in the UK at the time of supply by ICW to its customers in the Republic of Ireland; if not ICW's case was that there was no VAT due.

(2) If the vehicles were in the UK at the time of supply by ICW, whether those vehicles did leave the UK; if so ICW's case was that it was entitled to zero-rate the transactions.

(3) Did ICW take all reasonable measures to ensure its transactions were not connected to fraud; if so ICW's case was that it should be entitled to zero-rate the transactions.

3. The FTT decided that:

(1) the goods were in the UK at the time of supply (FTT, at [87]);

(2) if wrong on that point, the effect of s 7(7) of the Value Added Tax Act 1994 ("VATA") was that the place of supply was in the UK (at [87]);

(3) ICW had not provided satisfactory evidence to demonstrate that the vehicles had been removed from the UK (at [94]); and

(4) it was not satisfied that ICW had taken every reasonable measure to ensure that the supply did not lead to its participation in tax evasion, and on that basis HMRC was entitled to assess ICW for under-declared VAT (at [98]).

4. ICW's appeal to this tribunal concerns only the FTT's decisions as to the place of supply of the vehicles, namely the decisions referred to at (1) and (2) in the preceding paragraph. ICW did not seek to appeal the FTT's decision either as regards the failure to provide sufficient evidence of removal from the UK or in relation to the measures taken by ICW to ensure that the supplies did not lead to its participation in tax evasion (items (3) and (4)).

Background

5. The background to the appeals before the FTT is set out in the FTT's decision commencing at [10]. It is not necessary for us to repeat that summary in full. We record only the following material facts for the purpose of this appeal.

6. As we have described, the appeals before the FTT concerned two decisions of HMRC. Those were conveniently referred to by the parties and the FTT as Decision A and Decision B:

(1) Decision A concerned the supply by ICW of 34 new vehicles which took place in ICW's VAT accounting period 10/11. The customer in each transaction was A & P Flynn Ltd ("APF") of Dundalk, County Louth in the Republic of Ireland. The vehicles were (a) 13 VWs and 1 Audi purchased from a number of companies in Germany ("the German vehicles"); and (b) 20 Ford Focus vehicles purchased from Michael's Automotive Ltd in Cyprus ("the Cypriot vehicles"). The total sales value was £458,000.

(2) Decision B concerned 44 transactions which took place in ICW's VAT accounting periods 10/11 and 1/12. The customer in each transaction was Kilmac Contracts (IRL) Ltd ("Kilmac") in the Republic of Ireland. All the vehicles were VWs which ICW had purchased from Continental Cars Ltd in Malta ("the Maltese vehicles"). The total sales value was £784,507.92.

7. However, the appeal regarding these Decisions is subject to two qualifications. The first is that before the FTT ICW accepted that 13 of the Maltese vehicles were in the UK at the time of supply. Those vehicles are not therefore the subject of this appeal. Secondly, as Mr Brown, appearing for ICW, confirmed to us, no submissions were made on this appeal in respect of the FTT's conclusion as to the location of the German vehicles at the time of ICW's supply and consequently those vehicles too were not the subject of this appeal. Accordingly, the appeal concerns only the Cypriot vehicles that were the subject of Decision A and 31 out of the 44 Maltese vehicles that were the subject of Decision B. For all those vehicles, ICW's position was that the facts, properly analysed, established that its invoices to its customers were issued before the vehicles left, respectively, Cyprus and Malta.

ICW's appeal

8. ICW's appeal is on the question of the place of ICW's supplies at the times when those supplies were treated as being made.

9. First, in relation to the FTT's finding that the vehicles were in the UK at the relevant times, the appeal involves a combination of submissions that the FTT's approach erred in law and submissions that, on the basis of *Edwards v Bairstow* [1956] AC 14, the FTT's findings of fact or inference from the facts were "perverse or irrational; or there was no evidence to support [them]; or [they] were made by reference to irrelevant factors or without regard to relevant factors" (see *Begum v Tower Hamlets LBC* [2003] 2 AC 430, per Lord Millett at [99]).

10. Secondly, ICW argues that as a matter of law the FTT was wrong to decide that s 7(7)(a) VATA, which provides in certain circumstances for a supply of goods which involves the removal to or from the UK to be treated as a supply in the UK, applied in the circumstances of this case. Instead, ICW submits, the default position in s 7(7)(b) applied, with the result that the vehicles ought to have been treated as having been supplied outside the UK.

11. The premise on which ICW's appeal is made is thus that, if it is the case that ICW's supplies of relevant vehicles took place at a time when those vehicles were outside the UK, no charge to UK VAT should arise on those supplies.

The law

Domestic law

12. VAT is charged on both a supply of goods or services in the UK and on the acquisition in the UK of goods from another member state. Section 1(1) VATA provides:

> "(1) Value added tax shall be charged, in accordance with the provisions of this Act—
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply),
>
> (b) on the acquisition in the United Kingdom from other member States of any goods, and
>
> (c) on the importation of goods from places outside the member States,
>
> and references in this Act to VAT are references to value added tax."

13. The scope of VAT on acquisition of goods from member states is set out in s 10 VATA:

> "(1) VAT shall be charged on any acquisition from another member State of any goods where—
>
> (a) the acquisition is a taxable acquisition and takes place in the United Kingdom;
>
> (b) the acquisition is otherwise than in pursuance of a taxable supply; and
>
> (c) the person who makes the acquisition is a taxable person or the goods are subject to a duty of excise or consist in a new means of transport.
>
> (2) An acquisition of goods from another member State is a taxable acquisition if—
>
> (a) it falls within subsection (3) below or the goods consist in a new means of transport; and
>
> (b) it is not an exempt acquisition.
>
> (3) An acquisition of goods from another member State falls within this subsection if—
>
> (a) the goods are acquired in the course or furtherance of—
>
> (i) any business carried on by any person; or

(ii) any activities carried on otherwise than by way of business by any body corporate or by any club, association, organisation or other unincorporated body;

(b) it is the person who carries on that business or, as the case may be, those activities who acquires the goods; and

(c) the supplier—

(i) is taxable in another member State at the time of the transaction in pursuance of which the goods are acquired; and

(ii) in participating in that transaction, acts in the course or furtherance of a business carried on by him."

14. Section 11 describes the meaning of acquisition of goods from another member state. It relevantly provides:

"(1) Subject to the following provisions of this section, references in this Act to the acquisition of goods from another member State shall be construed as references to any acquisition of goods in pursuance of a transaction in relation to which the following conditions are satisfied, that is to say—

(a) the transaction is a supply of goods (including anything treated for the purposes of this Act as a supply of goods); and

(b) the transaction involves the removal of the goods from another member State;

and references in this Act, in relation to such an acquisition, to the supplier shall be construed accordingly.

(2) It shall be immaterial for the purposes of subsection (1) above whether the removal of the goods from the other member State is by or under the directions of the supplier or by or under the directions of the person who acquires them or any other person…"

15. Section 13 makes the following relevant provision with regard to the place of acquisition:

"(1) This section shall apply … for determining for the purposes of this Act whether goods acquired from another member State are acquired in the United Kingdom.

(2) The goods shall be treated as acquired in the United Kingdom if they are acquired in pursuance of a transaction which involves their removal to the United Kingdom and does not involve their removal from the United Kingdom, and (subject to the following provisions of this section) shall otherwise be treated as acquired outside the United Kingdom.

(3) Subject to subsection (4) below the goods shall be treated as acquired in the United Kingdom if they are acquired by a person who, for the purposes of their acquisition, makes use of a number assigned to him for the purposes of VAT in the United Kingdom.

(4) Subsection (3) above shall not require any goods to be treated as acquired in the United Kingdom where it is established, in accordance with regulations made by the Commissioners for the purpose of this section that VAT-

(a) has been paid in another member State on the acquisition of those goods; and

(b) fell to be paid by virtue of provisions of the law of that member State corresponding, in relation to that member State, to the provisions made by subsection (2) above."

16. Section 6 provides for the time of a supply. It is common ground that, irrespective of whether the supplies of the vehicles by ICW were found to have involved the removal of the goods from the UK, the time of supply was to be ascertained by reference to the dates on which ICW invoiced its supplies or received payment for those supplies. The relevant provisions are:

"…

(2) Subject to subsections (4) to (14) below, a supply of goods shall be treated as taking place—

(a) if the goods are to be removed, at the time of the removal;

(b) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied;

…

(4) If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.

…

(7) Where any supply of goods involves both—

(a) the removal of the goods from the United Kingdom; and

(b) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10,

subsections (2), (4) to (6) and (10) to (12) of this section shall not apply and the supply shall be treated for the purposes of this Act as taking place on whichever is the earlier of the days specified in subsection (8) below.

(8) The days mentioned in subsection (7) above are—

(a) the 15th day of the month following that in which the removal in question takes place; and

(b) the day of the issue, in respect of the supply, of a VAT invoice or of an invoice of such other description as the Commissioners may by regulations prescribe…"

17. The place of supply of goods is provided for by s 7. The scheme of the provision is to provide for a cascade of rules governing the place of supply where it has not been determined under the any preceding sub-section of s 7. For the purposes of this appeal, only s 7(2) and s 7(7) are material:

"(2) Subject to the following provisions of this section, if the supply of any goods does not involve their removal from or to the United Kingdom they shall be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise shall be treated as supplied outside the United Kingdom.

…

(7) 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."

Principal VAT Directive

18. Relevant provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("the Principal VAT Directive") are:

"**Article 31**

Where goods are not dispatched or transported, the place of supply shall be deemed to be the place where the goods are located at the time when the supply takes place."

"**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.

..."

"**Article 40**

The place of an intra-Community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods to the person acquiring them ends."

Article 41

> Without prejudice to Article 40, the place of an intra-Community acquisition of goods as referred to in Article 2(1)(b)(i) shall be deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that VAT has been applied to that acquisition in accordance with Article 40…"

Article 138

> 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."

Discussion

19. Fundamental to ICW's case in this appeal is the premise that if ICW's supplies took place at a time when the relevant vehicles were outside the UK, the place of supply of those vehicles was outside the UK and no UK VAT may be charged on those supplies. It was on that premise that Mr Brown, for ICW, made his submissions as to what he argued were errors of law by the FTT.

20. We have concluded, however, that in the circumstances of this case that fundamental premise cannot be sustained. Those circumstances include the fact, which ICW no longer disputes, that although the vehicles did arrive in the UK there was no evidence of removal of those vehicles from the UK, and the acknowledged facts, first, that in acquiring the vehicles from the Maltese and Cypriot suppliers respectively, ICW provided those suppliers with its UK VAT registration number, and secondly that ICW did not inform those suppliers that the vehicles would be sold on to another taxable person before they had left Malta and Cyprus respectively.

21. If ICW's arguments in this appeal were to be upheld, the consequence would be that there would have been successive supplies of the vehicles at a time when those vehicles were in Malta and Cyprus respectively; first the supply from the Maltese or Cypriot supplier ("the original supplier") to ICW; and secondly the supply by ICW (as the "intermediate supplier") to its customer ("the second recipient"). We consider therefore the VAT treatment of successive supplies, which has been the subject of a number of judgments of the Court of Justice of the European Union ("CJEU").

22. In *EMAG Handel Eder OHG v Finanzlandesdirektion für Kärnten* (Case C-245/04) [2007] STC 1461, EMAG, a company established in Austria, was the second recipient. The intermediate supplier was K, also established in Austria, which had sourced goods from original suppliers in other member States, namely Italy and the Netherlands. The goods were delivered to EMAG or directly to EMAG's own customers, which were also in Austria, on the instruction of K to the original suppliers in Italy and the Netherlands. K charged EMAG Austrian VAT and EMAG claimed

deduction of that VAT as input tax. That deduction was disputed by the Austrian tax office on the basis that K's supply should not have borne VAT as it was a tax-exempt intra-Community supply.

23. On the reference to the CJEU, the question arose whether successive supplies were to be treated as exempted intra-Community supplies when several undertakings enter into arrangements for the supply of the same goods and those arrangements were implemented by way of a single movement of goods, and whether the identity of the party having the right of disposal of the goods during their movement was a relevant factor.

24. The CJEU rejected the proposition that two successive supplies could both be exempted under what is now article 138.1 of the Principal VAT Directive (at that time article 28cA(a) of the Sixth Directive). It said, at [38] - [39]:

> "38. Firstly, even if two successive supplies give rise only to a single movement of goods, they must be regarded as having followed each other in time. The intermediary acquiring the goods can transfer the right to dispose of the goods as owner to the second person acquiring the goods only if it has previously been transferred to him by the first vendor and, therefore, the second supply can take place only after the first supply has been effected.
>
> 39. As the place of acquisition of the goods by the intermediary is deemed to be in the Member State of arrival of the dispatch or transport of those goods, it would be illogical for that taxable person to be deemed to have made the subsequent supply of those same goods from the Member State of the departure of that dispatch or transport."

25. The Court left open which of the two successive supplies would, in any given case, involve the intra-Community dispatch or transport of the goods, and thus be exempt. It said, at [48] – [51]:

> "48. In accordance with art 8(1)(a) of the Sixth Directive [now art 32 of the Principal VAT Directive], the place of that supply is deemed to be in the Member State of the departure of the dispatch or transport of the goods.
>
> 49. As the other supply does not involve dispatch or transport, the place of that supply is deemed, under art 8(1)(b) of the Sixth Directive [art 31 of the Principal VAT Directive], to be the place where the goods are when that supply takes place.
>
> 50. If the first of the two successive supplies is the supply which involves intra-Community dispatch or transport of goods and which, therefore, has as a corollary an intra-Community acquisition taxed in the Member State of arrival of that dispatch or transport, the second supply is deemed to occur in the place of the intra-Community acquisition preceding it, that is, in the Member State of arrival. Conversely, if the supply involving intra-Community dispatch or transport of goods is the second of the two successive supplies, the first supply, which, necessarily, occurred before the goods were dispatched

> or transported, is deemed to occur in the Member State of the departure of that dispatch or transport.
>
> 51. The answer to the first question must therefore be that only the place of the supply which gives rise to dispatch or intra-Community transport of goods is determined in accordance with art 8(1)(a) of the Sixth Directive; that place is deemed to be in the Member State of the departure of that dispatch or transport. The place of the other supply is determined in accordance with art 8(1)(b) of that directive; that place is deemed to be either in the member state of departure or in the Member State of arrival of that dispatch or transport, according to whether that supply is the first or the second of the two successive supplies."

26. Similar circumstances arose in the case of *Euro Tyre Holding BV v Staatssecretaris van Financiën* (Case C-430/09) [2011] STC 798. There Euro Tyre, a Netherlands company, was the original supplier. It sold goods to two intermediate suppliers in Belgium. When the sales agreements were concluded, the intermediate suppliers informed Euro Tyre that the goods would be transported to Belgium. The intermediate suppliers paid for the goods before they were delivered, and also before the goods were delivered the intermediate suppliers sold the goods to the second recipient, another company established in Belgium. The question arose whether in the circumstances of the case Euro Tyre was entitled to exempt its supplies as intra-Community supplies under what is now article 138.1 of the Principal VAT Directive.

27. The CJEU referred to its judgment in *EMAG*, particularly at [38], [50] and [51] of that judgment. The Court held, at [32] – [33], that the attribution of one of two successive supplies to the intra-Community transport depended on whether the second supply (that from the intermediate supplier to the second recipient) had taken place before the intra-Community transport had occurred. The Court said (referring to Euro Tyre as "ETH"):

> "32. In circumstances such as those at issue in the main proceedings, it must therefore be held that the collection of the goods from ETH's warehouse by the representative of the first person acquiring the goods must be regarded as the transfer to that person of the right to dispose of the goods as owner, and should be ascribed to the first supply.
>
> 33. However, that circumstance does not of itself suffice to justify the conclusion that the first supply constitutes an intra-Community supply. It cannot be ruled out that the second transfer of the power to dispose of the goods as owner may also take place in the Member State of the first supply, before the intra-Community transport has occurred. In such a case, the intra-Community transport could no longer be ascribed to that supply."

28. The Court then said (referring to the intermediate suppliers as "the purchasers"):

> "35. In this case, if the purchasers, as the first persons acquiring the goods, expressed their intention to transport the goods to a Member State other than the State of supply and presented their VAT identification number attributed by that other Member State, ETH was entitled to consider that the transactions that it effected constituted intra-Community supplies.

> 36. However, after the transfer to the person acquiring the goods of the right to dispose of the goods as owner, the supplier effecting the first supply might be held liable to VAT on that transaction if he had been informed by that person of the fact that the goods would be sold on to another taxable person before they left the Member State of supply and if, following that information, the supplier omitted to send the person acquiring the goods a rectified invoice including VAT."

29. The Court summarised its answers to the questions referred at [44] – [45]:

> "44. In view of the foregoing considerations, the answer to the question referred is that, when goods are the subject of two successive supplies between different taxable persons acting as such, but of a single intra-Community transport, the determination of the transaction to which that transport should be ascribed, namely the first or second supply—given that that transaction therefore falls within the concept of an intra-Community supply for the purposes of the first sub-paragraph of art 28c(A)(a) of the Sixth Directive, read in conjunction with art 8(1)(a) and (b), the first sub-paragraph of art 28a(1)(a), and art 28b(A)(1) of that directive—must be conducted in the light of an overall assessment of all the circumstances of the case in order to establish which of those two supplies fulfils all the conditions relating to an intra-Community supply.
>
> 45. In circumstances such as those at issue in the main proceedings, in which the first person acquiring the goods, having obtained the right to dispose of the goods as owner in the member state of the first supply, expresses his intention to transport those goods to another Member State and presents his VAT identification number attributed by that other State, the intra-Community transport should be ascribed to the first supply, on condition that the right to dispose of the goods as owner has been transferred to the second person acquiring the goods in the Member State of destination of the intra-Community transport. It is for the referring court to establish whether that condition has been fulfilled in the case pending before it."

30. *Euro Tyre* was considered by the CJEU in *Vogtländische Straßen-, Tief- und Rohrleitungsbau GmbH Rodewisch v Finanzamt Plauen* (Case C-587/10) [2013] STC 198 ("*VSTR*"). In that case, which principally concerned the evidence required to be provided by the original supplier on a claim for exemption in respect of an intra-Community supply, the original supplier was a branch of VSTR established in Germany which sold certain goods to a US company which was the intermediate supplier. The US company, which was not registered in any Member State and which consequently did not have a VAT identification number, made an intermediate supply to a Finnish company, the second recipient. The US company informed VSTR that it had sold the goods to the Finnish company and provided VSTR with the VAT identification number of the Finnish company.

31. The Court first reiterated the principles set out in *EMAG* and *Euro Tyre*. It referred, at [32] to the fact that the question of to which of two successive supplies the intra-Community transport should be ascribed depends on an overall assessment of the specific circumstances and to the fact that if the second power to dispose of the

goods as owner took place before the intra-Community transport, that intra-Community transport could no longer be ascribed to the first supply to the first person acquiring the goods. In terms of the facts of *VSTR*, the Court reasoned, at [33], that the supply by the branch of VSTR to the US company would not constitute an exempt intra-Community supply if the second transfer of the ownership of goods had taken place before the intra-Community transport of those goods had taken place.

32. The Court went on, at [34] and [35], referring to *Euro Tyre*, to note that in a case where the intermediate supplier has informed the original supplier of its intention to transport the goods to another Member State and has presented its VAT identification number attributed by that other State, the intra-Community transport should be ascribed to the supply by the principal supplier, on condition that the right to dispose of the goods as owner has been transferred to the second person acquiring the goods in the Member State of destination of the intra-Community transport. However, that would not be the case where the intermediate supplier had informed the principal supplier of the fact that the goods would be sold on to another taxable person before they left the Member State of the original supply.

33. Noting that the facts in *VSTR* were close to those in the latter example, in that the US company had made clear to the branch of VSTR, before the goods were transported to Finland, that those goods had already been sold on to a Finnish firm and had informed the branch of that Finnish firm's VAT identification number, the Court nonetheless, at [37], cautioned that this was not sufficient, on its own, to prove that the transfer to the Finnish company of the right to dispose of the goods as owner had taken place before their transport to Finland. That remained a fact to be established. In consequence, because it could not at that stage be determined that the intermediate supply had preceded the intra-Community transport (which would, in those circumstances, determine that the transport would be ascribed to the intermediate supply and not the principal supply), the question whether the principal supply constituted an intra-Community supply remained open.

34. It is accordingly established by *Euro Tyre* and *VSTR* that in principle, in circumstances where an original supplier is informed by the intermediate supplier that the goods are to be transported to another Member State, and the intermediate supplier provides the original supplier with his VAT identification number issued by that other Member State, the intra-Community transport will be ascribed to the supply by the original supplier. It would only be in the case where, first, the intermediate supplier has informed the original supplier of the fact that the goods would be sold on to another taxable person before they left the Member State of the original supply and secondly it was established in all the circumstances that the supply by the intermediate supplier did in fact take place before the goods left the original Member State, that the intra-Community transport would be ascribed not to the original supply but instead to the intermediate supply. The supply by the intermediate supplier would then constitute an intra-Community supply and be exempted from VAT.

35. In a case where the supply by the original supplier is exempted as an intra-Community supply, the supply by the intermediate supplier cannot be so exempted by reference to the same intra-Community transport. In such a case, as the CJEU in

EMAG made clear at [50], the corollary is that there is an intra-Community acquisition by the intermediate supplier in the Member State of arrival. Accordingly, the onward supply by the intermediate supplier is deemed to take place in that Member State.

36. That follows from the relevant provisions of the Principal VAT Directive and the corresponding domestic law. If the intra-Community transport is ascribed to the supply by the original supplier, it follows from article 32 of the Principal VAT Directive that the place of that supply will be where the dispatch or transport begins. The corollary of that is article 41, by which the place of an intra-Community acquisition by the intermediate supplier is deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition. The only exception to that is if the dispatch or transport ends in a different place, in which case if it is established that VAT has been applied accordingly under article 40, article 41 will not apply.

37. UK law reflects the effect of these provisions. Where there has been no acquisition in another Member State on which VAT has been paid by virtue of the laws of that other Member State (to which s 13(4) may apply), s 13(3) VATA treats the acquisition by a person who has used their UK VAT identification number for the purpose of the acquisition of the goods as an acquisition of the goods in the UK.

38. The result is that, in circumstances where, as in this case, ICW acquired the vehicles from its Maltese and Cypriot suppliers using its UK VAT identification number, and did not inform those suppliers that the vehicles would be sold on before the goods left Malta or Cyprus respectively, the intra-Community transports from Malta and Cyprus are ascribed to the supplies by the Maltese and Cypriot suppliers, and not to ICW. That is the case whether or not it can be established that ICW's own supplies took place before the vehicles left Malta or Cyprus, as the case may be. ICW is treated for VAT purposes as having acquired the vehicles in the UK, and there is no taxable acquisition by ICW in Malta or Cyprus.

39. It is equally the case that, the intra-Community transport having been ascribed to the supplies by the Maltese and Cypriot suppliers respectively and there having in each case been a deemed acquisition by ICW in the UK, the place of ICW's supplies must be deemed to have been in the UK (article 31 of the Principal VAT Directive; *EMAG*, at [50]). That also follows as a matter of UK law. Under s 7(2) VATA, as a general rule, if the supply of goods that are in the UK does not involve their removal from or to the UK, they are treated as supplied in the UK. In a case where the intra-Community transport is attributed to the supplies by the Maltese and Cypriot suppliers (and not to ICW's supplies), ICW's supplies themselves do not involve removal to the UK. The goods were, however, transported to the UK, but although ICW sold the vehicles to purchasers based in Ireland, the FTT found that ICW had not established that they were removed from the UK and that finding has not been challenged on this appeal. The place of supply is accordingly in the UK.

40. Section 7(7) VATA does not affect the position. It applies only where the place of supply has not been determined under any other provision of s 7. Furthermore, it

can apply on its own terms only if the supply in question involves the removal of the goods to or from the UK. Neither of those conditions apply in this case. ICW's supplies, for the reasons we have given, do not themselves involve removal to the UK; it is the supplies by the original Maltese and Cypriot suppliers that involve removal of the goods to the UK and it is ICW's acquisition of those goods that is treated as having taken place in the UK. Nor is there evidence of the removal of the goods from the UK.

41. In reaching that conclusion, we reject Mr Brown's submissions on the application of s 7(7). He argued that s 7(7)(a) could not apply in circumstances where, first, if had been found by the FTT that ICW could not prove that the goods had left the UK and, secondly, the goods had previously been removed to the UK, and that consequently s 7(7)(b) would apply with the result that the goods would be treated as having been supplied outside the UK. We disagree. For the reasons we have given, ICW's supply cannot be said to have involved either the removal to or from the UK, so that s 7(7) is in any event inapplicable. Furthermore, even if it were the case that ICW's supply were found to have involved the removal of the goods *from* the UK, s 7(7)(a) would have applied because that supply itself did not involve the removal of the goods *to* the UK. Section 7(7)(b) would not apply.

ICW's challenges to the FTT's decision

The relevance challenge

42. It follows from our conclusions on the ascribing of the intra-Community transports to the Maltese and Cypriot suppliers and the consequence for ICW as to its acquisition of the vehicles in the UK and that the place of supply of those vehicles by ICW was in the UK even on the assumption that ICW's supply took place before the vehicles left Malta and Cyprus respectively, that ICW's appeal cannot succeed and must be dismissed.

43. In those circumstances, it is not necessary for us to give detailed consideration to the specific grounds of appeal put forward by ICW to challenge the FTT's findings of fact on which it based its conclusions on the place of ICW's supplies. As we heard argument on those issues, however, we shall make a few fairly brief observations.

44. Mr Brown submitted that the FTT had erred in law by having regard, in determining the place and time of ICW's supplies, to the manner in which ICW had declared its purchases of the vehicles (namely as zero-rated acquisitions from the EU) and its supplies of the goods from the UK to the Republic of Ireland. The FTT had also had regard to the inclusion of the purchases and sales on IntraStat documents completed by ICW and in its VAT returns for the relevant periods (FTT, at [85]).

45. Mr Brown argued that these matters were irrelevant in considering the correct application of VAT. Equally irrelevant, in Mr Brown's submission, were the question whether, if ICW's argument was correct, VAT should have been charged in another Member State and the fact that ICW supplied its VAT identification number to the supplier in another Member State.

46. For the reasons we have explained, by reference in particular to *Euro Tyre* and *VSTR*, we do not accept that the fact that ICW provided its VAT identification number to the Maltese and Cypriot suppliers is irrelevant. It is highly relevant to the question of the ascribing of the intra-Community transport to one of successive supplies, to the acquisition in the Member State of arrival of the intra-Community dispatch or transport and to the place of supply by the person acquiring the goods.

47. Mr Brown sought to rely on *VSTR* in support of his general proposition on relevance. He referred in particular to the judgment of the CJEU at [29] - [30]:

> "29. As regards the conditions under which a transaction may be classified as an intra-Community supply within the meaning of the first subparagraph of art 28c(A)(a) of the Sixth Directive, it is clear from the case law that supplies of goods dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory of a Member State but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods, are covered by the term 'intra-Community supply' and are thus exempt from VAT (see, inter alia, *R* (para 40)[1]).
>
> 30. Apart from those requirements, relating to the capacity of the taxable person, to the transfer of the right to dispose of goods as owner and to the physical movement of the goods from one Member State to another, no other conditions can be placed on the classification of a transaction as an intra-Community supply or acquisition of goods (see *Teleos*[2] (para 70)), bearing in mind that the meanings of 'intra-Community supply' and 'intra-Community acquisition' are objective in nature and apply without regard to the purpose or results of the transactions concerned (see, inter alia, *Teleos* (para 38))."

48. Although the case law of the CJEU makes it clear that additional conditions may not be applied in determining the classification of a transaction as an intra-Community supply or acquisition of goods, that says nothing about the evidence on the basis of which such classification may be made. The authorities are replete with references to all the facts and circumstances being taken into account in making such an assessment, which has to be made on the basis of objective evidence. It is the case, of course, that evidence of a person's subjective understanding of the legal classification of a supply would not be relevant to an objective assessment. Nor could the formal declarations made by a taxpayer with respect to its transactions be decisive. But that does not render them irrelevant. As Ms Wilson-Barnes pointed out, in *VSTR* itself, at [56], the Court acknowledged (referring to *Teleos*, at [71]) that a return by the person making the intra-Community acquisition could not itself be decisive evidence of the capacity of that person as a taxable person and "at the most can only constitute an indication". Such a return, and other similar evidence, could therefore be relevant to the classification question.

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[1] *In criminal proceedings concerning R and others* (Case C-285/09) EU:C:2010:742

[2] *R (on the application of Teleos plc) v Customs and Excise Commissioners* (Case C-409/04) [2008] STC 706

49. We reject therefore Mr Brown's submission in this respect. The FTT did not, in our judgment, make any error of law in taking into account the factors to which Mr Brown referred. The FTT took the proper approach of considering all the facts and circumstances in reaching its determination.

The Edwards v Bairstow challenges

50. In relation to the Cypriot vehicles (which comprise 20 Ford Focus vehicles that were the subject of Decision A), ICW relied on two documents to support the proposition that the vehicles consigned from Cyprus arrived in the UK on 12 August 2011, eight days after the invoice date (4 August 2011) of ICW's onward supply of 19 of those vehicles to APF and nine days after the invoice date (3 August 2011) in respect of the remaining one vehicle. Those documents were:

> (a) a faxed communication from Import Clearance Services Ltd to ICW dated 11 August 2011 and headed Arrival Notice. The notice specified the vessel (Grande Mediterraneo), the exporter (Michael's Automotive – the Cypriot supplier), the 20 Ford Focus vehicles with their chassis numbers and an estimated time of arrival (ETA) of 12 August 2011. The fax stated: "Please be advised that the above mentioned goods will arrive at Portbury 12.08.11". It is also noted that the charges of £1179.90 were paid on 11 August 2011; and
>
> (b) a VAT invoice from Import Clearance Services Ltd to ICW dated 31 August 2011 which refers to the 20 Ford Focus vehicles, describes the departure from Limassol and the arrival at Avonmouth on 12 August 2011 and the "Transport ID" as "GR MEDITERRANEO". The invoice also included a "Job Date" of 20 September 2011.

51. In relation to these documents, the FTT said this (at [75]):

> "We were not satisfied that this document [the invoice], the purpose of which was to invoice for import fees rather than confirm departure or arrival dates, was sufficient to prove the date of arrival of the vehicles in the UK. We noted, for instance, that the document contained the date 20 September 2011 shown as 'job date' with no further explanation and the Arrival Notice showed 12 August as 'an ETA' which could not, in our view, be accepted as proof that the goods did actually arrive on that date."

52. Having found, from other evidence, that the vehicles were at Portbury Docks on 17 August 2011, the FTT then concluded, at [76], that on the question whether the vehicles arrived in the UK on or before that date, "the documents did not assist and it would be unsafe to read such information into them".

53. The *Edwards v Bairstow* threshold is a high one, and the greatest of respect is to be accorded to the FTT as the fact-finding tribunal. We are keenly aware that we should not seek to impugn a finding of fact by the FTT merely because we ourselves might have reached a different conclusion. If a finding is one that was open to the tribunal to make, there can be no error of law. But in relation to these documents, we

are compelled to say that the conclusion that they did not assist and that it would be unsafe to rely upon them in connection with the date of arrival of the vehicles into the UK was not one that was open to the FTT. Although weight is a matter for the fact-finding tribunal, it was not in our view open to the FTT to have reasoned as it did that no weight at all should be given to those documents.

54. There was no suggestion on the part of HMRC that the fax and invoice were not genuine documents. They appear to include relevant information of the nature that would be expected from a freight forwarder or clearance service provider. They are internally consistent (we do not regard the inclusion of a Job Date as capable of casting any doubt on the remainder of the invoice) and consistent too with the evidence, provided by delivery notes, of collection of the goods from Portbury Docks on 17 August 2011.

55. Ms Wilson-Barnes submitted that the FTT's findings were not based on the two documents alone. The FTT heard the evidence of Mr Crewe, the director and sole shareholder of ICW, and was entitled to take the evidence relied on by ICW as to location of the vehicles at relevant times in the context of the overall evidence, which included evidence as to dispatch to the UK and seeking to demonstrate removal from the UK to the Republic of Ireland. Ms Wilson-Barnes also argued that, in any event, the documents were inconsistent and lacking in credibility to show any clear timeline of movement.

56. We have only the FTT's decision from which to ascertain the FTT's reasoning. The FTT did not itself identify any inconsistencies or reasons why the documents in question lacked credibility. The FTT did not refer to other evidence before it, or the evidence as a whole, including Mr Crewe's evidence, as a reason why the fax and invoice referable to the Cypriot vehicles could not be relied upon or did not assist.

57. Were this matter to have been material to the outcome of this appeal, we would have found that the reasoning of the FTT as to why these two documents could not be relied upon was unsatisfactory, that the FTT erred in law in failing to have regard to the information in those documents as to the time of arrival of the vehicles into the UK and that to that extent the decision would have to be set aside and re-made. Having not heard or considered the other evidence on which it is said the FTT was entitled to rely, we would not ourselves be in a position to re-make the decision. We would therefore have remitted the issue of the location of the Cypriot vehicles at the material time to the same FTT with directions to reconsider that decision, taking into account the information in the documents in question. In view of our decision on the law, however, none of those steps is appropriate, and we do not set aside the FTT's decision.

58. We move therefore to Mr Brown's second *Edwards v Bairstow* challenge, which relates to the FTT's finding that the 31 Maltese vehicles that were the subject of Decision B and are the subject of this appeal were in the UK at the time of ICW's supplies of them to Kilmac. ICW relied on evidence of four T2L documents (a T2L is a customs document which is used to verify the intra-Community character of an import or export) which had been stamped, in a box on the form headed "Office of

Departure", by Customs in Malta. In each case the date stamped on the form was after the date of ICW's sales invoice to Kilmac and/or receipt of payment from Kilmac.

59. The FTT made the following findings with respect to the T2L documents (at [79]:

> "All of the vehicles in Decision B were purchased from Continental Cars. The Appellant produced T2L documents stamped by Maltese Customs on 15 November 2011, 21 October 2011, 7 December 2011 and one document was illegible. We heard no evidence as to the procedure by which a T2L is or can be obtained. The difficulty with which we were faced is the fact that other documents before us left us without any clear understanding as to where the vehicles were at any specific time. By way of example the Appellant contends that the Appellant's supply of VW Golf chassis number CW087886 took place outside of the UK on 30 September 2011. The T2L document relating to that vehicle is stamped 15 November 2011 which may be indicative of the vehicle being in Malta at that time. However the vehicle was sold on to Contour Hire & Leasing Ltd who invoiced for its sale to Crest Global Automotive UK Ltd on 19 September 2011. The invoice was VAT inclusive which suggests that the supply took place in the UK from which we could infer that the vehicle was in the UK. Mr Crewe provided no cogent evidence as to where the vehicles in question were at any specific point and we did not accept his evidence that an invoice was wholly irrelevant to the locality of a vehicle."

60. Mr Brown took issue with the FTT's reasoning as to the lack of evidence as to the procedure by which a T2L might be obtained. He referred us to the transcript of the evidence given by the HMRC officer, Mr Stephen Crooks, who had been responsible for issuing Decisions A and B. Mr Crooks had confirmed in evidence that the T2Ls were formal Customs documents that had, on the face of it, been stamped by Maltese Customs on the dates shown. In cross-examination by Mr Brown, there was the following exchange:

> "Q. They're stamped as leaving Malta on 15 November 2011 and they're invoiced by the appellant on 3 November 2011; yes? Do you agree?
>
> A. I agree that that's what the dates show."

61. We have considered the transcript of the evidence given by Officer Crooks in this respect. We do not accept Mr Brown's submission that, in the absence of any evidence to the contrary, the only inference was that the date of the Maltese Customs stamp in the box for the Office of Departure was the date of departure of the consignment of vehicles whose chassis numbers were listed in the form, or a date prior to departure. Such an inference could be made, but it was not the only possible inference. The evidence of Officer Crooks on this matter could not be conclusive. As the transcript shows, the officer was not familiar with T2L forms generally; the T2Ls in this case were the only ones he had come across. His answers, read in context, amount to nothing more than accepting what had been put to him by Mr Brown as to

the dates of the Maltese Customs stamps and the dates of the corresponding invoices. That did not provide any confirmation of the procedure which would have compelled the FTT to conclude that the T2Ls were indeed stamped on or before the actual date of departure of the vehicles from Malta.

62. It was accordingly, in our judgment, open to the FTT to conclude that no evidence had been given as to the procedure for obtaining a T2L. The FTT was also entitled, as it did, to have regard to other documents, and by way of example to have compared the date of the Maltese Customs stamp on a T2L in relation to a certain vehicle with an invoice from a third party supplier which indicated that the vehicle was in the UK on an earlier date. Furthermore, the FTT had also found, at [83], that CMR documents produced in respect of the same vehicles in which the carrier was Motor Vehicle Transportation Ltd ("MVT") could not reliably demonstrate when and where the vehicles were transported. As Ms Wilson-Barnes submitted, certain discrepancies can be identified when the T2Ls are compared with the corresponding CMRs issued by MVT which, absent other evidence of the date of removal of the vehicles from Malta, would support a conclusion that ICW had failed to discharge the burden of proof which lay on it in this respect.

63. We therefore reject ICW's challenge to the FTT's finding of fact that the Maltese vehicles were in the UK at the time of ICW's supplies of those vehicles.

Decision

64. For the reasons we have given, we dismiss ICW's appeal.

MR JUSTICE ROTH
UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 27 JUNE 2018