[2012] UKFTT 388 (TC)

TC02072

Appeal number: TC/2011/05965

VAT – new means of transport – private motor car supplied for removal to Germany – bought by member of UK armed forces based in Germany and taken there for two days – returned to UK because Appellant on temporary training here before six month operational deployment in Africa – car left in the UK during deployment – during deployment, Appellant notified that his German stationing was being terminated and he was being re-based in the UK – whether Appellant had sufficient intention to remove the vehicle from the UK when initially supplied to him to qualify for UK zero rating on that supply to him - X v Skatteverket (ECJ) considered – held yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

A SOLDIER **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MOHAMMED FAROOQ

Sitting in public in Temple Court, Bull Street, Birmingham on 25 April 2012

The Appellant appeared in person

Sylvia Knibbs, assisted by Jonathan Holl, presenting officers for HM Revenue and Customs

DECISION

Introduction

1. This appeal concerns the application of the specialised VAT rules about supplies of new means of transport (specifically, in this case, a BMW Z4 motor car) for removal to another EU member state in the special situation where the supply is made to a serving member of HM Forces stationed in Germany.

2. There is a relief from VAT applicable to the purchase of new means of transport in the UK which are supplied for removal to Germany by serving members of the armed forces stationed there.

3. There are two elements to this relief. First, there is a relief from UK VAT under the general rules relating to the purchase of new means of transport which are intended to be removed to another EU member state. Second, there are special rules under the "Status of Forces Agreement" governing the presence of NATO forces in Germany which afford relief from German VAT on the removal to Germany of personal vehicles by members of NATO armed forces and others.

4. This case concerns the supply in and removal from the UK of a new BMW motor car by a member of the UK armed forces stationed in Germany who claimed relief from UK VAT on that purchase. HMRC, having initially granted the relief and remitted the VAT, discovered circumstances which led them to believe that the relief should not have been claimed and therefore issued a demand for payment of that VAT. This is an appeal against that demand.

5. In view of the sensitive nature of some of the evidence put before the Tribunal, we have considered it appropriate to issue this decision in anonymised form.

The facts

6. The Appellant is a serving member of the Royal Military Police. He is a specialist in "close protection", i.e. acting as a personal bodyguard, typically for diplomats or high ranking military officers in very dangerous parts of the world. He has done this work for about seven years, having been deployed in places such as Baghdad, Afghanistan and Northern Ireland. We found him to be an intelligent, clear and, in our view, entirely reliable witness. His evidence was given on oath.

7. He was stationed in Germany from some time before November 2008 (we did not ask him to identify the exact date and it was not material to our decision). Earlier in his career, he had been stationed there and had bought a VW Golf motor vehicle in the UK, free of VAT, which he had immediately removed to Germany and used whilst stationed there. He had registered it in Germany with the British Forces Germany Customs & Immigration Unit following the standard procedures. After it had reached the relevant age he had repatriated it to the UK without incurring a VAT charge in accordance with the relevant rules and procedures.

8. We were given to understand that the rules generally require such a vehicle to be "BFG Registered" for a minimum of one year before they can be returned to the UK without incurring a VAT charge (presumably in Germany), though there are some special procedures to cover situations where the soldier in question unexpectedly has his posting changed before that year expires.

9. The Appellant had been posted to Germany and in November 2008 he still had more than two years of that posting to run.

10. At that time, BMW were running a scheme called "50:50", aimed at members of the UK armed forces stationed in Germany. It was only available to personnel with two years or more of their German posting unexpired (a normal posting would be for three years). Under the scheme, the customer would pay a certain amount of money (say £15,000) for the purchase in the UK of a brand new BMW worth twice that amount. He would immediately remove that vehicle to Germany, benefiting from relief from UK VAT. For normal citizens, this would result in a VAT charge in Germany. Exemption from German VAT was however conferred as a result of the customer's "BFG" ("British Forces Germany") status.

11. At the end of one year, the customer would be able to bring the vehicle back to the UK without incurring a German or UK VAT charge by following the appropriate formalities. He would at that stage exchange it in the UK for another brand new vehicle, again worth £30,000, which he would immediately remove to Germany (thus again suffering no UK VAT) and, once again, obtain exemption from German VAT by virtue of his BFG status. He would also pay a further amount (in this example, another £15,000) for the vehicle.

12. At the end of the second year, the customer would return the second vehicle to BMW in the UK. He would then receive a full refund of the £30,000 he had paid (subject to any deduction for excess mileage or damage to the vehicles). In effect, the customer would therefore be lending the BMW dealer £15,000 per year for two years, interest free, and he would have the use of two brand new expensive motor cars in sequence over that period in exchange.

13. The Appellant signed up for the 50:50 scheme in November 2008. He paid his first payment, picked up his VAT-free BMW 325 motor car at Dover and took it back to Germany. He "BFG registered" it there, exempting him from German VAT and the year passed without incident. During that year, the Appellant was sent on deployment to Afghanistan (and probably other places as well), leaving his car in Germany at his home whilst overseas.

14. In late summer of 2009 his mind started to turn to the selection of his replacement vehicle under the "50:50" scheme. He decided on a BMW Z4. He went to BMW's offices at or near his base in Germany to sort out the details and on or about 7 September 2009 he placed his order and filled in and signed all the relevant forms, including the form VAT 411 claiming the UK VAT relief from HMRC. At that time, so far as the Appellant was concerned, he was carrying on with his German posting until at least November 2010 (albeit that he expected no doubt to be deployed

abroad on operations from time to time as he had been in the past). His home was in Germany.

15. In October 2009 he was doing some planned training in Hereford in the UK. At about the time he started that training, on 9 October 2009, he was given about a month's warning that he was to be deployed to the Sudan. He was required to attend some further training in the UK in preparation for that deployment, immediately after his training at Hereford ended. This was at the UK base of the "Close Protection Unit" ("CPU") of the Royal Military Police. That training lasted from 8 November to 6 December 2009 and was on weekdays only.

16. The Appellant was due to pick up his new BMW Z4 on 24 November 2009. He could not do so until the following Friday, 27 November, when he drove his BMW 325 to Dover, exchanged it for the new Z4 and drove to his unit in Germany. He did this (rather than simply driving back to his UK training location) because he was aware that the UK VAT rules required him to remove the new vehicle from the UK within two months of acquiring it, and he was aware that this was going to be his only opportunity to do so. No VAT was chargeable on the car on the basis of the form VAT 411 he had already filled in, which was completed by the BMW dealership and submitted to HMRC.

17. In Germany, the Appellant obtained all the forms he needed to get the car BFG registered. Because it was the weekend, he was unable to physically visit the relevant office and submit the papers in person, but he arranged for their delivery and drove back to the UK on Sunday 29 November 2009 in his new car to complete the last week of his course at the CPU headquarters. He did so, then parked the car there and went off on his six month deployment to Khartoum on 7 December 2009. He had arranged for the BFG registration plates and other documents to be sent over to the CPU to await his return from deployment.

18. At this stage, so far as the Appellant was concerned, he was still formally stationed in Germany but was on another of his temporary overseas deployments from that base. His home and personal effects (apart from his car) were still in Germany, and that was where he expected to return when he came back from Khartoum. The car would enable him to drive there from CPU headquarters (which was where he would be returning to at the end of the operational deployment).

19. While the Appellant was on deployment in Khartoum, he was issued (on 15 December 2009) with an official "Assignment Order" from the Ministry of Defence's computerised system known under the abbreviation "JPA" which notified him that his German posting (following the end of his Khartoum deployment and his post-deployment leave) was being extended to 12 July 2013.

20. A little later during his Khartoum deployment, however, he was notified verbally of a change to that plan. He was told that he was instead to be transferred to CPU Headquarters in the UK, because he was being assigned to a small pool of specialist "quick response" close protection specialists who were maintained there in readiness for short notice deployments to meet unexpected needs. Following up this

verbal notification, he received a further "JPA" notification dated 8 March 2010, informing him that the extension of his German posting had been cancelled.

21. At this stage it is worth mentioning that there are apparently internal charging arrangements between the MOD and the Foreign and Commonwealth Office for the provision of military personnel for close protection duties for diplomats. Those arrangements require the personnel in question to be noted on JPA as formally posted to the CPU in the UK, to enable appropriate recharges to be raised. We were provided with a very helpful letter from the Regimental Administrative Officer of the CPU which explained the background and also confirmed that the Appellant was indeed formally scheduled to return to his German unit from his Khartoum deployment until the plans were changed while he was away in Khartoum. So whilst the JPA system showed the Appellant as having been permanently assigned to the CPU in the UK from 8 November 2009, it is clear that this was only in order to keep the accounting straight (and, apparently, to facilitate the issue of the requisite special diplomatic passport to the Appellant), and did not reflect his real posting, which continued to be with his unit in Germany until July 2010.

22. The Appellant successfully completed his Khartoum deployment and returned to the CPU headquarters on 8 June 2010. He then had his one month's post-deployment leave to drive his car to Germany, pack up his personal possessions, vacate his house and return to the UK before starting his new posting at CPU headquarters in July 2010. In his absence, the BFG number plates had arrived, so he affixed them to the vehicle before driving it back to Germany.

23. Whilst in Germany, the Appellant put in hand the process of getting the necessary forms to cancel the car's BFG registration without incurring German VAT and then formally bring it back to the UK and re-register it here. There appears to have been some kind of hitch in that process involving the Appellant being given the wrong form, as a result of which the Appellant had to drive back to Germany on about 10 August 2010 and at that stage problems started to emerge.

24. BFG Customs & Immigration in Germany obviously formed the view that the Appellant had acted improperly, presumably for personal gain. By reference to the JPA records, they considered his German posting had been terminated on 9 November 2009 (before he took delivery of the vehicle, at the time his pre-deployment training at the CPU had started) and therefore he had had no right to apply for BFG registration of the car later in November 2009. They also considered he had wrongfully had two BFG registered cars at once, as they believed he had owned the BMW 325 for less than 12 months and still owned it when he acquired the Z4. They inspected the car and found it had 3,640 miles recorded on the odometer on 10 August 2010.

25. After requiring the Appellant to return his BFG number plates, BFG C&I declared his BFG registration "void". The Appellant therefore had to remove and return the BFG registration plates and re-fit the original UK registration plates.

The appeal

26. In due course, HMRC issued a demand addressed to the Appellant dated 24 January 2011 for £4,193.52 (the dealer's calculation of the unpaid VAT on the car as set out on the original Form VAT 411). This decision was upheld after an internal review.

27. In their letter dated 3 June 2011 confirming their decision, HMRC justified the demand on the basis that by the time the vehicle was supplied to the Appellant, his intention had changed (i.e. that what he had done did not satisfy the requirements of the legislation for him to "intend" to remove the car from the UK at the time of its purchase). They cited, as objective evidence in support of their contention, the following factors:

(1) The JPA records showed that by 24 November 2011, the Appellant was no longer stationed in Germany.

(2) He only spent two days in Germany with the vehicle.

(3) Following his return to the UK, the vehicle was kept at the vehicle lines of the CPU until the end of the Appellant's Khartoum deployment.

28. In that letter, HMRC also referred to the ECJ decision in *X v Skatteverket* [2010] Case 84/09, though they did not say how they thought it supported their case.

The law

29. It is important to remember that this appeal, in relation to the UK VAT liability, is governed entirely by the normal provisions associated with the sale for intra-EU supply of new means of transport. If the Appellant can satisfy those provisions, then he is entitled to the relief from UK VAT and the appeal must succeed.

30. That may not be the end of the matter, however, as HMRC have said that "if it is ruled that the tax liability is actually in Germany your papers will be passed to the German authorities to decide whether relief is appropriate or tax due". In other words, if the Appellant is found not to have satisfied the conditions for BFG registration (which confers exemption from German VAT) then that issue will receive separate consideration in Germany.

The UK tax position – legislative background

31. Essentially this appeal requires a consideration of whether the Appellant satisfies Regulation 155 of the Value Added Tax Regulations 1995, which provides as follows:

> "**Supplies of new means of transport to persons departing to another member State**

> The Commissioners may, on application by a person who is not taxable in another member State and who intends –
>
> (a) to purchase a new means of transport in the United Kingdom, and
>
> (b) to remove that new means of transport to another member State,
>
> permit that person to purchase a new means of transport without payment of VAT, for subsequent removal to another member State within 2 months of the date of supply and its supply, subject to such conditions as they may impose, shall be zero-rated."

32. In paragraph 6.1 of HMRC Notice 728, the following provision is stated to have the force of law (presumably on the basis that it sets out the "conditions" imposed by HMRC under Regulation 155):

> "If you buy an NMT *[i.e. a new means of transport]* in the UK to take to another member State, you will be liable for the VAT on the value of the NMT when you arrive there. To ensure that the purchase of the NMT is free of UK VAT, you must comply with certain conditions. These are:
>
> - the means of transport must be 'new'
> - you or your authorised chauffeur, pilot or skipper must personally take delivery of the new means of transport in the UK
> - you must remove it from the UK to the Member State of destination within two months of the date of supply to you, **and**
> - you must complete and sign a declaration on a Form VAT 411, stating your intention to remove the NMT from the UK and to pay any VAT due in the Member State of destination. Your supplier must complete their part of the form."

33. It is common ground that the BMW Z4 car in question was a "new means of transport" for these purposes in November 2009.

The UK tax position – preliminary point

34. At the hearing, HMRC were unable to answer the Tribunal's question as to the specific legislation pursuant to which HMRC were demanding the VAT from the Appellant. It was most notable that the demand for payment addressed to the Appellant was headed "Demand to Pay Value Added Tax" and none of the usual "assessment" language or formalities were evident in it, nor did it cite any legislative or other authority for the demand it made.

35. Whilst the relief from VAT depends on the making of a declaration by the Appellant as purchaser of the car, it is notable that HMRC were unable to point us to any provision which imposes a liability on the purchaser if the relief is not in fact available. Indeed, bearing in mind that the relief is given by the mechanism of zero rating the supply to the purchaser (see the wording of Regulation 155 above), the more obvious conclusion is that if the relief is not available then the supply is subsequently discovered to have been standard rated, with the consequence that the supplier (rather than the purchaser) becomes liable for the unpaid VAT. Presumably the supplier will have ensured that its agreement with the customer entitles it to recover any such VAT liability from the customer.

36. It is clearly incumbent upon HMRC to justify, by reference to proper statutory or other authority, the legal basis upon which they seek to make any person liable to pay tax. It is axiomatic that before HMRC can demand any person to pay tax, they must show proper authority for that demand, and in this case they have failed to do so.

37. That on its own would be sufficient to dispose of the appeal, but in deference to the other arguments raised (and in recognition of the fact that if HMRC were indeed to raise an assessment against the supplier, no doubt the Appellant would end up having to address the substantive issues raised by HMRC) we go on to consider those arguments.

The UK tax position – HMRC's submissions

38. HMRC are disputing the Appellant's "intention to remove" the car to Germany, given the circumstances. As they said in their statement of case:

> "Notwithstanding the intention at the time of the order, it is the intention at the time of the supply that is material to finalising the actual liability and that intention has to be based on objective evidence.
>
> The objective evidence being that the appellant was now based in the UK and the only reason he went back to Germany was in a vain attempt to fulfil the original intention as per Form 411.
>
> HMRC do not consider that the two day trip to Germany that the appellant undertook is sufficient to be considered to be a removal of the NMT from the UK.
>
> Therefore HMRC do not accept that the appellant has complied with the declaration that his intention was to remove the NMT from the UK and pay any VAT due in the Member State of destination has not been met. This is because if the appellant had correctly removed the vehicle when he left the UK (27 November 2009) he would have been liable to German VAT as he was no longer on BFG strength. Therefore as he has not complied with his signed declaration on Form 411 the outstanding tax is due as per guidance found at paragraph 6.6 to VAT Notice 728 – New Means of Transport."

39. It is fair to say that the full facts of the case did not really emerge until the hearing, but HMRC nonetheless maintained this line of argument at the hearing.

The law – our evaluation of HMRC's submissions

40. We accept HMRC's submission that it is the intention of the Appellant at the time of the supply to him of the car that is relevant. This is in accordance with the principle of legal certainty, which requires the fiscal character of a transaction to be capable of ascertainment at the time of the transaction. It also accords with the decision of the ECJ in *Skatteverket*, when it said (at [51] and again in its final ruling):

> "In the specific case of the acquisition of a new means of transport within the meaning of Article 2(1)(b)(ii) of [EU Directive 2006/112], the determination of the intra-Community nature of the transaction must be made through an overall assessment of all the objective circumstances and the purchaser's intentions, provided that it is supported by objective evidence which make it possible to identify the Member State in which final use of the goods concerned is envisaged."

41. Thus it is clear that the exercise we are required to carry out is an "overall assessment" of both the "objective circumstances" and the Appellants "intentions", and that assessment must be supported by "objective evidence which makes it possible to identify the Member State in which final use of the goods concerned is envisaged".

42. So what then were the "objective circumstances", what were the Appellant's "intentions", and is there "objective evidence" to support our overall assessment of both? And does that objective evidence make it possible to identify the Member State in which "final use" of the car was "envisaged"? We accept that these questions must be addressed as at the time of supply to the Appellant of the car on 27 November 2009, though objective evidence from a later date can be considered if it casts light on the position as at that date.

43. First, there is the fact that the Appellant only removed the car from the UK for a very short period – two days – after he first acquired it and the vehicle was stored in the UK for six months while the Appellant was on operational deployment in Khartoum. Without further explanation, this does look unhelpful to the Appellant's case.

44. However, when the full context is considered, this fact appears in a very different light. As can be seen from the full factual history summarised above, the Appellant had very little choice in the matter. He knew that he had to remove the car from the UK within two months, and this was his only opportunity to do so before disappearing off to Sudan for six months. His duties at the time were such that he only had two days before he was required to be back at CPU headquarters for the last week of his training.

45. If he had left the car in Germany and found his way back to the CPU by other means, that would certainly have looked better. However, as the *Skatteverket* case at

[50] and [51] makes clear, consideration of particular periods of time in this context can lead to difficulties:

> "The essential issue is, in fact, to determine the Member State in which the final, permanent use of the means of transport will take place.
>
> … the classification of a transaction as an intra-Community supply or acquisition cannot be made contingent on the observance of any time period during which the transport of the goods in question from the Member State of supply to the Member State of destination must be commenced or completed."

46. From the evidence we heard, we have no doubt that when the Appellant picked up his car, his intention was that his final, permanent use of it (for the duration of his expected period of ownership) would be in Germany. His home was in Germany, he was formally posted there for at least another year and subject to the Army's operational requirements, that was where he intended to use it. Simple storage of the car in the UK while he was overseas on deployment from his German base certainly does not, in our view, point towards an intention that the "final, permanent use" of the car would be in the UK – at that time, the vehicle was not being used at all. Nor does the Army's decision in March 2010 unexpectedly to terminate his German posting and reassign him to a UK posting from July 2010 affect his original intention in November 2009.

47. We therefore find as a fact that the Appellant had, at the time of the supply to him of the vehicle, the necessary intention to remove it to Germany and to make final and permanent use of it there. It follows that his declaration in form V411 was validly made and the supply to him of the car in the UK was properly zero rated pursuant to that declaration.

Late argument raised by HMRC

48. HMRC also sought to introduce a new argument at the hearing, namely a submission that a separate liability arose on the Appellant's removal into the UK of a new means of transport when he drove from Germany back to the UK on his return to the UK in June or July 2010.

49. This argument was only put in the briefest terms, and no legislative authority was referred to, nor had the Appellant been alerted to it until he was surprised by it at the hearing. There was no hint of it in HMRC's decision letter or in their statement of case.

50. HMRC were therefore effectively asking the Tribunal to impose a VAT liability on the Appellant in the course of the hearing on the basis of an entirely different taxable event from that which formed the basis of their decision under appeal. They were not raising a new argument in support of the decision which was under appeal, they were arguing for an entirely new VAT liability. Clearly it would be inappropriate for the Tribunal to confirm a VAT liability which has not even been

the subject of a formal decision or assessment by HMRC. On that basis alone, we must dismiss HMRC's argument on this point.

51. As the argument was raised, however, we feel it appropriate to express some provisional views on it.

52. It is quite clear (from the odometer reading of 3,640 miles taken when the car was in Germany on 10 August 2010) that the car had travelled less than 6,000 kilometres (3,750 miles) under its own power at the time the Appellant drove it back to the UK in June or July 2010. The car would therefore have fallen within the definition of "new means of transport" at that time and therefore section 10 of the VAT Act 1994 might be regarded as potentially imposing a VAT liability on the Appellant as a result of the car's removal to the UK in June or July 2010.

53. However, the provisions of section 10 VAT Act 1994 which are relevant to acquisitions of new means of transport in the UK from other EU member states are to be interpreted by reference to section 11 of that Act. Section 11 makes it clear that a taxable acquisition can only arise under section 10 in pursuance of a transaction which is a supply of goods (or which is treated for the purposes of the Act as such a supply) involving the removal of the goods from another EU member state. A simple removal of the goods is insufficient. This is consistent with the general scheme of the EU Directive, which is (broadly) to tax the actual supply of a new means of transport in (and only in) the Member State in which the consumer intends to use it.

54. There has been no suggestion in this case that there was any supply made (or treated as made) to the Appellant involving the removal of the car from another EU member state in June or July 2010 – indeed, the contrary is the case: there was only one supply of the car, pursuant to which it was removed (as we have found) from the UK to Germany in November 2009.

55. It follows that our provisional view is that any argument that the Appellant should be liable for VAT on a taxable acquisition upon bringing the car back to the UK in June or July 2010 is misconceived in any event.

BFG Status

56. Whilst our jurisdiction is limited to determining the UK VAT liability attaching to the initial supply of the car, we feel it is appropriate to record certain points that came out in the evidence about the BFG registration process. These may assist in a consideration of the BFG registration position (and associated VAT exemption) in Germany.

57. HMRC included in their bundle of documents a copy of an extract from the Standing Orders for the British Forces in Germany governing the ownership and registration of BFG registered vehicles, dated 1 March 2011. They particularly drew our attention to the definition of "BFG Vehicle", which included a requirement that "[t]he vehicle must be physically in Germany at the time of registration". They pointed out that by the time the Appellant's initial BFG registration was actually issued in January 2010, the vehicle was parked in the UK.

58. The Appellant was able to produce at the hearing a copy of an extract from the same Standing Orders as issued on 1 November 2009. That version of the Standing Orders contained no reference to any requirement as to the physical location of the vehicle.

59. It seems that even the Appellant's superiors in Germany regarded the car's absence from Germany at the time of its BFG registration as crucial, presumably on the basis of the later version of the Standing Orders. As one Captain Hodson remarked in an email: "It's a pity he returned the car back to the UK prior to the initial BFG registration date, otherwise I may have been able to argue a case for his legitimacy to purchase it in the first place."

60. It is to be hoped that the BFG registration status of the Appellant's vehicle in Germany will be properly reconsidered in the light of all the facts now available and the version of Standing Orders in force at the relevant time in November 2009.

Conclusion and decision

61. HMRC have not identified any authority for the imposition of a VAT liability on the Appellant (as opposed to the supplier of the car in question) as a result of the supposed non-compliance with the conditions for zero rating the initial supply of the car to the Appellant.

62. In any event, we are satisfied, based on objective evidence, that the Appellant had the relevant intention on 27 November 2009 to remove the car from the UK to Germany (and in fact did so) and that the zero rating was therefore correctly applied.

63. It is not appropriate for us to consider HMRC's late argument to impose VAT on the Appellant by reference to a supposed taxable acquisition by him in June or July 2010 when he brought the vehicle back to the UK. Even if we were to do so, our provisional view of that argument is that it is without merit.

64. The appeal is therefore allowed.

65. Whilst recognising that we have no jurisdiction in the matter, we hope that the relevant authorities in Germany will reconsider the Appellant's BFG registration position based on the full facts that have now emerged and a consideration of the appropriate version of the Standing Orders.

66. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 11 June 2012