[2012] UKUT 361 (TCC)
Appeal number FTC/84/2010

VAT – Sale of vehicle registration marks – Whether transaction zero rated as an international supply – Place of supply in UK – Whether transaction involving a transfer or assignment of rights within para 1 of schedule 5 to VATA 1994 – Whether the DVLA a taxable person – Whether sale of registration marks by the DVLA an economic activity – Appeal dismissed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

ADOUM TANJOUKIAN **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE HENDERSON

Sitting in public at The Rolls Building, London EC4A 1NL on 10 May 2012

Mr Thomas Chacko, instructed by Gregory Rowcliffe Milners, for the Appellant

Ms Eleni Mitrophanous, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Mr Justice Henderson:

Introduction

1. This is an appeal from a decision of a single Judge (Dr K Khan) of the First-tier Tribunal ("FTT") released on 10 June 2010 ("the Decision"), following a hearing at the London Tribunal Centre on 16 April 2010. The basic issue for determination by the FTT was whether value added tax ("VAT") was properly chargeable at the standard rate on the sale by auction on 30 January 2009 of a personalised vehicle registration mark "1O" (i.e the number one and the letter "O") to Mr Adoum Tanjoukian ("Mr Tanjoukian") for a hammer price of £170,000 and buyer's premium of £12,750, to each of which VAT at the then standard rate of 15% was added by the auctioneer SMA (Leeds) Ltd ("SMA"). The auction was conducted by SMA on behalf of the Driver and Vehicle Licensing Agency ("the DVLA"), which was and is an executive agency of the Department for Transport, pursuant to the terms of an exclusive auction contract between SMA and the DVLA.

2. The basic facts which I have just summarised are fortunately not in dispute between the parties, but they are not the subject of any findings by the FTT in the Decision. A further crucial fact, which appears to have been common ground before the FTT (or at any rate not the subject of any effective challenge by HMRC), is that Mr Tanjoukian was at the material time resident in Saudi Arabia and not resident in the United Kingdom or anywhere else in the European Union ("the EU"). Again, no finding to this effect can be found anywhere in the Decision. I have, however, been shown photocopies of what appear to be Mr Tanjoukian's passport and driving licence, which indicate that he is an Austrian national with an Austrian passport and a driving licence issued by the Kingdom of Saudi Arabia, although on each document his name is given as "Adoum Tounjekian" which I take to be a variant spelling of his surname.

3. It appears from a witness statement dated 3 April 2012 by Mr Tanjoukian's son, Mr Hovan Tanjoukian, who has an address in the UK and who conducted the appeal to the FTT on his father's behalf, that both these documents were before the FTT, at least in the sense that he brought them to the hearing because he considered them to be potentially relevant. It is not clear, however, whether they were actually shown to or considered by the FTT, or whether Mr Tanjoukian's residence status was conceded by HMRC (who were represented at the hearing by an officer, Mr R Basi, who has subsequently left HMRC's employment), or whether the documents were (whether formally or

informally) put in evidence by Mr Hovan Tanjoukian. All this is most regrettable, and the position is made still worse by the fact that no formal notice of appeal to the FTT was ever served by or on behalf of Mr Tanjoukian, or (seemingly) ever required by the FTT, with the result that his grounds of appeal had to be deduced from two lengthy emails sent to the Tribunal Service by Mr Hovan Tanjoukian on 14 and 20 November 2009, together with a shorter confirmatory email of 25 November ("the November 2009 emails").

4. It is not easy to discern the central thrust of Mr Tanjoukian's appeal from the November 2009 emails, because (understandably, in documents prepared by a layman) they contain a mixture of substantive arguments, apparently predicated on the proposition that Mr Tanjoukian was an "international" customer of SMA resident outside the EU, and procedural complaints, based on a history of allegedly unclear and contradictory advice given to Mr Hovan Tanjoukian by HMRC, either directly or via SMA.

5. HMRC commendably did their best to make sense of the November 2009 emails, and to analyse the issues, in a document headed "Respondents' Statement of Case" which was prepared in the office of the General Counsel and Solicitor to HMRC on 26 March 2010. In summary, the contents of this document were as follows:

   (1) The introduction recorded HMRC's understanding that the appellant was a "Mr T Hovan", although various correspondence had referred to a "Mr Jarbighai". In the absence of any formal notice of appeal to clarify the identity of the appellant, HMRC said they would refer to the appellant as "Mr T Hovan" until his identity was clarified. The appeal was said to be against a decision of HMRC dated 8 October 2009 stating that a supply of intermediary services by SMA took place in the UK, and was therefore standard rated for VAT purposes. That decision had been reviewed by HMRC, who had concluded that the supply was standard rated whether the supply of services by SMA was one of intermediary services or one made by SMA acting as a principal.

   (2) The next section, headed "Background and Chronology", briefly recited the communications between SMA, HMRC and the appellant, from 17 February 2009 (when SMA wrote to HMRC seeking a ruling on the basis that they had sold a vehicle registration number at auction "to a customer who belongs outside the European Union" and had charged VAT on the sale and the buyer's premium) down to 10 November 2009 (when HMRC confirmed their earlier decision that the supply was standard-rated, following an internal review requested by the appellant).

(3) The next section set out certain provisions of the Value Added Tax Act 1994 ("VATA 1994") relevant to the place of supply, including the basic rule in section 7(10)(a) that a supply of services shall be treated as made in the UK if the supplier belongs in the UK, and the exceptions to that general principle contained in paragraph 1 of Schedule 5 and Group 7 of Schedule 8 respectively. Schedule 5 lists "services supplied where received", and paragraph 1 reads "Transfers and assignments of copyright, patents, licences, trademarks and similar rights." Schedule 8 lists supplies of goods or services which are zero-rated, and Group 7 covers "international services" as there defined.

(4) The next section sought to distil the appellant's case from the November 2009 emails, to the effect that the supply should either be zero-rated under Group 7 of Schedule 8, or the place of supply should be treated as outside the EU and as involving a transfer or assignment of rights within paragraph 1 of Schedule 5. Paragraph 18 then said:

> "Although not set out explicitly in the emails to the Tribunal by the Appellant, the Appellant also appears to contend that he "relied on" advice given to him by the Commissioners and that this created a legitimate expectation [on] the basis of telephone calls between the Appellant and the Commissioners"

(5) HMRC's case was then summarised, on the footing that the details of the contract between SMA and the DVLA were unknown to HMRC, but the supply by SMA was standard rated, irrespective of whether SMA was acting as principal or intermediary in the transaction.

(6) Finally, it was submitted that the FTT had no jurisdiction to consider issues of misdirection and/or legitimate expectation, because it had no power on an appeal under Section 83 of VATA 1994 to entertain public law issues of that nature.

6. Against this background, I consider that it was incumbent on the FTT, at the outset of the hearing on 16 April 2010:

a) to clarify the name and residential status of the appellant;

b) to formulate, with the assistance of the parties, precisely what the issues were;

c) to find out what facts (if any) were agreed; and

d) to ascertain what oral and/or documentary evidence the parties wished to rely upon.

Depending on the answers to those questions, the FTT would then have been in a position to make an informed decision whether to proceed with the substantive hearing of the appeal, or whether to adjourn it for further preparation of the parties' respective cases so that the real issues in dispute could be fully and fairly adjudicated upon.

7. Unfortunately, however, there is no indication that Judge Khan took any of these steps, and he appears to have despatched the appeal in short order. According to the uncontradicted evidence of Mr Hovan Tanjoukian (adduced in support of an application to allow fresh evidence to be placed before the Upper Tribunal, or alternatively to remit certain evidential questions to the FTT), there was a delay of an hour and a quarter, due to the late arrival of HMRC's representative, and Judge Khan then decided that the hearing would proceed. Mr Hovan Tanjoukian's account of the hearing reads as follows:-

> "9. The following were my arguments as to why the DVLA had no legal right to charge VAT:
>
> (a) The "place of supply" was outside the scope of VAT;
>
> (b) The DVLA are a "regulatory" government body (I referred to the *Hutchison 3G* case);
>
> (c) The international transaction was through an "intermediary"; and
>
> (d) The appellant was incorrectly advised by HMRC leading to a "legitimate expectation".
>
> 10. The judge only permitted points (a) and (c) to be argued. He told me that I was not able to argue points (b) and (d), but I did not understand the reasons for this.
>
> 11. As far as I recall, the argument (on both sides) took around half an hour in total. At the end of this, the judge told the Respondents that they had misadvised me and they apologised."

8. Of the four arguments referred to by Mr Hovan Tanjoukian, the first, third and fourth were foreshadowed in the November 2009 emails and in HMRC's analysis of the issues, but the second appears to have been a new point which had not been canvassed in the previous correspondence. The case referred to is evidently the decision of the Grand Chamber of the European Court of Justice ("the ECJ", now the CJEU) in Case C-369/04 Hutchison 3G UK Ltd & Others v Customs and Excise Commissioners, [2008] STC 218, where the Court had held that the allocation of third generation mobile telecommunications licences to the applicants by the Secretary of State for Trade and Industry, following an auction procedure, did not constitute an economic activity within the meaning of article 4 (2) of the Sixth VAT Directive and accordingly fell outside the scope of VAT.

9. HMRC could have fairly claimed to be taken by surprise by this new point, and it was perhaps for that reason that Judge Khan apparently did not permit it to be argued. Another possibility is that the point was touched on so briefly by Mr Hovan Tanjoukian that it did not register with Judge Khan as a separate argument that needed to be addressed. It is regrettable that I do not have HMRC's account of what transpired at the hearing, because (as I have already said) the officer who represented HMRC has now left the government service, and if he kept a note or record of the hearing, it has not been found. In any event, the fact remains that, for whatever reason, the point was not effectively argued before the FTT, and there is no reference to it anywhere in the Decision.

10. With every respect to Judge Khan, I feel bound to say that the Decision is in several respects a most unsatisfactory document.

11. In the first place, Judge Khan appears to have made no effort to clarify the true name of the appellant, or the relationship between the appellant and Mr Hovan Tanjoukian. Instead, he simply followed HMRC's statement of case in describing the appellant as "Mr T Hovan", and recorded that he "represented himself". This was wrong on every count, and a discourtesy both to Mr Tanjoukian and to his son who represented him.

12. Secondly, the Decision contains no findings of fact. Instead, there is a section headed "Background and Chronology" (paragraphs 2 to 9) which reproduces verbatim the corresponding paragraphs in HMRC's statement of case, and was presumably cut and pasted from it electronically. It needs to be emphasised that this is wholly unacceptable, because the primary duty of any tribunal of fact, such as the FTT, is to make its own findings of fact on the basis of the evidence before it. A brief recitation of who said what to whom in correspondence is no substitute for this, and leaves the reader in complete ignorance about the evidence which the tribunal actually heard and the findings which it made. It should not be necessary to state that, without proper

findings of fact, it will normally be impossible to tell whether the tribunal has correctly understood and applied the law in reaching its conclusions, because principles of law do not exist in a vacuum and they have to be applied to a given factual situation. Furthermore, where, as in the present case, a further appeal lies only on questions of law, and the FTT is accordingly the sole tribunal of fact, the failure to make any proper findings of fact at all can only be described as a dereliction of the tribunal's duty.

13. The next section of the Decision, headed "Relevant Legal Provisions", is again clearly based on HMRC's statement of case. In itself, this need not be objectionable, but it does not inspire confidence to note that a significant typographical error ("Group 7 of Schedule 5", when the reference should be to Schedule 8) remains uncorrected. One is also left wondering whether Judge Khan fully appreciated the significance of paragraph 1 of Schedule 5 to VATA 1994, because it only makes sense in the context of the present case when read together with article 16 of the Value Added Tax (Place of Supply of Services) Order 1992 (SI 1992/3121) ("the place of Supply Order") which provides, so far as material, that:

> "Where a supply consists of any services of a description specified in any of paragraphs 1 to 8 of Schedule 5 to [VATA 1994], and the recipient of that supply –
>
> (a) belongs in a country, other than the Isle of Man, which is not a Member State; or
>
> (b) …
>
> it shall be treated as made where the recipient belongs."

14. The next two sections of the Decision, headed "The Appellant's Submissions" and "The Commissioners' Submissions", are once again lifted almost verbatim from HMRC's statement of case, complete with typographical errors.

15. The final section, headed "Conclusion", reads in its entirety as follows:

> "20. If SMA is a principal in the supply of a registration mark then the supply of services shall be treated as made in the UK. The supplier is based in the UK. The supply of the registration mark is therefore standard rated.
>
> 21. The supply does not fall in paragraph 1 of Schedule 5, VATA 1994 because the supply of registration marks is not a transfer or an assignment of rights. The place of supply is where the supplier belongs, which is in the UK.

> 22. If SMA are acting as an intermediary, Section 7(11), VATA 1994 provides that the rule where supply of goods and services are made can be varied by the Treasury by order under the Place of Supply of Services Order 1992. Under Article 13 of that Order, intermediary services carried out by SMA would be carried out in the UK. The supply would therefore be standard rated. The underlying supply is not outside the EU member states and therefore will not be zero rated as submitted by the Appellant.
>
> 23. The Appellant has made a submission regarding the issue of misdirection and/or legitimate expectation. This Tribunal does not have power to look at such a matter.
>
> 24. In the circumstances the Appellant's appeal should therefore be dismissed.
>
> 25. It should be stated at the end that the Appellant has had very poor and conflicting advice from HMRC and has legitimate grounds for a complaint. HMRC should make available the appropriate literature and website reference to allow such a complaint to be made, if it has not already been made.
>
> 26. No issues of costs arose."

16. The conclusions stated in paragraphs 20, 21 and 22 are simply a condensed version of the submissions in the correspondingly numbered paragraphs of HMRC's statement of case. In the absence of any proper findings of fact, the paragraphs read as a series of hypotheses and assertions, with no process of connected reasoning to explain and justify them. For example, the judge does not explain why in his view the supply of the registration mark did not fall within the scope of paragraph 1 of Schedule 5, but merely stated, as though it were self-evident, that the supply was not a transfer or an assignment of rights. He did not engage at all with the legal issue of how a registration mark should be characterised, which would have involved a consideration of the statutory framework of vehicle registration in the UK. Nor did he consider whether the sale of the exclusive right to use such a mark might involve a transfer or assignment of rights "similar" to copyright, patents, licences or trademarks. As to paragraph 23 of the Decision, the judge clearly accepted HMRC's submission that the FTT had no jurisdiction to consider the issues of misdirection and/or legitimate expectation, but again no reasoning is provided to support the conclusion.

The appeal to the Upper Tribunal

17. Mr Tanjoukian's notice of appeal to the Upper Tribunal is not included in the appeal bundle, but the proposed grounds of appeal are summarised in HMRC's response to the notice of appeal settled by counsel now instructed on HMRC's behalf, Ms. Eleni Mitrophanous, on 18 November 2010. The grounds were three in number. First, the FTT was wrong to conclude that the supply did not fall within paragraph 1 of Schedule 5 to VATA 1994. Secondly, for the same reasons, the FTT was wrong to conclude that the underlying supply was not one made outside the EU. Thirdly, the FTT failed to take into account that the DVLA (acting through SMA) was not acting as a taxable person within the meaning of article 9 of the Principal VAT Directive, as the issuing of licences pursuant to the Sale of Registration Marks Regulations 1995 "is an essentially regulatory and not an economic activity", with the consequence that the supply was not made by a taxable person acting as such and was not chargeable to VAT. In the alternative, Mr Tanjoukian sought a reference to the ECJ for a preliminary ruling on the question whether the DVLA was acting as a taxable person.

18. HMRC set out their response to these grounds in the document which I have mentioned. In relation to the third ground, HMRC pointed out that it had not been raised in the November 2009 emails, and added "Nor was this ground apparently raised at the oral hearing". It was submitted that Mr Tanjoukian could not complain that the FTT erred in law "in failing to take account of an argument which he did not in fact submit to it". On the merits of the argument, HMRC said it was anyway wrong to argue that the DVLA was here engaged solely in a regulatory activity:

> "The DVLA is selling the right to use a number plate, with prices charged varying with each particular number plate. This goes beyond a merely regulatory activity and shows the DVLA is clearly engaging in an economic activity."

19. Having been refused permission to appeal by the FTT, Mr Tanjoukian applied for permission to the Upper Tribunal. The application was dealt with on paper by Judge John F. Avery Jones CBE on 21 October 2010. He granted permission to appeal on all three grounds, saying this in paragraph 2 of his decision notice:

> "The Applicant's grounds are whether the right to have a vehicle registration mark assigned to a vehicle is a right within para 1 Sch 5 VAT Act 1994; whether the supply in question was outside the EU; and whether the DVLA was a taxable person. The Applicant may apply for a reference to the ECJ. I

> consider that this raises an arguable point of law and I give permission to appeal to the Upper Tribunal."

20. On 1 March 2012, Mr Tanjoukian applied to the Upper Tribunal to add a further ground of appeal, to the effect that he had a legitimate expectation that the transaction was not subject to VAT. On 5 April 2012, the Upper Tribunal informed the parties that permission to appeal on the new ground was granted, but directed that it be stood over to be argued after the Upper Tribunal had given its ruling in the pending appeal in the case of Noor v HMRC [2011] UK FTT 349 (TC); meanwhile, the hearing of the appeal on the existing grounds, which had already been fixed for May 2012, should proceed.

21. Accordingly, the matter came before me on 10 May 2012 on the basis that Mr Tanjoukian had permission to appeal on the three existing grounds. He was by now represented by solicitors and by counsel, Mr Thomas Chacko. I also had before me the application relating to evidence which I have already mentioned. In his written submissions in support of the application, Mr Chacko pointed out, correctly, that no relevant facts had been found by Judge Khan in the Decision, but that permission to appeal had nevertheless been granted by Judge Avery Jones. The further evidence which Mr Tanjoukian wished to adduce fell into three categories: documents relating to the transaction in question; public documents demonstrating the manner in which the DVLA grants permission to use personalised number plates; and certain relevant HMRC publications. Mr Chacko submitted that the argument below had been essentially legal rather than factual in nature, and that the essential features of the transaction were unlikely to be in dispute. The transactional documents were all ones which Mr Hovan Tanjoukian had taken with him to the hearing below, with the single exception of a document dated 17 April 2011, addressed "to whom it may concern" and apparently signed by the general manager of a business in Saudi Arabia called Jeyad Najd Contracting Est., confirming that "Mr Adoum Tounjekian" had been resident in Saudi Arabia for more than 20 years under a resident permit, and had been working for the business as an investment adviser.

22. Mr Chacko submitted that the documents in question fell outside the normal criteria in Ladd v Marshall [1954] 1 WLR 1489 for the admission of fresh evidence on an appeal, because (with the single exception which I have noted) the documents were all present at the hearing below, but no relevant facts had been found by the FTT. The public documents were not contentious in nature, and the appellant wished to refer to them only in order to explain "the general manner in which the DVLA makes registration numbers of the type at issue available, what rules govern the right to use such registration numbers and the way in which the auctions in question operate". Mr Chacko relied on rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008 No. 2698), which provides that:

"(2) The Upper Tribunal may –

(a) admit evidence whether or not –

(i) the evidence would be admissible in a civil trial in the United Kingdom; or

(ii) the evidence was available to a previous decision maker…"

23. The application was not opposed by counsel for HMRC, but she made it clear that HMRC maintained their opposition to Mr Tanjoukian being permitted to argue that the DVLA was not a taxable person. She submitted that he should not be permitted to argue the point, even though permission to appeal on that ground had been granted by Judge Avery Jones, because (a) the point was a new one which had not been argued at all, or at least not argued effectively, below; and (b) its resolution would require the admission of fresh evidence, including expert evidence, going well beyond the uncontroversial material which Mr Tanjoukian wished to adduce.

24. In support of her submission, counsel for HMRC relied on guidance in the authorities on the circumstances in which a party should be allowed to raise on appeal an argument not relied on below. There is a helpful review by the Court of Appeal of the relevant principles, and a discussion of some of the earlier case law, in Lowe v W Machell Joinery Ltd [2011] EWCA Civ 794, [2012] 1 All ER (Comm) 153: see in particular the judgments of Lloyd LJ at [57] to [66], Rix LJ at [81] to [90] and Lewison J (as he then was) at [72] to [79]. Although the three judges in that case disagreed on the application of the relevant principle to the facts before them, there was no disagreement about the principle itself, which Rix LJ formulated as follows at [81]:

> "It is a long-standing and fundamental principle of this court that a new point of law which was not presented to the court of trial may be raised on appeal, but normally only where there is no possibility of any injustice occurring by reason of the fact that, if it had been raised at trial, it might have affected the conduct and in particular the evidence or its evaluation in those proceedings…"

25. In addition, counsel for HMRC questioned whether the Upper Tribunal could properly proceed on the footing that Mr Tanjoukian was at the material time resident in Saudi Arabia, and not resident within the EU, in the absence of any finding to that effect by the FTT. She said that it was the normal practice of HMRC to require proof of residence, and it was not clear that any such proof had been provided to the FTT. She accepted, however, that no point on Mr Tanjoukian's residence appeared to have been taken below by HMRC, and she

confirmed that there was no suggestion of any dishonesty or lack of good faith on his part. In those circumstances, despite the unsatisfactory nature of the evidence below, and the apparent failure of Judge Khan to clarify the point with the parties, I think I can and should proceed on the footing that Mr Tanjoukian was indeed resident in Saudi Arabia, and not resident anywhere in the EU, when he purchased the registration mark.

The system of vehicle licensing in the UK

26. The outline which follows is based on the helpful summary in Mr. Chacko's skeleton argument, and is not in dispute.

27. The system of vehicle licensing in the UK is governed by the Vehicle Excise and Registration Act 1994 ("VERA 1994"), section 21(1) of which provides that where a vehicle licence is issued for a vehicle which is not already registered the Secretary of State for Transport will register that vehicle. Using or keeping an unlicensed vehicle is an offence under section 29. When a vehicle is registered, it is assigned a "registration mark" indicating its registered number: see section 23(1). By virtue of section 24(1), the Secretary of State may by regulations make provision for the allocation of registration marks for vehicles to approved motor dealers. Section 27 provides for the sale of rights to particular registration marks, which have either never been assigned to a vehicle or have previously been assigned but subsequently withdrawn. The section empowers the Secretary of State, by regulations, to establish a scheme providing for such registration marks to be assigned to vehicles registered under the Act in the names of, or of the nominees of, persons who have acquired rights under the scheme to have the marks assigned to them. Regulations under the section may include provision for the payment of money in respect of the acquisition of the right, and the Secretary of State may determine how and on what terms the rights are to be sold.

28. Sales under section 27 of VERA 1994 are governed by the Sale of Registration Marks Regulations 1995, SI 1995 No. 2880 ("the 1995 Regulations"), as amended by the Sale of Registration Marks (Amendment) Regulations 2008, SI 2008 No. 2372. Under regulation 4 of the 1995 Regulations, an agreement for the acquisition of a "relevant right" (defined in regulation 2 as a right to have a particular registration mark to which section 27 of VERA 1994 applies assigned to a vehicle registered in the name of a purchaser of the right or his nominee) may be made by public auction, tender or private treaty. Regulation 6 provides that the purchaser of such a right must pay both the price for the right (determined as the Secretary of State thinks fit) and a fee equal to the charge under section 25 of VERA 1994 for assigning a used registration mark from one vehicle to another. At the material time, the amount of that charge was £80.

29. The right to use an existing registration mark may be transferred from one vehicle to another pursuant to section 25 of VERA 1994, and before the mark is applied to a vehicle the owner of the right can nominate someone else to be permitted to apply the registration mark to the nominee's vehicle: see regulation 3 of the 1995 Regulations. In this way, registration marks can effectively be sold between private parties, as well as being acquired either directly from the DVLA or through dealers (who may themselves purchase registration marks from private parties, other dealers or the DVLA). The prescribed functions of the Secretary of State under the 1995 Regulations are carried out by the DVLA, which sells some fixed-price registration marks directly to the public, but puts those of higher value up for auction using SMA as the sole auctioneer. The DVLA operates a website which provides a search function for desired registration marks, and gives details of forthcoming auctions.

30. It was in the course of one such auction that SMA, on behalf of the DVLA, sold the registration mark "1O" to Mr. Tanjoukian by auction on 30 January 2009.

The first and second grounds of appeal: where was the place of supply?

31. It is convenient to begin with the two grounds of appeal which turn on the place of supply, assuming for this purpose that the DVLA was a taxable person and that the supply to Mr. Tanjoukian of the registration mark in January 2009 was a supply of services which prima facie fell within the scope of VAT. It is common ground that the supply was one of services, because it was not a supply of goods, and was made for a consideration: see VATA 1994 section 5(2)(a) and (b).

32. VAT is charged on a supply of services in the UK: see VATA 1994 section 1(1)(a). The general rule, contained at the relevant time in section 7(10), was that :

> "A supply of services shall be treated as made –
>
> (a) in the United Kingdom if the supplier belongs in the United Kingdom; and
>
> (b) in another country (and not in the United Kingdom) if the supplier belongs in that other country."

Both the DVLA and, if it is relevant, SMA clearly "belonged" in the UK within the meaning given to that concept in section 9. However, section 7(11) provided that:

> "The Treasury may by order provide, in relation to goods or services generally or to particular goods or services specified in the order, for varying the rules for determining where a supply of goods or services is made."

33. I have already referred to the Place of Supply Order, which was made pursuant to section 7(11), and to the terms of article 16, which provided that a supply of any services of a description specified in paragraphs 1 to 8 of Schedule 5 to VATA 1994 should be treated as made "where the recipient belongs", if the recipient belongs in a country which is not a Member State of the EU. I have also explained that I think it is right for me to proceed on the basis that Mr. Tanjoukian was at the relevant time resident in Saudi Arabia, and not resident anywhere in the EU. On that basis, he "belonged" in Saudi Arabia by virtue of section 9(3) of VATA 1994 which provides that:

> "If the supply of services is made to an individual and received by him otherwise than for the purposes of any business carried on by him, he shall be treated as belonging in whatever country he has his usual place of residence."

Accordingly, the critical issue is whether the supply fell within paragraph 1 of Schedule 5, there being no suggestion that any other paragraph of that Schedule might be relevant. If it did, the supply is treated as having been made in Saudi Arabia and it fell outside the territorial scope of VAT.

34. It is convenient to mention at this point that the place of supply rules in the UK VAT legislation were substantially revised by the Finance Act 2009, and the provisions which are now in force were introduced with effect from 1 January 2010. All statutory references in this judgment are to the previous legislation as it stood at the relevant time, in January 2009.

35. The wording of paragraph 1 of Schedule 5 is "Transfers and assignments of copyright, patents, licences, trade marks and similar rights". Other services which are treated as supplied where received include, for example, advertising services (paragraph 2); services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services (paragraph 3); and banking, financial and insurance services (paragraph 5). The wording of paragraph 1 reproduces the wording in article 56(1)(a) of the Principal VAT Directive (Council Directive of 28 November 2006 on the common system of value added tax), and corresponding language in the previous Sixth Directive

of 17 May 1977. The language of the paragraph has not been the subject of any consideration or exposition by the ECJ.

36. The argument advanced by Mr. Chacko on behalf of Mr. Tanjoukian runs as follows. He submits that the rights listed in paragraph 1 are all examples of rights that give you permission to do something that someone else would otherwise be able to prevent you from doing. The value of a personal registration mark is that it allows the owner to use the number plates of his car to display something to the world that he would otherwise be prevented from displaying. The fact that the mark also enables the purchaser to fulfil the registration requirements of VERA 1994 is, he submits, merely incidental. He relies on the following statement by HMRC in paragraph 76923 of the Capital Gains Tax Manual:

> "The value of a personalised car number plate lies in the right to use a particular combination of numbers and letters. This right is an intangible asset which is separate from the actual plate, and from the vehicle to which it is attached."

So understood, the purchase of the mark is the purchase of the right to display an exclusive image on the vehicle, and the right is one which is "similar" to those listed in paragraph 1.

37. Mr. Chacko also referred to a number of recent cases in the ECJ to establish the uncontroversial propositions that the economic reality of a supply determines its nature, and that this question is principally considered from the point of view of the recipient or customer. He submits that, where a single supply combines multiple elements, it is the aspects in which the customer is principally interested which determine the nature of the supply. In the present case, the supply was of a single right, but there were two purposes for which the mark was purchased. The first purpose was to obtain permission to apply the mark to a car so that it could be used and driven in the UK. The second purpose was to be allowed to display that registration mark to the world at large when making use of the car. It was the second purpose which, he submits, must have predominated when Mr. Tanjoukian bid no less that £170,000 in order to acquire the mark. Accordingly, the supply should be characterised as the supply of the right to display a certain image and to prevent others from doing so.

38. These submissions were engagingly presented by Mr. Chacko, but I find them unconvincing. Counsel for HMRC submitted, and I agree, that the primary focus of paragraph 1 of Schedule 5 is on recognised forms of intellectual property whereby legal protection is afforded to certain defined products of human skill, endeavour or invention. Copyright, patents and trademarks are of course major and well-recognised forms of intellectual property, and are the

subject of detailed legislation, both domestic and European. Thus, to take only domestic legislation, section 1(1) of the Copyright, Designs and Patents Act 1988 provides that copyright is a property right which subsists in certain specified descriptions of work, namely original literary, dramatic, musical or artistic works; sound recordings, films or broadcasts; and the typographical arrangement of published editions. In relation to patents, section 1 of the Patents Act 1977 provides that a patent may be granted only for an invention in respect of which the following conditions are satisfied, namely, the invention is new; it involves an inventive step; it is capable of industrial application; and the grant of a patent for it is not excluded by certain specified exceptions. In relation to trademarks, section 1(1) of the Trade Marks Act 1994 defines a "trade mark" for the purposes of the Act as meaning any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. Although the scope of the word "licences" is potentially very broad, it seems to me that in this context the reference must be to licences which relate to a recognised form of intellectual property; and that "similar rights" must likewise be rights which either are, or are similar to, some recognised form of intellectual property. Examples of such rights would include design rights, plant variety rights and data protection rights, all of which are the subject of separate statutory codes.

39. By contrast, I think no one would say that the UK system of vehicle registration involves the creation of intellectual property rights in any recognisable shape or form, or even anything analogous thereto. It is true that registration marks are used to distinguish one vehicle from another, but they form part of a legislative scheme the primary purpose of which is to licence and regulate the use of road vehicles in the UK. Each mark is admittedly a unique collocation of letters and numbers, but the marks are not themselves the product of any intellectual or inventive process to which the law affords protection. Their primary purpose is simply to provide a unique identification for any vehicle to which they may be attached in the UK. Nor does the grant of a registration mark confer any private right on its owner to prevent anybody else from using it. If two vehicles bearing the mark "1O" were to be found simultaneously on an English road, it might indicate a fault in the system of vehicle registration, or the other driver might be guilty of using a false number plate, but Mr. Tanjoukian would have no personal right of action against the other driver.

40. That being the essential nature of a vehicle registration mark, I do not see how its characterisation for VAT purposes could be transmuted into something akin to a form of intellectual property merely because there are certain marks which people are prepared to pay good money to acquire, and because such marks can become articles of commerce in one of the ways I have described. Even looking at the matter exclusively from the point of view of Mr. Tanjoukian, the fact remains that what he bought was the right to use a particular

registration mark which was intrinsically no different from any other registration mark attached to any other road vehicle in the UK. Further, even if it were right to regard the purchase of the mark, in circumstances like those of the present case, as involving the purchase of a right to display a particular image on the purchaser's vehicle, the insuperable problem still remains that the right bears no similarity, except perhaps in the most superficial way, to any recognisable form of intellectual property.

41. For these reasons, I consider that Judge Khan clearly came to the correct conclusion when he held that the supply did not fall within paragraph 1 of Schedule 5, and that the appeal on this ground must be dismissed. Mr. Chacko invited me, if I felt any doubt on the matter, to refer the question to the ECJ for a preliminary ruling. I agree that this would have been the appropriate course if there were any real doubt about the point, and I have in mind the well-known guidance on when a national court should refer a question to the ECJ given by Sir Thomas Bingham MR in R v Stock Exchange, ex parte Else Ltd [1993] QB 534 at 545 B-G. I can only say that, in my view, this is one of the cases where "the national court can with complete confidence resolve the issue itself".

42. Although the question whether the supply was made outside the EU is formulated as a separate ground of appeal, I heard no separate argument on it because it was common ground between counsel that the answer to the question turned exclusively on the answer to the first ground of appeal. In other words, if (as I have held) the supply did not fall within paragraph 1 of Schedule 5, there is no other basis upon which Mr. Tanjoukian now contends that the place of supply was outside the EU.

The third ground of appeal: Was the DVLA a taxable person?

(1) Economic Activity

43. The first question that needs to be considered under this head is whether the DVLA was carrying out an economic activity, within the meaning of article 9 of the Principal VAT Directive, when it sold the registration mark to Mr. Tanjoukian. The question arises in the following way. As I have already explained, VAT is charged on the supply of goods or services within the UK. It is only charged where the supply is "made by a taxable person in the course or furtherance of any business carried on by him": VATA 1994 section 4(1). This wording reflects two fundamental principles enshrined in the Principal VAT Directive. The first principle is that VAT is charged only when a supply is made "by a taxable person acting as such": see article 2(1)(a). The second

principle is that a "taxable person" means "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity": see article 9(1). Article 9(1) goes on to state that:

> "Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

44. On the basis of the definition in article 9, it might be thought almost self-evident that the DVLA was indeed engaged in an economic activity when it sold registration marks by auction. Not only was that an economic activity in the normal sense of those words, but it would seem to fall squarely within the express reference to "exploitation of… intangible property for the purposes of obtaining income therefrom on a continuing basis". Nevertheless, Mr. Tanjoukian contends to the contrary, relying for this purpose exclusively on the decision of the ECJ in the Hutchison 3G case. Since this is a pure question of law, and since its resolution does not obviously depend on any evidence not now before the court, I am prepared to entertain the question, even though it does not appear to have been effectively argued, if it was argued at all, below.

45. The applicants in Hutchison 3G were providers of mobile telecommunications services to the public. In March/April 2000 the UK conducted an auction of five licence packages for the use of certain frequency bands to provide third-generation ("3G") mobile communications. The auction was conducted by the Radiocommunications Agency, an authorised agency of the Department of Trade and Industry, on behalf of the Secretary of State. Each of the five applicants bid successfully for one licensing package, and the total amount paid by them was approximately £22.5 billion. The applicants considered that the allocation of licences by the Secretary of State was subject to VAT, and that the sums paid by them were therefore VAT-inclusive, even though the relevant agreements did not refer to VAT. They therefore sought to deduct the sums which they claimed to have paid by way of VAT as input tax against their taxable supplies. This was resisted by the Commissioners of Customs and Excise, who considered that the auctioning of the licences was not a taxable activity within the scope of VAT. In subsequent proceedings before the VAT and Duties Tribunal, a number of questions were referred to the ECJ to determine, in particular, whether the auction of the licences constituted an economic activity within article 4(2) of the Sixth VAT Directive, and whether in carrying out the relevant regulatory activities under Community law the Radiocommunications Agency, as the national competent authority, should be regarded as a taxable person pursuant to article 4(5). The provisions of article 4 of the Sixth Directive which the ECJ had to consider were in materially the

same terms as the subsequent provisions of the Principal VAT Directive to which I have already referred.

46. The first question considered by the Grand Chamber in its judgment was whether the auction of the licences by the Secretary of State constituted an "economic activity" within the meaning of what is now article 9(1) of the Principal VAT Directive. In paragraph 29 of the judgment, the court said it was:

> "…apparent from settled case law that an analysis of the definitions of "taxable person" and "economic activities" shows that the scope of the term "economic activities" is very wide, and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results…"

47. The Court then continued as followed:

> "30. According to the order for reference, in the main proceedings the activity carried out by the Secretary of State consisted of allocating, by auction, rights to use certain frequencies in the electromagnetic spectrum to economic operators for a specified period. At the end of the awards procedure, those operators were issued with the authorisation to exploit the rights thus acquired to set up telecommunications equipment operating in defined parts of the electromagnetic spectrum.
>
> 31. Therefore it has to be established whether the issuing of such an authorisation is to be regarded, by its very nature, as the "exploitation of… property" within the meaning of art 4(2) of the Sixth Directive.
>
> 32. At the outset, it is important to point out that, in accordance with the requirements of the principle of neutrality of the common system of value added tax, the term "exploitation" refers to all transactions, whatever may be their legal form, by which it is sought to obtain income from the goods in question on a continuing basis…
>
> 33. In that regard, it must be stated that the activity at issue in the main proceedings consists of the issuing of authorisations which allow the economic operators who receive them to exploit the resulting frequency use rights by offering their services to the public on the mobile telecommunications market in return for remuneration.

34. Such an activity constitutes the means of fulfilling the conditions laid down by Community law, for the purpose, inter alia, of ensuring the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems and also the efficient management of radio frequencies…

35. Furthermore, it should also be pointed out that… the issuing of such authorisations falls exclusively within the competence of the member state concerned.

36. Thus, an activity such as that at issue in the main proceedings constitutes a necessary precondition for the access of economic operators such as the applicants in the main proceedings to the mobile telecommunications market. It cannot constitute participation in that market by the competent national authority. Only the operators, who are the holders of the rights granted, operate on the relevant market by exploiting the property in question for the purpose of obtaining income therefrom on a continuing basis.

37. In those circumstances, an activity such as that at issue in the main proceedings cannot, by its very nature, be carried out by economic operators. In that regard, it must be pointed out that it is irrelevant that those operators thereafter have a right to transfer their rights to use radio frequencies. Such a transfer, apart from remaining subject to the control of the national regulatory authority responsible for spectrum assignment… cannot be compared to the issuing of an authorisation by the state.

38. Therefore, in granting such an authorisation, the competent national authority is not participating in the exploitation of property, consisting in rights to use the radio-frequency spectrum for the purpose of obtaining income therefrom on a continuing basis. By means of that allocation procedure, that authority exclusively carries out the activity of controlling and regulating the use of the electromagnetic spectrum which has been expressly delegated to it.

39. Furthermore, the fact that the issuing of licences such as those at issue in the main proceedings gives rise to a payment cannot affect the legal status of that activity…

40. Consequently, the issuing of those licences cannot constitute an "economic activity" within the meaning of art 4(2) of the Sixth Directive."

48. I confess that I do not find the reasoning of the ECJ in this passage altogether easy to follow, but it seems to me that there were two main strands of thought which led it to the conclusion that the auction of the third generation licences by the Secretary of State was not an economic activity within the scope of what is now article 9(1) of the Principal VAT Directive. The first strand is that the Secretary of State was performing a statutory function laid down by EU and domestic law in the control and regulation of the telecommunications market, as a necessary preliminary to the exploitation of that market by the successful bidders. The second strand is that, in granting the necessary authorisations, the Secretary of State was not himself participating in that market, but was merely enabling the successful operating companies to do so.

49. It appears to be implicit in this reasoning that the only relevant economic activity was that carried on by the operating companies once they had been granted the necessary licences. One might ask why that should be the only candidate, and why the grant by the Secretary of State of the licences in return for vast sums of money should not itself be regarded as a separate form of economic activity. The answer to this question must, I think, lie in the first of the two strands which I have identified. The ECJ must have considered that, when the Secretary of State was acting in the performance of his core regulatory functions, he was not engaging in a form of economic activity within the scope of VAT, despite the presence of many of the normal indicia of such activity (the sale of valuable intangible rights, on the open market, in return for consideration). Perhaps the point can be put most simply by saying that, in performing his regulatory functions, the Secretary of State was not engaged in an *economic* activity, but a *regulatory* one. It is instructive, in this connection, to note what the ECJ went on to say in paragraphs 41 and 42 of the judgment:

> "41. That finding is not called into question by the argument that, having regard to art 4(5) of the Sixth Directive *[now article 13 of the Principal VAT Directive]*, it is not inconceivable that a regulatory activity carried out by a body governed by public law may constitute an economic activity within the meaning of art 4(2) of that directive, so that that body would have to be considered a taxable person in respect of that activity.
>
> 42. Even if such a regulatory activity could be classified as an economic activity, the fact still remains that the application of art 4(5) of the Sixth Directive implies a prior finding that the activity considered is of an economic nature. It is apparent from the answer given in paragraph 40 of this judgment that that is not the case."

50. On the strength of Hutchison 3G, Mr. Chacko submits that the Secretary of State for Transport is likewise performing a regulatory function when issuing registration marks for road vehicles through the agency of the DVLA, with the result that the grant of a registration mark is not a taxable supply within the scope of VAT. The mere fact that members of the public are prepared to pay large sums for certain registration marks does not alter the analysis, he submits, any more than the fact that the third generation licences were sold for huge sums altered the characterisation of the regulatory activity in Hutchison 3G.

51. Counsel for HMRC did not, I think, dispute that the basic regulatory framework for the registration of road vehicles fell outside the scope of VAT, but she submitted that the sale of particular registration marks pursuant to section 27 of VERA 1994 was a different matter. She submitted that, although regulated by statute, this was in substance an ancillary activity of a profit-making nature, and that the Secretary of State was in effect a participator in the same market for personalised registration marks as are independent dealers in the same field. She submitted that there were three key distinctions from the position in Hutchison 3G. First, when the Secretary of State makes provision for the sale of registration marks pursuant to section 27, he is not acting in a regulatory capacity as such. Secondly, there is a flourishing existing market for the sale of registration marks, and the sale of marks by the Secretary of State pursuant to section 27 is not a precondition of the existence of that market. By contrast, the market for third generation telecommunications licences could only begin to operate once the necessary authorisations had been provided by the Secretary of State. Thirdly, the sales made under section 27 and the 1995 Regulations are similar in nature to the sales made by independent dealers in registration marks. Again by way of contrast, the allocation of the third generation licences by the Secretary of State in the spring of 2000 was an activity of a different nature from subsequent sales or transfers of licences by the operating companies.

52. In my judgment the submissions of HMRC are correct, and there is a clear distinction between the facts of the present case and the relevant circumstances in Hutchison 3G. In particular, I think it is right to regard the sale of registration marks pursuant to section 27 and the 1995 Regulations as a separate economic activity which falls outside the core regulatory functions of the Secretary of State. The primary purpose of this separate activity is not to provide registration marks for the vehicles to which they will be attached, if they are not simply retained as investments by the purchasers, but rather to enable the Secretary of State to participate in the market for distinctive registration marks and to generate revenue for the public purse by so doing. To a limited extent, an analogy may perhaps be drawn with the issue of commemorative postage stamps by the Post Office, which are primarily aimed at collectors even though the stamps may be used to frank letters in the ordinary way. The sale of registration marks in my judgment bears no

significant similarity to the regulatory activity considered by the ECJ in Hutchison 3G, and I therefore conclude that nothing stands in the way of the straightforward analysis that in selling the registration marks the Secretary of State, through the DVLA, was carrying on an economic activity within the meaning of article 9.

53. Mr. Chacko again invited me to refer the question to the ECJ for a preliminary ruling if I felt any real doubt about the answer to it. As before, I decline the invitation, because I consider the answer to be clear. I would add that the case is, in my view, anyway unsuitable for a reference to the ECJ in the absence of any proper findings of fact by the FTT. An essential preliminary to any reference would be a remitter to the FTT for findings of fact to be made, or possibly the production of an agreed statement of facts by the parties. I make it clear, however, that my primary reason for declining to make a reference is simply that I consider the issue, on the merits, to be clear.

(2) Other arguments

54. Mr. Tanjoukian wishes to rely on an alternative argument based on article 13 of the Principal VAT Directive, which so far as material provides as follows:

> "1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition."

55. The proposed argument begins with the proposition that the DVLA is a "body governed by public law" within the meaning of the first limb of article 13(1), and that when it grants licences and registrations for motor vehicles it is engaged in that activity as a public authority, again within the meaning of article 13(1). If that proposition is correct, the effect of the first limb of article 13(1) is that the DVLA is not to be regarded as a taxable person, unless the second limb of the article is engaged. That raises the question whether the treatment of the DVLA as a non-taxable person "would lead to significant distortions of competition". Mr. Tanjoukian submits that such treatment would not lead to any significant distortion of competition, so the DVLA is a non-

taxable person by virtue of article 13, even if (as I have held) it was engaged in an economic activity when it sold the registration mark to Mr. Tanjoukian.

56. HMRC take issue with this argument on its merits, but their primary submission is that it is an entirely new point which Mr. Tanjoukian should not be permitted to raise in the Upper Tribunal because, if it had been advanced below, it would have been necessary for the parties to adduce detailed evidence about the nature of the activities in which the DVLA was engaged, the terms of its relationship with SMA, the extent and nature of the wider market in registration marks, and the potential competition issues which might arise if the DVLA alone were to be free to sell such marks without having to charge the buyer VAT.

57. I accept HMRC's primary submission. In my view this is indeed an entirely new argument, because there was no reference to it in the November 2009 emails, and it is also separate from the argument based on Hutchison 3G which Mr. Hovan Tanjoukian says he at least tried to raise before the FTT, and which I have now considered and rejected. Accordingly, the position is governed by the principles relating to the raising of new points of law on appeal to which I have already referred: see paragraphs 22 to 24 above. It appears to me clear beyond argument that, if this argument had been raised below, it would almost certainly have affected the conduct of the case and the evidence which the parties would have adduced. In particular, I do not see how the competition issues could possibly have been decided in the absence of extensive factual, and probably also expert, evidence.

58. It is no answer to this point, in my judgment, to say that the case could now be remitted to the FTT for further findings of fact to be made, coupled with liberty to adduce new evidence. If that were a sufficient answer, the content of the rule in cases of the present type would become virtually non-existent. There is a strong public interest in finality in litigation of all kinds, and one facet of this is that parties are not normally permitted to raise on appeal arguments which they could perfectly well have run below, but for whatever reason failed to do so. Where the new point is a pure question of law, and where its admission on appeal would not occasion any injustice of the type referred to by Rix LJ in Lowe v W Machell Joinery Ltd at [81], the interests of justice will normally favour the grant of permission to argue the point. But the position is very different where the conduct of the trial below either would, or might, have been significantly different if the new point had been taken. In those circumstances, the balance will nearly always come down the other way and permission to argue the new point will be refused.

59. I bear in mind that Mr. Tanjoukian was resident abroad at the time of the hearing before the FTT, and that he lacked professional representation. Nevertheless, he was represented by his son, who could and did raise a

number of pertinent arguments in correspondence. It is also clear that he is a man with sufficient resources to engage lawyers to act for him, if he chooses to do so. Indeed, the fact that he spent over £170,000 on a personalised number plate speaks for itself in this regard. Taking everything into account, I can see no good reason to depart from the salutary general rule in the present case, and I therefore refuse to grant permission to Mr. Tanjoukian to run this alternative argument.

Conclusion

60. For the reasons which I have given, despite the able arguments of Mr. Chacko on his behalf, Mr. Tanjoukian has been unable to demonstrate any error of law in the conclusion of the FTT, and his appeal on the three grounds argued before me must therefore be dismissed. The ultimate outcome of the appeal will depend on the adjourned fourth ground of appeal relating to legitimate expectation: see paragraph 20 above.

TRIBUNAL JUDGE

MR JUSTICE HENDERSON

RELEASE DATE: 19 OCTOBER 2012