

MAINE DISTRIBUTION LTD v HMRC [VAT Decision 20284]

Intra-Community supplies – Conditions for zero-rating – MTIC fraud - Spanish purchaser regarded as not carrying out any economic activities in Spain – Withdrawal by Spanish authorities of VAT registration number valid for intra-community trades – Article 28(c)A and Article 4 of the Sixth Directive

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The Appellant (“Maine”) first registered for VAT as a furniture distributor though, in October 2005, it informed the Commissioners that it would commence wholesale trading in Computer Chip Units (“CPUs”). The Commissioners repeatedly informed the Appellant of the risks inherent in such wholesale trade, particularly be referenced to MTIC fraud, and pointed out the needs to carry out due diligence checks on all trading partners.

The present dispute arose out of three transactions during the course of November 2005 in which Maine supplied CPUs to Indigo Light SL (“Indigo”), a company registered in Spain. The Commissioners refused the Appellant’s claim to be able to zero-rate such supplies on the basis that Indigo was not a taxable person in another Member State and Maine had failed to show due diligence in its dealings with that company. Additionally, the Commissioners established that, in relation to each of the three transactions, there had been a tax loss as each commenced with a missing trader in the UK.

Early in October 2005, Maine had enquired from the Commissioners about Indigo and, on 18th October 2005 the

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Commissioners had confirmed that, as at that date, the company appeared to have a valid Spanish VAT number to carry out intra-Community transactions, as recorded on VIES, the central European database. This was the only check ever carried out by Maine in relation to Indigo. Part of the argument advanced by the Commissioners was that, had Maine undertaken more adequate checks, it would have been immediately apparent that Indigo's address was no more than a "letter box" and that the company was not carrying out any relevant economic activity in Spain, as the Spanish authorities were able to demonstrate following straightforward enquiries.

Under Spanish law, all companies are allocated a tax identification number, including for VAT purposes, but companies wishing to carry out intra-Community transactions are additionally required to be registered on a special register, the Registro de Operadores Intercomunitarios ("ROI").

As a result of investigations carried out by the Spanish authorities, they established, following a simple control visit, that Indigo was not operating as a taxable person in Spain and that its registered office was the address of a lawyers' practice. That address was no more than a correspondence address where no activity was carried out. All correspondence was simply forwarded to the UK at the address of the sole director of Indigo, a UK resident. No books or accounts were held at the Spanish address and the lawyers confirmed that they did not carry out any activity related to Indigo's business. Accordingly, under Spanish law, the procedure was initiated for removal of Indigo from the ROI, which removal took place on 19 October 2005. Indigo did not take any steps to challenge such removal. It also appears that Indigo did not declare any intra-Community acquisitions at any time since its registration and, accordingly, did not account for acquisition tax on any of the transactions subject matter of the appeal.

Accordingly, at the time the relevant transactions took place in November 2005, Indigo was not, as a matter of Spanish law, a taxable person entitled to carry out intra-Community transactions. It was on this basis that, following receipt of information from the Spanish authorities by the Commissioners, an assessment for some 326K was issued against Maine, due to its failure to fulfil the conditions for zero-rating of the relevant transactions.

The Appellant contended that, while Indigo had been removed from the ROI, it still had a valid VAT number in Spain and, therefore, all conditions for zero-rating of the relevant transactions has been fulfilled. In the alternative, even if Indigo's VAT number was not valid for the purpose of Notice 725 due to the removal of the company from the ROI, Indigo was nevertheless a "taxable person" for the purpose of Article 4 of the Sixth Directive and Maine was therefore entitled to zero-rate its supplies to it.

The Commissioners contended that, not only was Indigo removed from the ROI, thereby depriving it of the status of taxable person for the purpose of intra-Community transactions, but also that the Spanish authorities, following fairly straightforward enquiries, had clearly established that Indigo was not carrying out any economic activity and, accordingly, Indigo could not be acting as a taxable person within the meaning of Article 4. The conclusion to be drawn from the information supplied by the Spanish authorities was that Indigo was no more than a vehicle for MTIC fraud to be carried out.

The Tribunal had no difficulty in rejecting the Appellant's main argument and in concluding that, as Indigo had been removed from the ROI and it was not carrying out any economic activity, it could not be regarded as a taxable person "acting as such" for the purpose of Article 28(c)A. This was so despite the fact that it remained registered for VAT for domestic Spanish purposes.

In relation to the Appellant's alternative argument, the Tribunal indicated that, as such argument had already been rejected in *JP Commodities* [VAT Decision 19904], it was minded to reject that argument also. Nevertheless, as *JP Commodities* was under appeal to the High Court, due to be heard shortly, the Tribunal decided to defer its decision on the Appellant's alternative argument.

This case is a good example of the increased attention and additional resources which the Commissioners are devoting to combating MTIC fraud, even when arising out of relatively small

scale and low value transactions, such as those of the present case. Judging from the level of information supplied by the Spanish authorities in this case, it also appears that more co-ordinated efforts are being made by different Member States in the continuing fight against this type of fraud, which is estimated to cost the Revenue several billions a year in the UK alone. It is also clear that, following the demise of the arguments deployed by the Commissioners up until release of the ECJ judgment in *Optigen Ltd, Fulcrum Electronics Ltd and Bond House* (Cases 354/03, 355/03 and 454/03) [2006] STC 419, the Commissioners are not limiting themselves to arguing that taxpayers had the knowledge or means of knowledge of MTIC fraud (as endorsed by the ECJ in *Kittel* (Case 439/04 and 440/04)), but are seeking to deploy every argument available to them, such as the failure to fulfil the conditions for zero-rating in the present case. It is also clear from this and other recent Tribunal cases arising out of MTIC fraud that the Tribunal is increasingly willing to subject the conduct of allegedly "innocent" taxpayers who become embroiled in such fraud to detailed scrutiny and expect such traders to undertake adequate checks in order to ensure the integrity of the supply chain and dispel any links with fraudulent activities. This is the area where litigation is likely to focus in the coming months, as appeals against decisions taken by the Commissioners following release of the *Kittel* judgment by the ECJ come to substantive hearings. It will be interesting to see how far the Tribunal will require "innocent" taxpayers to go in order to protect themselves against the risks of MTIC fraud elsewhere in the supply chain.

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