

IN THE FIRST TIER TRIBUNAL

(TAX CHAMBER)

BETWEEN:

JOLYON MAUGHAM QC

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondent

GROUNDS OF APPEAL

I INTRODUCTION

1. The Appellant is a self-employed barrister who carries on business in the supply of legal services. He is registered for VAT under VAT registration number 714441558. He charges and accounts for VAT on his supply of legal services to third party customers.
2. The Appellant appeals against the decision of the Respondent ("HMRC") dated 6 November 2017 at page [1] of the Annex ("the Decision") pursuant to section 83(1) of the Value Added Tax Act 1994 ("VATA"). The Decision concerns the correct tax treatment of a supply of Uber private minicab services made on 15 March 2017 to the Appellant ("the Supply"). The Supply was made in the course of the Appellant's business and for the purposes of making taxable supplies of legal services (the minicab took him from his Chambers to a meeting with his client).

3. In the Decision, HMRC determined (a) that VAT was not chargeable on the Supply and (b) that the Appellant was not entitled to deduct any input tax in relation to the Supply.

II BACKGROUND FACTS

4. The Appellant submitted his quarterly VAT return for the period 05/17 electronically on 30 June 2017. On his VAT return he claimed to deduct input tax in respect of supplies purchased in the course of his business. As explained in his letter of 30 June 2017 at page [2] of the Annex, among the sums for which he claimed input tax recovery was the sum of £1.06, being the VAT fraction of the price of the Supply. The fare was £6.34.
5. The Appellant was supplied with a receipt for the Supply (page [3] of the Annex), but that receipt was not a VAT receipt for the purposes of regulation 13 of the Value Added Tax Regulations 1995 (“the VAT Regulations”). The Appellant, considering that the Supply was made by Uber London Limited (“ULL”) (registered under VAT registration number 140668515), had written to ULL requesting the issue of a VAT invoice. But ULL had refused on the basis that, according to ULL, the Supply was not made by it, but instead by the driver, who was not registered for VAT.
6. In light of that refusal, the Appellant’s letter of 30 June 2017 invited HMRC to waive the requirement under regulation 29(2) of the VAT Regulations that a taxable person claiming to deduct input tax must hold a VAT receipt for that purpose.
7. HMRC replied on 7 August 2017 (page [4] of the Annex) stating:

“Based upon the documentation you have attached, we cannot [use our powers of discretion pursuant to Regulation 29(2)] because in our opinion the attached invoice is not a valid VAT invoice in accordance with the conditions set out in Regulation 13 of the [VAT Regulations], nor have you “provide[d] such other evidence of the charge to VAT” as the Commissioners would require to exercise this discretion.

However, if you believe you can provide additional evidence to show that VAT was charged then are willing to reconsider our decision.”

8. The Appellant had in his letter of 30 June acknowledged that the receipt that he had been provided with was not a VAT Invoice for the purposes of regulation 13 of the VAT Regulations. So HMRC's response appeared to be seeking further evidence that the supply made to the Appellant included a charge to VAT.
9. The Appellant replied to HMRC by letter dated 1 September 2017 (page [5] of the Annex). Attached to that reply was the Appellant's letter before action of 21 March 2017 which he had served on ULL and ULL's reply dated 3 April 2017. The Appellant's letter went on to note the following points that arose from that pre-action correspondence: -
 - a. there was, and could be, no dispute about the fact of the Supply to the Appellant or as to the price that was paid;
 - b. there was, and could be, no dispute that if the Supply was made by ULL (a taxable person registered for VAT) then the price paid would have included an amount of input tax of £1.06 (corresponding to the amount of output tax for which ULL would on that basis be obliged to account for to HMRC); and
 - c. the only reason why there was no VAT invoice recording VAT in the amount of £1.06 was that ULL denied that it made the Supply, contending that the Supply was instead made by the individual driver (who was not registered for VAT).
10. Each of those contentions were established by the evidence provided by the Appellant to HMRC by his letter of 1 September 2017. The letter thus stated:

"Given those facts...I can with respect see no basis for you to decline to exercise your discretion:

 - (1) If you agree with Uber that the supply is made by the driver then the appropriate course is for you to raise an assessment against me under section 73(1) Value Added Tax Act 1994; and*
 - (2) If you agree with me that the supply is made by [ULL] then you ought to exercise your discretion to allow my claim for input tax."*

11. HMRC replied to the Appellant by way of the Decision on 6 November 2017. The Decision stated:

“Having carefully considered this further evidence and your argument, we have concluded that these documents cannot in our view be read as demonstrating that VAT has been charged or was payable. As we set out in our previous letter, the legal position is that we can only provide a refund on the basis of a valid VAT invoice or other sufficient evidence of the VAT charge.”

12. It is to be noted that: -

- a. the letter did not suggest that there was any basis for the Decision other than that (in HMRC’s view) the supply was not subject to VAT;
- b. the letter did not indicate any disagreement with the Appellant’s contention (see §§9 and 10 above) that the only rational basis for the conclusion reached in the Decision could be that the supply was not subject to VAT; and
- c. the Decision determined that the Claimant was not entitled to deduct any input tax in relation to the supply.

13. In consequence, the Decision is a decision subject to appeal under section 83(1) of VATA, being: -

- a. a decision as to the VAT chargeable on the supply (section 83(1)(b); and
- b. a decision as to the amount of input tax to be credited to the Claimant in relation to the supply and the proportion of input tax allowable (section 83(1)(c) and (e)). The Appellant refers, in particular, to *Kohanzad v Customs and Excise Commissioners* [1994] STC 967 and subsequent decisions following that case.

14. It is noted that HMRC have, in breach of section 83A of VATA, failed to offer the Appellant the right to a review of the Decision. However, the Appellant is content to waive his right to a review and to proceed directly to an appeal to this Tribunal.

III APPLICABLE LAW

15. Article 167 of the Principal Vat Directive (“PVD”) provides that *“A right of deduction shall arise at the time the deductible tax becomes chargeable.”*

16. Article 168 of the PVD provides:

“In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;”

17. Section 25(1) and (2) of VATA provides:

“(1) A taxable person shall –

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting periods”) at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.”

18. Section 26(1) and (2) of VATA provides:

“(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business –

(a) taxable supplies;

(b) (...)

(c) (...)"

19. Section 83(1) of VATA provides that an appeal shall lie to the tribunal with respect to:

"(b) The VAT chargeable on the supply of any goods or services, on the acquisition of goods from another member State or, subject to section 84(9), on the importation of goods from a place outside the member States;

(c) the amount of any input tax which may be credited to a person;

(..)

(e) the proportion of input tax allowable under section 26;"

20. Section 83A of VATA is entitled 'Offer of review' and provides:

"(1) HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.

(2) The offer of the review must be made by notice given to P at the same time as the decision is notified to P."

21. Regulation 13 of the VAT Regulations materially provides:

"(1) Save as otherwise provided in these Regulations, where a registered person –

(a) makes a taxable supply in the United Kingdom to a taxable person

...

he shall provide such persons as are mentioned above with a VAT invoice

...

(5) ... the documents specified in paragraphs (1... above shall be provided within 30 days of the time when the supply is treated as taking place under section 6 of the Act, or within such longer period as the Commissioners may allow in general or special directions."

22. Regulation 29 of the VAT Regulations relates to claims for input tax and materially provides:

“(1) Subject to paragraph (1A) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable

(...)

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of –

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;

...

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, or provide, such other evidence of the charge to VAT as the Commissioners may direct.”

IV GROUND OF APPEAL

Jurisdiction

23. The jurisdiction of this Tribunal has been explained above (§13).

Substance

24. There appears to be no dispute: -

- a. that the Supply was made at the time and for the consideration set out in the Appellant’s letters;
- b. that the Supply was of services (private minicab services) that are standard-rated;
- c. that if the Supply was made (as the Appellant contends) by ULL then the price paid for the Supply included £1.06 of VAT, for which ULL was liable to account to HMRC and which the Appellant was entitled to deduct as input tax; or

d. that the Supply was made to the Appellant in the course of his business and for the purpose of making taxable supplies (supplies of legal services to his client).

25. As explained above, the only basis (and certainly the only rational basis) for the Decision is that the Supply was not made by ULL but by the driver.

26. However, the Supply was made by ULL and not by the driver.

27. The contractual arrangements between ULL, its drivers, and customers were analysed in *Aslam v Uber BV [2017] I.R.L.R. 4*. In order to reach its conclusion that ULL's drivers were workers for the purposes of employment legislation, the Employment Tribunal ("ET") held that the true analysis of those contractual arrangements was (at §92) that: -

Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits.

28. That conclusion was upheld by the Employment Appeal Tribunal ("EAT") in *Uber BV v Aslam* Appeal No: UKEAT/0056/17/DA, which held at §109 that: -

The ET was not bound by the label used by the parties; in the same way as the first instance tribunals in the VAT context, the ET was concerned to discover the true nature of the relationships involved. Its findings led it to conclude that the reality of the relationship between ULL and Uber drivers was not one of agent and principal; specifically, it rejected the argument that the drivers were the principals in separate contracts with passengers as and when they agreed to take a trip.

29. The EAT also held at §116 that: -

the ET did not err either in its approach or in its conclusions when rejecting the contention that the contract was between driver and passenger and that ULL was simply the agent in this relationship, providing its services as such to the drivers. Having rejected that characterisation of the relevant relationships, on its findings as to the factual reality of the situation, the ET was entitled to conclude there was a contract between ULL and the drivers whereby the drivers personally undertook work for ULL as part of its business of providing transportation services to passengers in the London area.

30. In light of the decisions of the ET and the EAT, on whose findings of fact and law the Appellant relies, there can be no dispute that it was ULL (which is registered for VAT), and not the driver (who was not), that made the Supply to the Appellant.

31. It follows that input tax of £1.06 was included in the price of the Supply, which the Appellant has a right to deduct.

V RELIEF

32. The Appellant therefore seeks: -

- a. a determination by the Tribunal that VAT at the standard rate was chargeable on the Supply; and
- b. a determination that the Appellant is entitled to be credited with £1.06 of input tax in relation to the Supply.

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