



TC06403

Appeal number: TC/2016/06538

VAT – Value Added Tax Act 1994, sections 4 and 73(1) – whether or not the appellant made supplies of silver ingots – no – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

QUALITY ENGINES DIRECT LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER
MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE RICHARD CHAPMAN
MRS SHAMEEM AKHTAR**

**Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA
on 8 December 2017**

Mr Alan Rashleigh, Chartered Accountant, for the Appellant

**Mr Bernard Haley, Presenting Officer, instructed by the General Counsel and
Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

Introduction

5 1. This is an appeal against a VAT assessment dated 4 August 2016 in the sum of £60,052 for the period 04/16 (“the Assessment”) issued pursuant to section 73(1) of the Value Added Tax Act 1994 (“VATA 1994”). The Assessment was in respect of two supplies of silver ingots in the total sum of £360,374 (“the Silver”). The dispute is a narrow one: whether or not the appellant, Quality Engines Direct Ltd (“QEDL”) supplied the Silver.
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Background

2. The broad factual background was not in dispute. QEDL carries on business in the renovation and restoration of engines for road vehicles. It operates from a garage in Oldham and has been registered for VAT since 1 December 2009. The director of
15 QEDL is Mr Jahinger Rafiq. The shareholders of QEDL are Mr Rafiq (with 25 shares), Mr Rafiq’s father (with 75 shares) and Mr Rafiq’s mother (with the remaining 75 shares).

3. HMRC interviewed Mr Rafiq about QEDL’s affairs on 23 May 2016 and 13 July 2016. This arose out of the fact that HMRC had become aware of two invoices (“the
20 Invoices”) to Microring Limited (“Microring”), which stated on their face that they were from QEDL and were for what was said to be silver “scrap bars”. The first invoice was dated 5 February 2016 and was in the gross sum of £177,660. The second invoice was dated 26 February 2016 and was in the gross sum of £182,714. Mr Rafiq maintains that these invoices are not genuine and that QEDL did not trade with Microring.

4. In the course of these interviews, Mr Rafiq explained QEDL’s involvement with
25 Microring. He told HMRC that he was selling QEDL’s business and had been approached by somebody called Mr Healey who offered to purchase the shares for £5,000. However, Mr Healey immediately treated QEDL as his own and made payments into QEDL’s bank account through a company called Microring Limited
30 (“Microring”). Mr Rafiq objected to this and was told by Mr Healey to whom to make repayments and in what sum. QEDL’s bank account reveals the following transactions:

- (1) A credit on 5 February 2016 from Microring in the sum of £177,600.
- (2) A debit on 8 February 2016 to Progress-Consul 7 (“Progress”) in the sum of £175,417.40.
- 35 (3) A credit on 26 February 2016 from Microring in the sum of £182,714.40.
- (4) A debit on 1 March 2016 to Progress in the sum of £180,000.

5. Mr Rafiq also informed HMRC that QEDL did supply the Silver and that the
Invoices were not genuine. He said that QEDL did not trade in silver. In early February 2016, two heavy crates arrived at QEDL’s premises. These were unsolicited and so
40 QEDL did not sign for them. Mr Healey subsequently rang to ask if the loads had

arrived. Mr Rafiq said that he was not accepting them for Mr Healey and required them to be removed. They were then removed.

6. HMRC did not accept these explanations and reached the view that the Silver was supplied by QEDL. This ultimately resulted in the Assessment.

5 **The Appeal**

7. QEDL appeals against the Assessment by a notice of appeal dated 23 November 2016. The grounds of appeal (with typographical errors corrected) are as follows:

10 “The Commissioners’ assessment is based on a false assumption that the goods in question were owned by the appellant. In fact they were sent to them unsolicited and they were still in an unopened crate when the visiting officers attended the premises of the appellant. They were never owned by the appellant, therefore any assessment has no validity.

15 The Commissioners have alleged that the appellant had not done any due diligence checks, whereas they were informed that the checks that the appellant had undertaken were satisfactory and that they were in the process of informing the owner of the goods accordingly (this was within the period of only a few days), but before that action could be formalised the unsolicited goods (and the visiting officers) arrived.”

20 8. Notwithstanding the grounds of appeal, the parties now agree that the loads were not at QEDL’s premises at the time of HMRC’s visit.

25 9. HMRC’s statement of case and skeleton argument suggest that QEDL argues that the Assessment was not made to HMRC’s best judgment. However, this does not form part of the grounds of appeal and did not form part of Mr Rashleigh’s opening or closing submissions. There was no dispute that, if we find that the Silver was supplied by QEDL, QEDL had thereby made taxable supplies. Further, Mr Rashleigh made it clear in his opening submissions that HMRC’s calculation of the VAT was not in dispute. The parties agreed, therefore, that the appeal simply turns upon whether or not QEDL supplied the Silver.

The Legal Framework

30 10. Section 4 of VATA 1994 deals with the scope of VAT on taxable supplies as follows:

“(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

35 (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.”

11. Section 73(1) of VATA 1994 deals with assessments following the failure to make returns as follows:

5 “(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.”

12. The parties were agreed that the burden of proof is upon QEDL to establish that QEDL did not supply the Silver. In turn, the standard of proof is that of the balance of probabilities.

10 **Findings of Fact**

The Evidence

13. We read witness statements and heard oral evidence from Mr Rafiq and Mr Andrew Schofield (QEDL’s external accountant) on behalf of QEDL and from Mr Tony Booth (the decision making officer) on behalf of HMRC. We make it clear at the
15 outset that we found all three witnesses to be honest, helpful and credible.

14. Mr Rafiq repeated and adopted the evidence that he had given HMRC and as set out in paragraphs 2 to 5 above. He also amplified this during cross-examination and in response to our questions. In particular, we note the following additional evidence.

15. Mr Healey had telephoned Mr Rafiq after becoming aware that QEDL’s business
20 was for sale. Mr Healey then visited QEDL’s premises. However, at that point, Mr Healey told Mr Rafiq that he did not want to purchase the stock and instead only wanted QEDL as a shell company and would pay £5,000. No agreements were signed, although Mr Rafiq gave Mr Healey QEDL’s bank details so that the purchase price could be paid. Mr Rafiq wanted this to be formalised by his accountant. He also wanted his accountant
25 to carry out due diligence, for which purpose Mr Healey gave him a copy of his driving licence. Two further meetings were arranged in order to progress the purchase but these were aborted when Mr Healey did not attend either of them.

16. Mr Rafiq said that he was made aware of the first payment into QEDL’s account by his employee. He then got a call from Mr Healey saying that money had been paid
30 into the account as he owns the company and it was now his. Mr Rafiq said that he did not want it in his account and so Mr Healey gave him the details as to whom to pay it to and as to how much, with the remainder being left in the account as a deposit towards the £5,000 purchase price of the shares. The same then happened with the second payment into QEDL’s account.

35 17. Mr Rafiq also gave further evidence about the Silver. He was not present when it arrived. His employee rang him and asked what to do. Mr Rafiq told him not to accept anything as he was not expecting any deliveries. Mr Healey subsequently telephoned Mr Rafiq to ask if a delivery had arrived for him. Mr Rafiq said that it had and told Mr Healey that he could not use QEDL as his own until the deal had been completed. He
40 told Mr Healey to remove the crates, which was done later that day. As the crates were left on the main street rather than the garage, Mr Rafiq did not know who picked them

up. He said that this was the last contact he has had with Mr Healey. The balance of the monies paid into QEDL's account (£4,897.03) remains there as Mr Rafiq said that he did not know what to do with it.

5 18. Mr Rafiq was adamant that the Invoices were not his and highlighted various inconsistencies between them and the genuine invoices included in the bundle by way of comparison. Their layout is different, the wording is different, the email address is different and the invoice numbers are in different formats. Mr Rafiq accepted that an electricity invoice which was apparently sent to Microring was genuine. Mr Rafiq had no explanation as to how Microring came to be in possession of this. Although he
10 hypothesised that Mr Healey could have taken it from the garage when he visited, he could not positively say that he did.

15 19. Mr Schofield's first involvement in these matters was to carry out some due diligence in respect of the sale of QEDL to Mr Healey. At that point, he was not concerned about the purchase of QEDL as a shell company rather than as a going concern as he understood that some purchasers may be keen to obtain a credit history. However, upon learning that Microring had made payments into QEDL's account and that there was no apparent connection between Mr Healey and Microring, he told Mr Rafiq to (as he put it) "walk away from the deal".

20 20. Mr Schofield also explained that he did not include the payments in or out in the accounts and raised an internal invoice for the balance as a service invoice. QEDL then paid VAT on this internal invoice. He noted that he had asked HMRC how to deal with this but HMRC refused to tell him. The balance was not simply returned to Microring as Mr Schofield advised that QEDL should have no further dealings with Microring and that there could be a fraud.

25 21. Mr Booth assisted in explaining the basis of his decision. During the course of cross-examination, he was taken to an internal memorandum following his visit in which he had said as follows:

30 "My main concern is that although Mr Rafiq's version of events does seem to add up and is quite plausible, however, there is no real physical evidence to back this up. I do not feel that there is sufficient evidence to enable HMRC to raise an assessment on the £355,417.37 for the alleged onward sale of the goods based on the evidence that I have seen to date."

22. Mr Rashleigh put to Mr Booth that this remained the proper conclusion. Mr Booth replied that he retained a number of concerns when he looked at the matter again.

35 23. Mr Booth said that there was no evidence of any supply of the Silver to QEDL other than the fact that they arrived and that payments were made out of the account.

QEDL's Submissions on the Facts

24. Mr Rashleigh submitted that the Silver was not supplied by QEDL. In short, he said that Mr Rafiq's explanation should be accepted; QEDL had no dealings with

Microring and the payments by Microring and out to Progress were engineered by Mr Healey.

HMRC's Submissions on the Facts

5 25. Mr Haley submitted that, on the balance of probabilities, QEDL had made supplies of Silver. He said that Mr Rafiq's explanation was not credible, there was no formal paperwork to substantiate the sale of the shares, it is puzzling as to why the monies would have been paid into QEDL's account, it is not clear why the crates were attributed to Mr Healey, and the balance of the payments has been retained.

Our Findings

10 26. We find that, on the balance of probabilities, QEDL did not make supplies of the Silver. This is for the following reasons.

27. First, we accept Mr Rafiq's evidence that the Invoices are not genuine. They are wholly different to QEDL's genuine invoices (which HMRC did not dispute). The use of a different email address and logo are particularly striking.

15 28. Secondly, we accept Mr Rafiq's evidence that the Silver arrived unsolicited, that he told Mr Healey to remove it and that he said that he could not use the company in this way. We agree that it is somewhat convenient that Mr Healey telephoned Mr Rafiq after the Silver arrived. However, this is consistent with the process being co-ordinated by Mr Healey.

20 29. Thirdly, we accept Mr Rafiq's evidence that the movements in QEDL's account represent Mr Healey using QEDL for his own purposes rather than representing payment to QEDL by Microring for the Silver. We believe the central strand running through Mr Rafiq's evidence that he did not ask Mr Healey or anybody else to deposit the monies in QEDL's account and that he obtained Mr Healey's instructions as to where to pay it back to. It must be said that we do have our concerns as to those transactions. Mr Rafiq was repaying the funds to a party he had never heard of, which was different to the company which paid it into QEDL's account and had no apparent connection to Mr Healey. He did this without satisfying himself as to whether or not there was a risk of involving himself or QEDL in money laundering or other fraudulent activities. However, we make no findings in this regard; it is sufficient for the purposes of this appeal that, whatever the true purpose of these receipts and payments were, they did not represent payment to QEDL from a customer, or payment by QEDL to a supplier, in respect of the Silver.

30 30. Fourthly, we accept Mr Haley's diplomatically put submission that there are features of Mr Rafiq's explanation which are puzzling. In particular, the fact that payment was made to QEDL when the purchase was said to be of the shares, the absence of any paperwork, the fact that Mr Healey treated QEDL as his own from the outset, the fact that Mr Healey did not call for the whole sums to be returned, the retention of the £4,897.03, and Microring's unexplained possession of QEDL's electricity bill. However, Mr Rafiq (particularly when advised by Mr Schofield) had his own concerns about the deal and told Mr Healey not to treat QEDL as his own. In any

event, these puzzling features do not themselves evidence a supply of the Silver by QEDL and, on the balance of probabilities, are overridden by the features and findings which we have set out in paragraphs 27 to 29 above.

Decision

5 31. Given the common ground between the parties as to the issues in dispute, it follows from our finding of fact that QEDL did not supply the Silver that there was no taxable (or any) supply by QEDL and so the appeal must be allowed.

10 32. Before concluding, we make the point that we do not criticise Mr Booth for making the Assessment on the facts available to him. We have had the benefit of hearing oral evidence and reaching our conclusions on the submissions as presented by Mr Haley and Mr Rashleigh. However, as set out above, the question of best judgment was not in issue between the parties and is in any event superseded by our finding that there were no supplies of the Silver by QEDL.

15 33. 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
20 and forms part of this decision notice.

**RICHARD CHAPMAN
TRIBUNAL JUDGE**

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RELEASE DATE: 21st MARCH 2018