Stuart Hathaway
VAT Litigation Team (A2)
Solicitor's Office
HM Revenue & Customs
1st Floor North SW Wing, Bush House
Strand, London WC2B 4RD
Direct Dial : 03000 586005
Email:
Stuart.Hathaway@hmrc.gsi.gov.uk

Irwin Mitchell LLP
40 Holborn Viaduct
London EC1N 2 PZ

Tel 03000 586005

Fax 03000 586908

Email Stuart.Hathaway@hmrc.gsi.gov.uk

www.hmrc.gov.uk

DX

Date 12th April 2019
Our Ref SH/SLR
Your Ref AIR/W1J/05333298-00000001

Dear Sirs

Your client Mr J Maugham QC and Good Law Project Ltd
Letter before claim for judicial review

Further to our letter of 18th March we now respond to your original letter dated 6th March.

The Claimants

1. Jolyon Maugham QC, a tax barrister, director of Good Law Project Ltd, and private citizen.
2. Good Law Project Ltd, a company limited by guarantee, self-described as funded by membership subscriptions and donations and not for profit.

The Defendant

The Commissioners of Her Majesty's Revenue and Customs, ("HMRC").

Matter challenged

Your letter of 6th March summarises the matter challenged as "HMRC's on-going

failure to raise VAT assessments against Uber under the VAT Act 1994" ('Uber' in this context referring to the company Uber London Ltd). Before we respond to the grounds of challenge that you set out in your letter, it is worth making a number of initial observations about the matter your clients seek to challenge.

Sector wide issue

Your letter focuses on the VAT analysis of Uber's business model. We note at the outset that in fact there is a growing sector providing (or, purporting to provide, under your analysis) intermediary services through technology using online or app-based services. More particularly, we should point out that under modern conditions it is quite common for passengers to book rides from various parties using internet-based contact systems and any conclusions that the Commissioners reach as to how supplies of transportation services are made and consequential tax liabilities are likely to have implications for other providers and not simply Uber.

HMRC activity to date

It is a matter of public knowledge that the Commissioners have been monitoring the online or app-based intermediary sector for some time. You will note that in the evidence given to the Public Accounts Committee on 6 November 2017 by Jon Thompson, HMRC's Chief Executive and Permanent Secretary, and Jim Harra, then HMRC's Director General of Customer Strategy and Tax Design, which you appended to your letter of 6 March, the following points were clear. First, that the Commissioners were at that stage already seeking advice from leading counsel. Second, that the Commissioners were monitoring legal developments in this area, including both the progress of the *Aslam* case which you cite through the appeal courts and a number of then-anticipated CJEU decisions. Third, that this linked to wider activity on the Commissioners' behalf that stretched back further over time, including the 2014 Supreme Court case of *Secrets Hotels 2* [2014] UKSC 16 and further litigation thereafter (in our letters of 14th and 22nd March we provided you with the details of the cases cited). Last, as noted above, that this issue goes more widely than the potential liability of one entity, Uber.

As we are referring to the evidence given at the Public Accounts Committee it is opportune to correct a misunderstanding on your clients' part as to one element of that evidence. You state that in answering question 92 Jim Harra suggested waiting for the Supreme Court decision in *Aslam* before raising assessments. As you note in paragraph 44 of your letter, Mr Thompson had (shortly before) referred to the *Secret Hotels* Supreme Court decision, and Mr Harra was clearly referring to that case.

You are also aware from our previous letters that the Commissioners continued to seek advice and that a conference took place on 27 March 2019, which had been arranged prior to receipt of, and independently from dealing with, your pre-action correspondence. For the avoidance of doubt the Commissioners do not waive privilege in respect of their discussions with counsel.

Standing

We acknowledge that in *R (National Federation of Self-Employed and Small Businesses Ltd) v Inland Revenue* [1981] AC 617 and *R (UK Uncut Legal Action) v HMRC* [2012] EWHC 2017, the courts have accepted in principle that public pressure groups may in appropriate cases have standing to bring actions in judicial review against HMRC in respect of its handling of individual taxpayers' affairs. However, we

observe that cases in which such a group is found to have standing are rare and in our view, confined to a very limited class of cases.

We do not accept that Mr Maugham has standing in his own right to bring a judicial review. We are not aware of any instances in which the court has held that one private citizen has standing to complain about the tax affairs of another.

We also reserve the right to oppose any claim on the basis of lack of standing on the part of the Good Law Project Ltd.

Response to proposed claim

Taxpayer Confidentiality and interaction between HMRC and Uber

You will be aware that the Commissioners are generally prevented from disclosing any information about the tax affairs of individual taxpayers by s.18(1) of the Commissioners for Revenue and Customs Act 2005 ("CRCA"), which is backed up by a criminal offence provision in s.19. Therefore, while s.18(2)(c) CRCA does permit the Commissioners to make disclosure for the purpose of civil proceedings relating to their functions, at this pre-action protocol stage, the Commissioners are mindful of their obligation to consider whether, and if so what, information may lawfully be disclosed for the purpose of those potential proceedings.

For present purposes, in light of the challenge as articulated in your letter, we point out that it is already documented in the witness evidence of Francois Pascal Chadwick in the related claim by Mr Maugham in the High Court, that (1) as at October 2017 HMRC and Uber were in regular dialogue relating to its tax affairs, including VAT, and (2) that that dialogue was continuing in January 2019.

VAT analysis

At the time of writing, the Commissioners are continuing their investigations into and consideration of the facts and are not yet in a position to reach a firm conclusion as to the VAT implications of Uber's business model. In light of the response below to your clients' proposed grounds for judicial review, we consider it is neither necessary nor appropriate (in the light of s.18 CRCA) at this stage to set out the Commissioners' possible analysis of the correct VAT position on Uber's operations and transport services supplied by or via its drivers. In particular we consider it would be objectionable, as a matter of public policy, good administration and fairness to the party concerned, to disclose to the public at large, let alone private individuals or groups, any view of another party's tax liability, particularly before that view had been notified to that party and it had had the opportunity of responding.

However, we will make the following observations.

As we pointed out in our letter of 14th March, the potential VAT liability of supplies by internet-based providers, especially in the context of transport services but not limited to those, is an extremely complex matter. As is clear from the above, it is a matter which the Commissioners have had under active consideration for some time.

In paragraph 30 of your letter dated 6th March it is stated "The Claimants consider it clear (*sic*) that where someone books a vehicle for a journey through Uber's app, Uber is making a taxable supply of transportation services for the purposes of the VAT Act 1994". The Claimants may take that view, but the analysis set out in paragraphs 31 to 34 of your letter is very limited. The *Aslam* case concentrated on

whether drivers are 'workers' for the purposes of entitlement to protections under employment law (paragraph. 33); the '*Uber Spain*' case concerned whether a Spanish company (Uber Systems Spain SL) fell within the definition of providing 'services in the field of transportation' (as opposed to 'information services') for the purpose of Spanish regulatory requirements (paragraph 34). Those decisions (in particular the positive findings of the Court of Appeal in *Aslam* approving the judgment of the Employment Appeal Tribunal) do throw some light on whether the contracts between Uber LL, the drivers and passengers, reflect the economic reality, but it remains necessary to determine what the economic reality is. It should be obvious, given that in the Court of Appeal there was a split decision and Underhill LJ saw no proper basis to say that the contracts did not reflect economic reality, that the matter is not simple and straightforward.

We also observe that there is no analysis in your letter, or even recognition, of the fact that the Uber App is operated by Uber BV which is a company based in the Netherlands, and not by Uber LL. The Commissioners have yet to determine what the implications of that may be for who is making supplies to passengers – or indeed any other taxable supplies.

In paragraph 35 of your letter you refer to "a number of further decisions around the world in which the Uber group has been supplying transportation services as principal and engaging drivers to supply services to it". We are not clear what cases you are referring to and it may assist us in reaching our conclusions if you were to provide us with copies. We observe, however, that what one company in the 'Uber group' does in a different jurisdiction may provide little information about what another company is doing within the UK.

In paragraphs 14 and 18 of your letter you describe the two methods for utilising Uber's services that your client Jolyon Maugham used. You go on to contrast the contractual position relating to the two models. We would be grateful if you would confirm whether your analysis at paragraph 31 et seq. is considered to be applicable to both models?

Protective Assessments

Assessments may only be raised on a 'best judgement' basis. 'Best judgement' means that the Commissioners must have reasonable grounds for believing that there is a liability as a matter of law and that a particular amount is due. We do not agree that *Courts plc v Customs and Excise Commissioners* [2004] EWCA Civ 1527, is authority for the general proposition that the Commissioners may assess where they have not yet reached a concluded view that a liability arises. On the contrary, the Commissioners cannot make assessments on the basis that there may or may not be a liability, but they are unsure either way; that could not be a 'best judgement' conclusion and any assessment made on such a speculative basis would be liable to be struck down as unlawful. That is, of course, quite different to the situation where the Commissioners have concluded that there is a liability but that it may be justified on alternative bases, even if those different arguments give rise to different figures.

Response on articulated grounds of judicial review

It follows from the paragraph above that we reject the Claimants' assertion that the Commissioners have failed to properly understand the nature of their powers to raise assessments.

More generally, in response to the further three articulated grounds of a challenge (irrelevant factors; adherence to published policy; irrationality), we reject entirely the assertions in paragraph 47 of your letter that the Commissioners are acting unlawfully and unreasonably by not issuing assessments before taking proper steps to consider the facts and reach an informed view on how the law applies to those facts. Rather, the Commissioners continue to take the entirely rational course of further investigating the factual and legal position, in line with their published policies, taking account of legal developments, including now considering the position in the light of the Court of Appeal judgment in *Aslam*.

Any proceedings issued by your client before the Commissioners have completed its analysis and determined their appropriate course of action will therefore be defended.

The Action required to be undertaken and Costs

When the Commissioners have reached a conclusion as to any liability the appropriate action will be taken, but that will be a result of them carrying out their statutory responsibilities and not as a result of any steps taken by your clients. Therefore any proceedings brought by your clients at this stage would be entirely premature and will be strongly resisted; if the Commissioners are successful or proceedings are started and abandoned then the Commissioners reserve the right to seek indemnity costs on the basis that to bring proceedings in these circumstances is wholly inappropriate.

Interested Parties

At present the Interested Party is Uber London Ltd. We understand that you are in contact with them. For the reasons already given we are uncertain whether Uber BV may also be an Interested Party.

ADR proposals

Do your clients have any suggestions as to how the Commissioners might engage in ADR which could be compliant with the provisions of the CRCA?

Response to request for further info

Already supplied.

Address for service

As previously advised, judicial review proceedings are required to be served on HMRC at the Solicitor's Office address above; and should be marked for the writer's attention.

Yours sincerely

Stuart Hathaway

STUART HATHAWAY
For the Commissioners