Reasons why you have not supplied a document and date when you expect it to be available:-

Signed _____ Claimant ('s Solicitor) _____

Case No.

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN

THE QUEEN
-on the application of-
GOOD LAW PROJECT LIMITED

Claimant

-and-

COMMISSIONERS OF HER MAJESTY'S REVENUE AND CUSTOMS ("HMRC")

Defendant

UBER LONDON LIMITED

Interested Party

STATEMENT OF FACTS AND GROUNDS

References in the square brackets follow the referencing structure [tab/page]

A. INTRODUCTION

1. This is the statement of facts and grounds in support of the Claimant's claim for judicial review by which the Claimant challenges HMRC's failure to raise a VAT assessment in relation to the Interested Party, Uber London Limited ("**ULL**"). The consequence of that failure is that HMRC will become time-barred from recovering a very substantial amount of VAT which, on the basis of publicly available information and existing judicial findings, there is good reason to consider that ULL owes. That loss is ongoing every quarter in circumstances where it is a reasonable estimate that it could amount to £200 million per annum. As explained below, there are strong grounds to believe that HMRC's failure to raise a VAT assessment is based on a failure on the part of HMRC to have regard to the time limits that apply and/or an error as to the scope its powers to

raise a protective assessment and/or is inconsistent with its published policies and/or is based on irrelevant considerations.

2. The Claimant also applies for a judicial review costs capping order ("**JRCCO**") in the proceedings to limit its costs exposure to £20,000 in total, with a reciprocal cap limiting HMRC's costs exposure to £40,000. The grounds for that application are set out in a separate document.

B. FACTUAL BACKGROUND

The Claimant

3. The Claimant is the Good Law Project Limited (the "**Good Law Project**"), a not for profit organisation dedicated to bringing and supporting public interest litigation, including in the tax field. The GLP was founded by Mr Jolyon Maugham Q.C., a barrister by profession and a well-known expert in the field of taxation, who is a Member and Director of the GLP. Further information about the GLP is provided in the witness statement of Jolyon Maugham.

ULL

4. ULL is a company incorporated in the UK and registered for VAT purposes under VAT registration number 140668515. ULL is a licensed private hire operator in London under the Private Hire Vehicles (London) Act 1998. ULL purports to accept private hire bookings as an intermediary between persons seeking transportation services and third-party private hire vehicle drivers. As of 15 August 2018, ULL claimed that about 45,000 drivers work for Uber in London. There are reported to be around 3.5 million users in London. Based on a conversation between Mr Maugham and ULL's Head of Communications in the UK, Ireland and Benelux in March 2016, Mr Maugham estimated that the per annum turnover of the London market for Uber taxis is £1.25 billion per annum. That estimate has not been challenged in ongoing proceedings by Mr Maugham against ULL (see the following paragraph). That estimate would suggest that, if ULL is properly characterised as the supplier of services, ULL's liability to output tax would be in excess of £200 million per annum, and that (together with

interest, and possible penalties), ULL's historic liability in respect of VAT could be £1 billion.

Separate proceedings between Mr Maugham and ULL – VAT invoice

5. Mr Maugham has brought separate proceedings against ULL in relation to the refusal of ULL to provide him with a VAT invoice under regulation 13 of the VAT Regulations 1995. On 15 March 2017, Mr Maugham booked a journey through the Uber App and took a taxi service for consideration of £6.34 in order to travel to a client. The trip was in furtherance of Mr Maugham's business for the purposes of section 26(2) of the VAT Act 1994. Mr Maugham asked for a VAT invoice but ULL refused to provide one. In those proceedings, ULL asserted that it had been involved in regular discussions with HMRC in relation to its affairs, including in relation to VAT.

Mr Maugham's appeal against HMRC – input tax deduction

6. On 30 June 2017, Mr Maugham wrote to HMRC noting that he had claimed an entitlement to set off the VAT on that journey, noting that he did not have a VAT invoice and inviting HMRC to exercise its discretion to allow him to do so. Further correspondence ensued, culminating in a letter dated 9 November 2017 by which HMRC refused to exercise its discretion. Mr Maugham brought an appeal against that refusal, which was dismissed by consent by order dated 9 July 2018 because the appeal would serve no purpose in light of the decision of the Court of Appeal in *Zipvit Ltd v HMRC* [2018] EWCA Civ 1515. That agreement to dismiss those proceedings had nothing to do with, and casts no doubt on, the claim that Uber in fact made a taxable supply to .

HMRC's evidence to the Public Accounts Committee

7. On 6 November 2017, several of the Commissioners of HMRC gave evidence before the Public Accounts Committee. The following exchanges took place:

> "*Q88* ***Shabana Mahmood:*** *An employment tribunal recently found that Uber is supplying transportation services, the result of which is that VAT should be payable on all its transactions. In normal practice, we would assume*

that HMRC would raise a protective assessment, in order to protect any revenue that should be payable if that decision stands; the decision will obviously be subject to appeal and further legal proceedings. It is my understanding that HMRC has not raised a protective assessment in relation to Uber. Can you explain whether that is the case, and if it is, why?

Jon Thompson: *Sure. Let me lead off and then see if Jim wants to add. Again, I am sorry about this, but we cannot talk about that specific taxpayer under the 2005 Act. I know that is frustrating.*

Q89 ***Chair:*** *We understand, but hypothetically?*

Jon Thompson: *Let me generalise and go to what is a systemic question here. The systemic question is about who the agent is and who the principal is in the transaction between a customer and two other parties. We tested this back in 2014 in a case against a website called Secret Hotels. We actually lost that case, because we argued that the website was indeed the principal, and was therefore responsible for VAT. It won the case and came out as the agent.*

Since 2014, we have tested that five times in the courts, to try to establish that what appears to be the organisation that the customer is dealing with is actually the principal. On all five occasions since 2014, we have lost. We have tried six times to establish that the agent is actually the principal, and is therefore responsible for VAT.

We continue to monitor at least two further developments: one is the one you mentioned, the other is that there have been some EU cases in this field. They may change the situation and the advice to us. We are in conversation with counsel about this issue. Consumers use their smartphone or iPad or whatever and interact with a website or whatever, thinking that their contract is with that organisation, but it actually turns out it is not, and that the organisation is an agent for the principal. We will continue to test this.

We will monitor the two ongoing legal cases; depending on how they land, we will take further counsel's opinion and we will test it again. You talked about one taxpayer, but there is a vast array of these intermediary agent organisations. I am being transparent with you: we have tried six times in the last three years to prove that they are the principals and we have lost.

Q90 ***Chair:*** *Do you need a change in the law?*

Jon Thompson: *Possibly; I may need to defer to Jim.*

Jim Harra: *European VAT law determines who has to pay the VAT, so it is not something the UK could change by itself at this time. However, I think it is certainly something that we have been analysing, with our European partner tax authorities, across a whole new sector—not just Uber—as Jon mentioned. We await with interest the outcome of the cases. None of them are tax cases: one is an employment case, one is a regulatory one.*

However, having seen the Advocate General's advice in the regulatory cases involving some French and Spanish cities, if the European Court chooses to adopt what the Advocate General has advised, it might have implications for the precedent of that Secret Hotels case and might create some new avenues of argument for us. We can only make assessments on taxpayers based on our best judgment of the law and based on advice, otherwise they just get

overturned. We keep monitoring the situation and we will look for the outcome of those cases.

Q91 ***Shabana Mahmood:*** *Thank you. What you say about the number of times we have tested the position, in relation to principals and agents, in the courts is helpful. My question was really driving at what is stopping you from putting forward a protective assessment, which does not oblige you to collect that tax. This is a developing picture and there will be more legal cases, but there is a four-year time limit on VAT payments, so why not just raise an assessment and see how things play out?*

Jim Harra: *I appreciate that there are time limits. We do not have absolute discretion to raise assessments. The law says we can only raise them if our best judgment is that the tax is due. We have been taking advice on these cases and, as Jon says, we have now fought and lost a significant number. Our advice is that the law in this area is reasonably clear unless and until it is changed, for example by one of the cases that you have mentioned. We raise assessments where we think we can, but we cannot just raise them we want to.*

Q92 ***Shabana Mahmood:*** *So your position is that the employment tribunal decision, specifically in relation to Uber, does not change the advice you have been given about the basis on which you should put forward a protective assessment?*

Jim Harra: *The employment tribunal decision—which is under appeal, so we will see where that goes—relates to the status of the drivers and whether they are self-employed, workers or employees. I believe that tribunal has ruled that they are workers for the purposes of workers' rights. I am not aware that the tribunal made any ruling regarding principal and agent, which is what is critical to VAT law, not the workers' rights. Given that there is a Supreme Court decision, an employment tribunal would not be able to overturn that precedent anyway. We would have to see that go through the courts."*

The nature of Uber's operations

8. ULL provides its services through the Uber smartphone app ("**the App**"). The intellectual property rights in the App are held by Uber BV ("**UBV**"), a Dutch corporation. UBV is also the parent company of ULL and of Uber Britannia Limited ("**UBL**") which holds or manages private hire operator licenses issued by various local authorities in the UK outside of London.

9. The following summary of the operation of the App is adapted from findings made by the Employment Tribunal (the "**ET**") in the case of *Aslam (and others) v Uber (and others)* [2018] EWCA Civ 2748 ("***Aslam***"), as quoted at paragraphs 12 – 24 of the judgment of Sir Terence Etherton MR and Bean LJ. The judgment notes that the contractual terms have evolved over time but, for the avoidance of doubt, there is

nothing to suggest that the economic reality of the relationship between the various Uber companies, drivers and passengers has materially changed.

10. In order to use the App, a person must be aged 18 or over. They register by providing personal information including credit or debit card information. They can book a trip by downloading the App, logging on and requesting a trip. Once a request has been received, ULL locates from the pool of available drivers the one estimated by their equipment to be closest to the passenger and informs the driver (via his smartphone) of the request. The driver is given the passenger's first name and "rating" (drivers can "rate" users of the services). The driver has 10 seconds in which to accept the trip. If a driver does not respond, they are assumed to be unavailable and another driver is located. Once a driver accepts, ULL confirms the booking to the passenger and allocates the trip to the driver. The passenger and the driver are then put into contact through the App. The driver is not made aware of the destination until he has collected the passenger. At the end of the trip, the driver presses a "complete trip" button on his smartphone and becomes eligible to collect further passengers.

11. At the end of the trip, the fare is calculated based on GPS data from the smartphone. It is in theory open to a driver to agree a lesser (but not a greater) fare for the trip but that is not encouraged and if a driver were to agree to a lower fare, UBV would remain entitled to its service fee calculated on the basis of the recommended amount. The passengers pays the fare in full to UBV, by credit or debit card, and receives a receipt. An invoice is also generated which is formally addressed to the passenger but is not actually sent to the passenger and forms a record of the trip for the driver.

12. The written contract entered into between ULL and a passenger using the App states that ULL does not itself provide transportation services but acts as an agent for the transportation provider.

13. The "Rider Terms" purport to govern the conditions on which a passenger is given access to the App. They record a further contractual relationship between the passenger and UBV, and are declared to be governed exclusively by the law of the Netherlands.

14. The purported agreement between UBV and a driver also states that UBV does not provide any transportation services and characterises the driver as a customer of UBV.

15. It should be noted that ULL also provides services through UberPool. UberPool has somewhat different features from the standard Uber service. With Uber Pool, the payment received by the driver for any journey will depend not only on the time and distance to be travelled but also the number of passengers (such that the more passengers, the lower the percentage of the fare is paid to the driver).

The *Aslam* litigation – ascertaining the commercial reality of ULL's services

The ET

16. In *Aslam*, it was common ground before the ET that the vast majority of drivers using the App are sole operators. Drivers were required to agree to constant monitoring by UBV. The terms made provision for UBV to recover fares on behalf of drivers and deduct "commission", calculated as a percentage of the fare in each case.

17. The ET found as a fact that although a driver was nominally free to accept or decline trips as he chose, a driver's acceptance status was monitored and the driver had to accept at least 80% of trip requests to retain his or her account. Drivers who declined three trips in a row were liable to be forcibly logged off for 10 minutes. The right to cancel was expressed to be subject to UBV's cancellation policy.

18. The ET concluded that while drivers were under no obligation to switch on the App, any driver who had the App switched on within the territory in which he or she was authorised to work and was able and willing to accept assignments was working for ULL under a "worker contract" for the purposes of section 230 of the Employment Rights Act 1996, and the extended definitions under section 43K of the Employment Rights Act, regulation 36 of the Working Time Regulations and section 34 of the National Minimum Wage Act 1998.

19. The ET's findings and analysis at [85]-[97] are particularly relevant to the commercial reality of the Uber companies' arrangements with drivers and passengers which in turn underlies the VAT analysis (as explained further below). In particular:

a. At [87], the ET notes that it was "*struck by the remarkable lengths to which Uber has gone in order to compel an agreement with its (perhaps we should say its lawyers') description of itself and with its analysis of the legal relationships between the two companies, the drivers and the passengers*". The ET held that the arrangements required a "*degree of scepticism*", noting, *inter alia*, that the documentation resorted to "*fictions, twisted language and even brand new terminology*". The Uber companies' case and witness evidence reminded the ET of "*Queen Gertrude's most celebrated line: **The lady doth protest too much, methinks***".

b. At [88], the ET referred back to various things written and said in the name of the Uber companies "*in unguarded moments*" "*which reinforced the Claimants' simple case that the organisation runs a transportation business and employs drivers to that end.*"

c. At [89], the ET concluded that it was "*unreal*" to deny that the Uber companies are in business as a supplier of transportation services. The ET held that "*Simple common sense argues to the contrary. ... Moreover, the Respondents' case here is, we think, incompatible with the agreed fact that Uber markets a 'product range'. One might ask: Whose product range is it if not Uber's? The 'products' speak for themselves: they are a variety of driving services. [The drivers do not offer such a range]. The marketing self-evidently is not done for the benefit of any individual driver. Equally self-evidently, it is done to promote Uber's name and 'sell' its transportation services. In recent proceedings under the title of* Douglas O'Connor-v-Uber Technologies Inc *the North California District Court resoundingly rejected the company's assertion that it was a technology company and not in the business of providing transportation services. The judgment included this: **Uber does not simply sell software; it sells rides. Uber is no more a***

"technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs. *We respectfully agree."*

d. At [90], the ET determined that the Defendants' general case and the written terms on which they relied "*do not correspond with practical reality*".

e. Elsewhere, the ET describes the Defendants' case on the arrangements as "*faintly ridiculous*" (at [90]) and "*not real*" (at [92]), the logic as "*difficult*" and certain of their propositions as "*absurd*" (at [91]), leading the ET to hold at [91] that: "*... we are satisfied that the supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties*" and at [92], "*... the only sensible interpretation is that... Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits*".

*Uber companies' appeal to the Employment Appeals Tribunal (the "**EAT**")*

20. The EAT upheld the ET's decision in a judgment handed down on 10 November 2017.

21. The EAT referred to the decision of the Supreme Court in *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 16; [2014] 2 All ER 685 ("***Secret Hotels2***") concerning the relevance of written contractual documentation as follows:

> *"105. In the normal commercial environment (that pertaining in Secret Hotels2) the starting point will be the written contractual documentation; indeed, unless it is said to be a sham or liable to rectification, the written contract is generally also the end point - the nature of the parties' relationship and respective obligations being governed by its terms."*

22. However, the EAT went on to contrast the position in respect of the Defendants' written contractual arrangements, rejecting their submissions on the basis that the reality of the relationship between ULL and drivers was not one of agent and principal; specifically, the EAT held that drivers were not acting as principals in separate contracts with passengers as and when they agreed to take a trip:

"105. ...Here, however, the ET was required to determine the nature of the relationship between ULL and the drivers for the purposes of statutory provisions in the field of employment law; provisions enacted to provide protections to those often disadvantaged in any contractual bargain. The ET's starting point was to determine the true nature of the parties' bargain, having regard to all the circumstances. That was consistent with the approach laid down in Autoclenz and was particularly apposite given there was no direct written contract between the drivers and ULL. Adopting that approach, the ET did not accept that the characterisation of the relationship between drivers and ULL in the written agreements properly reflected the reality. In particular - and crucial to its reasoning - the ET rejected the contention that Uber drivers work, in business on their own account, in a contractual relationship with the passenger every time they accept a trip...

...

109. Uber's case in these respects is founded on the premise that the ET's starting point should have been informed by the characterisation of the relationship between ULL and the drivers as set out in the documentation. I disagree. 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. It rejected that case because it found the drivers were integrated into the Uber business of providing transportation services, marketed as such (paragraphs 87 to 89), and because it found the arrangements inconsistent with the drivers acting as separate businesses on their own account, given that they were excluded from establishing a business relationship with passengers (drivers could neither obtain passengers' contact details nor provide their own), worked on the understanding that Uber would indemnify them for bad debts and were subjected to various controls by ULL .... Having found that Uber drivers did not operate businesses on their own account and, as such, enter into contracts with passengers, the ET was entitled to reject the label of agency and the characterisation of the relationship in the written documentation."

<u>*Uber companies' appeal to the Court of Appeal*</u>

23. The Court of Appeal upheld the decision of the ET and EAT in a judgment handed down on 19 December 2018.

24. The majority concluded that "*the ET was not only entitled, but correct, to find that each of the Claimant drivers was working for ULL as a limb (b) [of section 230 of the ERA 1996] worker*" (paragraph 71).

25. At paragraphs 76 – 82, the majority compared the Defendants' contractual documentation with the reality of the situation and said:

> *"76 At stage (1), acceptance of the request by the driver means that, subject to the right of the driver and the passenger to cancel, the driver is expected to proceed to collect the passenger from the notified location and to complete the journey. That is consistent with the language of 2.4 of the 2015 New Terms, which talks of the option "to cancel an accepted request". In the language of Autoclenz, at paragraph 35, the "reality" is that at that stage there is an obligation on the driver to fulfil that expectation. The contractual documentation states that, at that stage, there is a contract between the driver and the passenger but that cannot be correct as vital elements of any such contract are missing.*
>
> *The driver does not know at that point a fundamental fact, namely the passenger's destination, as, according to the ET, he only obtains that information either directly from the passenger or via the App at the moment of pick up.*
>
> *77 It is also true that the driver does not know what the fare will be where ULL (as the PHV operator) has given an estimate, as the actual fare will be determined by Uber at the end of the ride. That, however, while relevant to the issue of the reality of the situation, may be seen as less decisive as a matter of strict contract law as it is arguably consistent with a contract that the fare will be as determined by Uber.*
>
> *78 Our initial view was that, irrespective of the absence of agreement on an essential term (the destination), the passenger has not, at that stage, provided any consideration for an obligation on the driver to collect him or her. In supplementary submissions following circulation of draft judgments, which we heard in private at Ms Rose's request as they concerned the draft judgment, Ms Rose argued that this point had not been argued below (nor expressly before us); that it was a mixed question of law and fact; and that it was unfair to her clients that it should be taken for the first time in this court by the court itself*
>
> *79 We do not think that there has been any unfairness to Uber: it has been clear from the start that the Claimants' case is that there is in reality no contract between passenger and driver. However, the question of whether any consideration passes between driver and passenger is a minor point and, on reflection, we are content not to pursue it.*
>
> *80 The passenger has no contract to compel the driver to pick up him or her. The contract at the point of acceptance of the request must be with ULL. The request is communicated to the driver by ULL and is accepted by the driver in responding to Uber. There is no basis for saying that it is with UBV, via the agency of ULL, as there is nothing in either version of the UBV agreement that says that ULL, in sending the request and receiving the driver's acceptance, is acting as UBV's agent. Clause 2.2 of the New Terms says that ULL is at that stage acting as the driver's agent but, plainly, that cannot be correct if there is a contract between ULL and the driver.*

81 Both the existence of any such contract and its terms must be established objectively. In relation to the factual aspects of both matters, the Autoclenz "reality" and "worldly wise" approach applies. There is a contract with ULL for the reasons we set out in this judgment. The terms are those fulfilling the expectation, on the driver's acceptance of the request from ULL, that the driver will proceed to collect the passenger from the notified location and to complete the journey and are the same as those found by the ET as a matter of fact. There is no finding by the ET and it is not a ground of appeal that, if there was a contract between the driver and ULL, it is limited to picking up the passenger.

82 The ET found that there is no contract between the driver and the passenger. That is not a necessary finding in order to support a contract between ULL and the driver at the point of acceptance by the driver. There is no analytical reason why there could not be two contracts subsisting at the same time, or rather from the time of pick up, the contract between ULL and the driver having commenced at an earlier point of time in accordance with the above analysis. But any contract was plainly not one under which ULL was the driver's client or customer for the purposes of section 230(3)(b) of the ERA 1996."

26. At paragraph 88, the majority continued:

"88 ULL is the PHV operator for the purposes of the PHVA 1998 and the regulations made under it. It is ULL which has to satisfy the licensing authority for the purposes of section 3(3)(a) of the Act that it is a fit and proper person to hold a PHV licence. It is ULL which alone can accept bookings, and ULL which is required by the PHV Regulations to provide an estimate of the fare on request. For ULL to be stating to its statutory regulator that it is operating a private hire vehicle service in London, and is a fit and proper person to do so, while at the same time arguing in this litigation that it is merely an affiliate of a Dutch registered company which licenses tens of thousands of proprietors of small businesses to use its software, contributes to the air of contrivance and artificiality which pervades Uber's case."

27. At paragraph 90, the majority concluded that there was a high degree of fiction in the wording of the standard form agreement between UBV and each of the drivers:

"a) ULL, despite being the PHV operator in London, and therefore the only entity legally permitted to operate the business, is scarcely mentioned at all, even as an "Affiliate" of UBV;

b) The agreement refers to the party with whom UBV is contracting as the "Partner" (2013) or "Customer" (2015), as if it were a separate legal entity employing one or more drivers. Indeed, in the 2015 version, the "Customer" is described as "an independent company in the business of providing transportation services". But, as the ET noted (para 34) and Ms Rose accepted in this court, it is common ground that the vast majority of drivers are sole

operators; in the words of the ET at para 80, the "business" consists of a man with a car who seeks to make a living from driving it.

c) We agree with the submission of Mr Linden QC, for some of the Claimants, that:-

"The documents required the drivers to agree to numerous facts and legal propositions about the position of others, such as the relationships between the customer and Uber and/or the driver, rather than being confined, as one would expect, to the mutual obligations of the parties to the agreement. This unusual feature was the hallmark of an attempt to describe the set up as Uber wished to portray it and then bind the driver to that description, whereas the function of a contract is actually to set out obligations and then only the obligations of the party to the contract. Moreover, the drivers could not be bound by facts or legal propositions of which they were unaware and/or which were false."

28. At paragraph 91, the majority noted:

"91 The omission of ULL from both versions of the standard terms is all the more striking because ULL enforces a high degree of control over the drivers and for the most part does so (quite understandably and properly) in order to protect its position as PHV operator in London. It is difficult to see on what basis ULL is entitled to act in this way other than pursuant to a contractual relationship between itself and each driver. We do not accept as realistic the argument that ULL is merely acting as local enforcer for UBV as holder of the intellectual property in the App."

29. At paragraph 94, the majority noted:

"94 The ET were also right to attach significance to what they described as "the many things said and written in the name of Uber in unguarded moments which reinforce the Claimants' simple case that the organisation runs a transportation business and employs the drivers to that end."

30. At paragraph 95, the majority said:

"95 We agree with the ET's finding at paragraph 92 that "it is not real to regard Uber as working "for" the drivers and that the only sensible interpretation is that the relationship is the other way round. Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits.""

31. Considering the nature of UBV, the majority said at paragraph 98:

"98 Before the ET it was submitted by leading counsel on behalf of Uber (David Reade QC) that "if the drivers had any limb (b) relationship with the organisation, it must be with UBV. There was no agreement of any sort with ULL, which only exists to satisfy a regulatory requirement". This was not a prominent feature of the submissions of Ms Rose before this court. For the reasons we have given above, and for the avoidance of doubt, we agree with the following findings of the ET at paragraph 98:-

"UBV is a Dutch company the central functions of which are to exercise and protect legal rights associated with the App and process passengers' payments. It does not have day-to-day or week-to-week contact with the drivers. There is simply no reason to characterise it as their employer. We accept its first case, that it does not employ drivers. ULL is the obvious candidate. It is a UK company. Despite protestations to the contrary in the Partner Terms and New Terms, it self-evidently exists to run, and does run, a PHV operation in London. It is the point of contact between Uber and the drivers. It recruits, instructs, controls, disciplines and, where it sees fit, dismisses drivers. It determines disputes affecting their interests.""

CJEU litigation concerning Uber's Spanish operation

32. Uber's Spanish operation has been involved in separate proceedings before the CJEU.

33. In *Asociacion Profesional Elite Taxi v Uber Systems Spain SL* C-434/15; [2018] Q.B. 854 (***"Uber Spain"***) (handed down on 20 December 2017), the CJEU concluded that while Uber's Spanish operation met the criteria for an "information society service" in principle, that service was formed an integral part of a transport service. At paragraph 39, the Court noted:

"39 In that regard, it follows from the information before the court that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion."

The pre-action correspondence

34. By a letter dated 6 March 2019, the Claimant and Mr Maugham wrote a pre-action protocol letter to HMRC, intimating a claim for judicial review of HMRC's failure to raise a VAT assessment in relation to ULL and notified ULL of their proposed claim. In particular, it noted the time limits governing assessments to VAT and asserted that it was unlawful of HMRC to fail to raise assessments to protect the fisc in the event that ULL was liable to VAT. That letter appears at [C/1].

35. Following correspondence as to the appropriate date for a reply, by letter dated 12 April 2019, HMRC replied to the PAP letter. That letter appears at [C/7]. That letter noted the prohibition on HMRC disclosing information in relation to an individual taxpayer. It stated that HMRC was continuing its investigations into and consideration of the facts and was "***not yet in a position to reach a firm conclusion*** *as to the VAT implications of Uber's business model*" **(emphasis added).**

36. That letter referred to the decisions in *Aslam* and *Uber Spain* and stated that those cases "*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*". The letter stated that the fact that Underhill LJ in *Aslam* saw no proper basis to say that the contracts did not reflect economic reality showed that the matter was not simple and straightforward. That letter stated that HMRC had yet to determine what the implications of the fact that the Uber App is operated by Uber BV, a company operated in the Netherlands, might be.

37. HMRC's response stated that "*Best judgment must have reasonable grounds for believing that there is a liability as a matter of law and that a particular amount is due...the Commissioners cannot make assessments on the basis that there may or may not be a liability, but they are unsure either way.*" HMRC's response asserts that any claim is premature.

C. VAT FRAMEWORK

38. This section sets out the relevant VAT legislation, HMRC's published guidance on its relationship with taxpayers and case law on "best judgment" assessments.

EU and domestic VAT legislation

39. The law relating to payment and recovery of VAT in the United Kingdom is contained in the Value Added Tax Act 1994 ("**VATA 1994**"), which was intended to reflect the provisions of certain EC Directives, most notably EC Council Directive 67/227 (on the harmonisation of legislation of member states concerning turnover taxes) (the "**First Directive**") and EC Council Directive 77/388 (on the harmonisation of the laws of the member states relating to turnover taxes - Common system of value added tax: uniform basis of assessment) (the "**Sixth Directive**").

40. The current EU provisions relating to VAT are contained in Council Directive 2006/112/EC (the "**Principal VAT Directive**" or "**PVD**").

41. Article 1(2) of the PVD describes the basic system of VAT:

> *"The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged. On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components. The common system of VAT shall be applied up to and including the retail trade stage."*

42. VAT is charged on "*supplies*" of goods and services for consideration - see art.2(1) of the PVD. As art.63 of the PVD states, VAT becomes chargeable when a supply takes place.

43. Articles 14(1) and 24 of the PVD (reflected in s.5 of, and Sch.4 to, VATA 1994) define the concepts of "*supply of goods*" and "*supply of services*" respectively, in the following terms:

> *"'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner."*

"'Supply of services' shall mean any transaction which does not constitute a supply of goods."

44. Article 73 of the PVD, reflected in s.19 VATA 1994, defines, so far as relevant, the "*taxable amount*" as:

"in respect of the supply of goods or services ... everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, ..."

45. Article 168 of the PVD, reflected in ss.24(1), 24(2), 26(1) and 26(2) VATA 1994, allows a taxable person the right, "*[i]n so far as the goods and services are used for the purposes of the taxed transactions of a taxable person*", to deduct VAT due or paid "*in respect of supplies to him of goods or services carried out or to be carried out by another taxable person*".

46. So far as the provisions of VATA 1994 are concerned, they must be interpreted as far as possible so as to comply with the PVD. It should be common ground that there is no difference between the relevant EU and domestic VAT legislation. Nevertheless, the relevant domestic law is provided below for completeness.

47. Section 4 VATA 1994 provides:

"(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.

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

48. Section 24 VATA 1994 provides, so far as is relevant here:

"(2) Subject to the following provisions of this section, "output tax", in relation to a taxable person, means VAT on supplies which he makes or on the acquisition by him from another member State of goods (including VAT which is also to be counted as input tax by virtue of subsection (1)(b) above)."

49. Section 73 VATA 1994 contains HMRC's powers to raise assessments. So far as is relevant here, it provides:[1]

> *"(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."*

50. Sections 73(6) and 77 VATA 1994 impose certain time limits on HMRC's ability to raise assessments. Of principle relevance is the "long stop" for raising a s.73 "*best judgment*" assessment of **4 years** after the end of the relevant VAT period (per s.76(1) VATA 1994).

HMRC's relationship with the general body of taxpayers

51. HMRC has published its "*Taxpayer Charter*" (the "***Charter***") explaining what taxpayers can expect from HMRC and what HMRC expects in return.

52. Paragraph 1.7 of the Charter provides under the heading "*What you can expect from us*":

> ***"1.7 Tackle those who bend or break the rules***
> *We'll identify those who are not paying what they owe or are claiming more than they should and recover the money. We'll charge interest and penalties where appropriate and be reasonable in how we use our powers"*

53. The first of HMRC's three strategic objectives is described as follows:

> *"maximise revenues due and bear down on avoidance and evasion..."*

54. HMRC also has published guidance relating to VAT Assessment and Error Correction.

55. The guidance at VAEC 1111 states:

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[1] Section 76 VATA 1994 provides a similar power to raise an assessment in respect of amounts due by way of penalty, surcharge or interest.

*"...Whilst **the norm must be to assess for tax as envisaged by the legislation,** we must be prepared to recognise the exceptional circumstances where it would be unreasonable to do so.*

*Where we consider that there are grounds for exercising this discretion you should remember that as a matter of policy, the exercise of this discretion is always dealt with as if it were extra statutory either as a class or individual concession with appropriate management authority required." **(emphasis added)***

56. VAEC 1120 states:

"...Therefore, HMRC as a matter of published policy, rely on the date of notification of an assessment as the material date for time limit purposes.

It is therefore essential that assessments are notified within the statutory time limits prescribed in the VAT Act for the making of assessments." (emphasis added)

57. VAEC 1143 states:

"Four years is the maximum time limit available to the Commissioners for assessments under Section 73 VATA except where the twenty year rule applies, see VAEC1140.

The clock for capping purposes does not stop running between, the time you have information sufficiently identifying an under-declaration, to the time when you have sufficient information to make the assessment.

*It is therefore important to remember that the earliest accounting periods may be vulnerable to falling outside the assessing period, during the enquiry time and **if in doubt you should consider making an assessment to best judgement,** see VAEC1400." **(emphasis added)***

58. VAEC 1420 provides detailed guidance in relation to "*best judgment*" as follows:

"Any assessments made must satisfy the best judgement criteria. This means that given a set of conditions or circumstances, you must take any necessary action and produce a result that is deemed to be reasonable and not arbitrary.

In other words best judgement is not the equivalent of the best result or the most favourable conclusion. It is a reasonable process by which an assessment is successfully reached.

The meaning of the phrase 'to the best of their judgement' and principles inherent in the Commissioners requirement to exercise best judgement were considered in a High Court ruling given by Woolf J, as he was then, in the appeal case Van Boeckel v C & E QB Dec 1980, [1981] STC 290.

The case set the benchmark for best judgement. In summary, the principles adopted in Van Boeckel are that

- *the Commissioners should not be required to do the work of the taxpayer*
- *the Commissioners must perform their function honestly and above-board*
- *the Commissioners should fairly consider all the material before them and on that material, come to a decision which is reasonable and not arbitrary, and*
- *there must be some material before the Commissioners on which they can base their judgement.*

The basic principles have been refined in a number of other cases. In the case of CA McCourtie LON/92/191 the tribunal considered the principles set out in Van Boeckel and put forward three further propositions

- *the facts should be objectively gathered and intelligently interpreted*
- *the calculations should be arithmetically sound, and*
- *any sampling technique should be representative."*

Case law on "*best judgment*" assessments

59. In *Van Boeckel v C&EC* [1981] 2 All ER 505, 507, Woolf J held:

"The contentions on behalf of the taxpayer in this case can be summarised by saying that on the facts before the tribunal it is clear, so it is contended, that the assessment in question was not valid because the commissioners had taken insufficient steps to ascertain the amount of the tax due before making the assessment. Therefore it is important to come to a conclusion as to what are the obligations placed on the commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then leave it to the taxpayer to seek, on appeal, to reduce that assessment.

Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be

very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

60. In *Rahman v Customs and Excise Commissioners* [1998] STC 826, Carnwath J said at paragraph 25:

"I have referred to the judgment in some detail, because there are dangers in taking Woolf J's analysis of the concept of "best judgment" out of context. The passages I have underlined show that the Tribunal should not treat an assessment as invalid merely because they disagree as to how the judgment should have been exercised. A much stronger finding is required: for example, that the assessment has been reached "dishonestly or vindictively or capriciously"; or is a "spurious estimate or guess in which all elements of judgment are missing"; or is "wholly unreasonable". In substance those tests are indistinguishable from the familiar Wednesbury principles ([1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment."

61. In *McNicholas Construction Co. Ltd v HM Commissioners of Customs and Excise* 2000 WL742054, Dyson J said:

"76. I accept Mr Parker's summary of the position in these terms: the words "to the best of their judgment" permit the Commissioners a margin of discretion in making an assessment; a taxpayer may only challenge the assessment if he can show that the Commissioners acted outside the margin of their discretion, by acting in a way that no reasonable body of Commissioners could do. In order to succeed, the taxpayer must show that the assessment was wrong in a material respect, and that if so, the mistake is such that the only fair inference is that the Commissioners did not apply best judgment, as explained by Woolf J in Van Boeckel. The primary focus of the attention of the Tribunal, therefore, should be on the objective evidence adduced by the taxpayer in seeking to discharge the burden of showing that the amount of VAT assessed was not due from him. This is because it would be absurd for the Tribunal to conclude that the assessment was correct, but that the Commissioners had made a dishonest or capricious assessment. Parliament cannot have intended that a Tribunal should be required to set aside assessments which are shown to be correct, or which the taxpayer does not show are incorrect."

62. Those authorities were approved in *Rahman v Commissioners of Customs and Excise* [2002] EWCA Civ 1881, [2003] STC 150. At [32], Chadwick LJ noted that simply because a Tribunal might allow a taxpayer's appeal from a best judgment assessment, it did not mean that HMRC must have made unreasonable assumptions or that they were outside the margin of discretion inherent in the exercise of judgment in these cases. If the Tribunal concludes that HMRC made a mistake:

> *"...the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was, indeed arbitrary."*

63. At [44] and [45], Chadwick LJ considered that where a Tribunal broadly agreed with the amount of an assessment, the Tribunal may well take the view that considering whether HMRC exercised best judgment in making their assessment was a sterile exercise. Conversely, if a Tribunal determines that the amount of tax properly due is substantially different from that assessed by HMRC, the Tribunal may think if appropriate to investigate why there is a difference and to seek an explanation. This may (but often will not) lead to the conclusion that HMRC did not exercise best judgment in making their assessment. If that is the case, then it would be open to the Tribunal to discharge the assessments in their entirety. However, as Chadwick LJ observed, the Tribunal could simply give a direction specifying the correct amount with the consequence that the assessment would have effect pursuant to s.84(5) VATA 1994. The Tribunal could not be criticised for doing so because, as Chadwick LJ concluded:

> *"The underlying purpose of the legislative provisions is to ensure that the taxable person accounts for the correct amount of tax."*

64. There is no doubt that an assessment can be made on a "*protective*" basis. In *Courts plc v Customs and Excise Commissioners* [2004] EWCA Civ 1527 ("***Courts***"), the Court of Appeal accepted that HMRC can raise an assessment in order to protect the position of the taxpayer in respect of a future contingency (in that case, an appeal being decided in the Commissioners' favour): see paragraphs 102 – 103:

"102. In the third place, I agree with the judge that a `protective' assessment, in the sense of an assessment which is made in order to protect the Commissioners' position in the event of a subsequent appeal being decided in their favour (see the internal guidance quoted in paragraph 14 above), is nonetheless an assessment. As such it will, when notified, create a debt (see s.73(9)). The fact that no steps will be taken to recover the debt so created pending the occurrence of a future contingency cannot, in my judgment, affect the fact that an assessment has been made.

103. Nor, in my judgment, does the `protective' nature of an assessment render it void or unenforceable on grounds of uncertainty. The epithet `protective' is directed not to the content of the assessment but to the reason for making it."

65. The Court also recognised the possibility of alternative assessments (at [46] and [111]): *Courts* was applied in *Westone Wholesale Ltd v Revenue and Customs Commissioners* [2007] EWHC 2676 (Ch); [2008] S.T.C. 828, in which the Court held that alternative assessments could exist on the basis of mutually inconsistent facts such that only one assessment could succeed (see paragraphs 35 – 39). And in *University Court of the University of Glasgow v Commissioners of Customs and Excise* [2003] ScotCS 38 the Court of Session reached a similar conclusion.

D. STANDING

66. In its pre-action response, HMRC reserved the right to oppose any claim on the basis of lack of standing on the part of the Good Law Project.

67. HMRC's position is misconceived since the Claimant clearly does have standing to bring this proposed claim.

68. The question of standing is to be determined by asking whether a claimant has a sufficient interest in the matter under challenge to bring the claim. In *R (National Federation of Self-Employed and Small Businesses Ltd) v Inland Revenue* [1981] AC 617 ("***National Federation***"), Lord Diplock said at 644:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. ... It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central

government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."

69. Lord Wilberforce said at 633:

"That a case can never arise in which the acts or abstentions of the revenue can be brought before the court I am certainly not prepared to assert, nor that, in a case of sufficient gravity, the court might not be able to hold that another taxpayer or other taxpayers could challenge them. Whether this situation has been reached or not must depend upon an examination, upon evidence, of what breach of duty or illegality is alleged. Upon this, and relating it to the position of the complainant, the court has to make its decision."

70. At 653, Lord Scarman quoted from Lord Wilberforce's judgment in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, where he stated, at 482, the modern position in relation to prerogative orders: "*These are often applied for by individuals and the courts have allowed them liberal access under a generous conception of locus standi.*" Lord Scarman continued that in order to determine the sufficiency of an applicant's interest, consideration needed to be given to whether the applicant had a *prima facie* case, or reasonable grounds for believing, that there has been a failure in public duty. The Federation had not shown sufficient interest because it had failed to show any grounds for believing that HMRC had failed to do its statutory duty. However, Lord Scarman continued, at 655:

"Had [the federation] shown reasonable grounds for believing that the failure to collect tax from the Fleet Street casuals was an abuse of the revenue's managerial discretion or that there was a case to that effect which merited investigation and examination by the court, I would have agreed with the Court of Appeal that they had shown a sufficient interest for the grant of leave to proceed further with their application. I would, therefore, allow the appeal."

71. In *R v Her Majesty's Treasury, ex parte Smedley* [1985] Q.B. 657; [1985] 2 W.L.R. 576, 660-670, Slade LJ referred to the speeches of the House of Lords in *National Federation* observing that the rules in relation to standing had subsequently been greatly relaxed:

"If the court had taken the view that Mr. Smedley's application was of a frivolous nature, the wide discretion given it by R.S.C., Ord. 53 would have enabled it to dispose of it appropriately. There has, however, been no suggestion that it is of this nature. It raises a serious question as to the powers of Her Majesty in Council to make an Order in Council in the form of the draft now before Parliament. The making of any such Order would be likely to be followed automatically by the expenditure by the government of substantial sums from the Consolidated Fund in reliance on section 2 of the European Communities Act 1972 . I do not feel much doubt that Mr. Smedley, if only in his capacity as a taxpayer, has sufficient locus standi to raise this question by way of an application for judicial review; on the present state of the authorities, I cannot think that any such right of challenge belongs to the Attorney-General alone."

72. In *R v Secretary of State for Foreign and Commonwealth Affairs* [1995] 1 W.L.R. 386, 395-396 Rose LJ accepted that the question of standing went to the Court's jurisdiction to entertain a claim. However, Rose LJ went on to refer to the "*increasingly liberal approach to standing*" which "*should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case*". The merits of the challenge were "*an important, if not dominant, factor when considering standing*" and, referring to Professor Wade's words in Administrative Law, 7th ed. (1994), p. 712 : "*the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved*".

73. With reference to supporting authority, Rose LJ observed that, in addition to a consideration of the merits of the claim, several other factors were significant:

a. The importance of vindicating the rule of law;

b. The importance of the issue raised;

c. The likely absence of any other responsible challenger;

d. The nature of the breach of duty against which relief is sought; and

e. The prominent role of the applicants in giving advice, guidance and assistance with regard to aid.

74. In *R (UK Uncut Legal Action) v HMRC* [2012] EWHC 2017, permission was granted to the claimant, a campaign group whose purpose was to promote the effective and prompt collection of taxes owed by large companies, to challenge HMRC's settlement of claims in relation to the tax liability of Goldman Sachs. At paragraph 41 of the substantive judgment ([2013] EWHC 1283 (Admin)), Nicol J noted in relation to *National Federation*:

> *"...the reason why other taxpayers may have sufficient interest to challenge the decision by the Revenue to waive tax in certain situations is because an over-generous approach to one taxpayer may correspondingly increase the burden on all other taxpayers."*

75. Here, all these considerations lead to conclusion that the Claimant does have sufficient standing to bring a claim. *Inter alia*:

a. The Claimant is dedicated to bringing and supporting public interest litigation, including in the tax field.

b. It is a matter of serious public concern that HMRC has not taken steps to protect the taxpayer from potentially very substantial losses of tax arising in the context of novel business practices in the so-called "gig economy".

c. It is a matter of record that this is a concern to members of the Public Accounts Committee. This can be seen both from the questions raised by the Committee referred to above and an article in the Financial Times entitled 'Taxman under fire for failing to prober Uber stance on VAT' [D/1].

d. The decisions of the EAT in *Aslam* and the CJEU in *Uber Spain* were handed down almost 18 months ago, and that of the Court of Appeal in *Aslam* almost 6 months ago. In circumstances where HMRC acknowledges that ULL may have a VAT liability its failure to raise a protective assessment means that hundreds of millions of pounds of VAT that may be due will be lost to the fisc because of the time limits applicable to an assessment.

e. No other body is better placed to bring the claim, nor is there any other means of challenging HMRC's inaction than by way of judicial review proceedings.

76. To characterise this as a case of "*one private citizens...complaining about the tax affairs of another*", as HMRC does in its PAP response, is misconceived and ignores the reality of the claim.

77. Indeed, the propriety of judicial review was recognised in *Maugham v ULL* [2019] EWHC 391 (Ch) at [70], where Mr William Trower QC (sitting as a Deputy Judge of the High Court) held:

> *"Mr Maugham has challenged HMRC's conduct in failing to raise VAT assessments on Uber as "inexplicable", "outrageous" and "a genuine scandal", and he criticises their general approach to assessment and enforcement in this area. He may be right that HMRC are in fact failing in their duty, but even if they could be pursuing Uber, the evidence does not establish that the public interest requires that that issue be investigated in these proceedings. A* ***properly formulated public law challenge by way of judicial review is the right way of reviewing HMRC's conduct in not exercising its powers under section 73(1) of VATA*** *and would engage the possibility of a costs capping order under the 2015 Act."* **(Emphasis added)**

78. On any view, it is plain that Good Law Project has standing in the same way that the Courts have recognised the standing of other public interest organisations in numerous other contexts. The question of standing is therefore not a legitimate bar to this claim, particularly in view of the strength of the Claimant's case on the merits and in the absence of any other body better placed to bring this claim.

E. GROUNDS OF CHALLENGE

Overview

79. In essence, the Claimant's case is as follows. HMRC plainly appreciates that Uber may have under-declared VAT. This is apparent from the fact that HMRC says (and indeed has for some time said) that they are keeping the situation under review (including the outcome of the employment tribunal appeal and other EU case law concerning Uber). If there is under-declared VAT, it would appear to be common ground that it is substantial (running into hundreds of millions of pounds at least, if not £1 billion or more). With every VAT period that passes, one historic VAT period falls out of time with the result that unpaid VAT in that period becomes irrecoverable forever.

80. HMRC's decision not to act would appear (from their PAP response) to be the result of internal discussions, including with counsel, as to the merits of HMRC's case. HMRC's PAP response suggests that HMRC has neither concluded their investigations nor satisfied themselves that they are more likely than not to win. However, as is clear from the case law above, as a matter of law, it is not necessary for HMRC to have concluded their investigations – or to have reached a concluded view on the merits of their case – in order to for HMRC to raise protective assessments. Rather, the case law on "best judgment" shows that the threshold is far lower. Accordingly, HMRC has erred in law in their decision not to act.

81. This is not to say that the merits of HMRC's case are an entirely irrelevant consideration in deciding whether to issue protective assessments. However, as already stated, it can be inferred from the fact that HMRC is keeping the situation under review that they at least consider there to be a risk of underpaid VAT as matters presently stand (otherwise there would be nothing to review). Moreover and in any event, at no stage have HMRC suggested that there is no unpaid VAT and, in the light of the findings of the commercial reality of ULL's arrangements in *Aslam*, there is no basis for them doing so.

82. Accordingly, HMRC's continued failure to raise best judgment assessments must necessarily arise from a misdirection by HMRC as to their assessment powers. In these circumstances, the Claimant seeks:

    a. An order requiring HMRC to raise protective assessments; or

    b. Alternatively, an order requiring HMRC to consider raising protective assessments in light of the correct understanding as to the scope of its power to do so.

Ground 1: treating time limits as irrelevant

83. HMRC have been considering whether to assess Uber in respect of unpaid VAT for some time. This is apparent from a number of sources, *inter alia*:

a. In response to Question 92 of the evidence before the Public Accounts Committee, Jim Harra (the present Tax Assurance Commissioner for HMRC and Deputy Chief Executive and Second Permanent Secretary) refers to "*seeing where the employment tribunal decision [in* Aslam*] goes*" and that HMRC "*...would have to see that go through the Courts*".

b. In response to Question 90, Jim Harra notes that the VAT treatment of the industry is "*certainly something that [HMRC] have been analysing*", that HMRC "*await with interest the outcome of the cases*" and that "*[HMRC] keep monitoring the situation and... will look for the outcome of those cases*".

c. In response to Question 89, having identified that "*the systemic question is about who the agent is and who the principal is in the transaction between a customer and two other parties*" Jon Thompson (Chief Executive and Permanent Secretary of HMRC) continues, "*We will monitor the two ongoing legal cases; depending on how they land, we will take further counsel's opinion and we will test it again*".

84. It is also apparent from the responses given both in evidence before the Public Accounts Committee and in HMRC's PAP letter that HMRC's concern is that they do not yet feel that they are in a position to win a case against ULL at trial since HMRC emphasise their record in losing previous agency VAT cases in the (very different) hotel sector.

85. To this the Claimant says that, on any view, the case for raising an assessment is very compelling: most recently, the majority in the Court of Appeal in *Aslam* determined that the real contractual relationship here is one where the drivers supply their services to ULL. In the VAT context, this would equate to a supply being made by the drivers to ULL who use those services to make onward supplies of transportation services to passengers using the App.

86. The reason why HMRC have not yet raised assessments emerges from the answer to Question 91:

"I appreciate that there are time limits. The law says we can only raise them if our best judgment is that the tax is due."

87. In other words, HMRC's evidence is that notwithstanding they are fully aware that there are time limits for raising assessments, they consider that the exercise of their assessment raising power is impeded here by the requirement for HMRC to use their "*best judgment*".

88. In reaching this conclusion (and as a result, in failing to raise assessments to the best of their judgment), HMRC has erred in law in its understanding of the scope of its powers:

    a. First, where (as here) there is a strong *prima facie* case that VAT has been unpaid, the VAT at stake is substantial and time limits are passing, HMRC must assess to protect the fisc. It is a misdirection on HMRC's part to consider that time limits are of marginal or no relevance.

    b. Secondly, HMRC have misdirected themselves as to whether they have *vires* to make an assessment.

89. This is clear from the Court of Appeal's judgment in *Courts*. The appeal concerned a protective assessment pending the ruling of the CJEU (as explained at [16]).

90. The key paragraphs of the Tribunal's decision are set out in the Court of Appeal's judgment at [50]:

"11. Protective assessments, which are not a different type of assessment but a normal assessment made in particular circumstances, are required to keep time limits open... The only way in which the Commissioners can keep time limits open is accordingly to make a protective assessment."

91. At [71], the Court of Appeal summarises the arguments made by the taxpayer's Counsel:

"...he submits that there is no power under section 73 of the 1994 Act to make so-called 'protective assessments', and that any such attempts at assessment fail to meet the requirements of a valid and binding assessment in so far as they do not create, and are not intended to create, an immediate and

enforceable debt; rather, they are by their nature both speculative and conditional."

92. However, the Court of Appeal rejected this argument, holding at [102]:

> *"In the third place, I agree with the judge that a 'protective' assessment, in the sense of an assessment which is made in order to protect the Commissioners' position in the event of a subsequent appeal being decided in their favour (see the internal guidance quoted in paragraph 14 above), is nonetheless an assessment. As such it will, when notified, create a debt (see s.73(9)). The fact that no steps will be taken to recover the debt so created pending the occurrence of a future contingency cannot, in my judgment, affect the fact that an assessment has been made."*

And at [103]:

> *"Nor, in my judgment, does the 'protective' nature of an assessment render it void or unenforceable on grounds of uncertainty. The epithet 'protective' is directed not to the content of the assessment but to the reason for making it."*

Ground 2: misdirection about its assessment powers

93. In its PAP response, HMRC gives various reasons why it considers that it cannot raise "*best judgment*" assessments on the basis of the information presently available to it. These are all misconceived.

94. First, HMRC notes that this is a "*Sector wide issue*" 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*". This is no reason for inaction against ULL:

    a. The VAT treatment of different providers will turn on the written agreements and economic reality in those cases (all questions of fact). Indeed, in *Aslam* the ET noted at [97] that:

> *"...none of our reasoning should be taken as doubting that the Respondents could have devised a business model not involving them employing drivers. We find only that the model which they chose fails to achieve that aim."*

b. Accordingly, the conclusions that HMRC reaches in relation to ULL *might* be relevant to other providers but equally, they may well not be. It all depends on the precise arrangements entered into by those other providers. If, by virtue of the *Aslam* litigation, HMRC is further forward in its investigations in relation to ULL than it is in relation to other providers, this is no reason for inaction in relation to Uber whilst HMRC progresses its investigations against the others.

95. Secondly, HMRC notes that "*the Commissioners are continuing their investigations into and consideration of the facts* ***and are not yet in a position to reach a firm conclusion***" (**emphasis added**). This statement betrays a fundamental misapprehension on HMRC's part as to the scope of their powers to raise s.73 VATA 1994 assessments. As Woolf J. made clear in *Van Boeckel*:

> "*In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them.*"

96. HMRC does not need to reach a "*firm conclusion*", nor does HMRC need to have reached the end of its investigations before it can assess. All that is required is for there to be "*some material on which the commissioners can reasonably act*". In the circumstances, it is clear that HMRC is applying an excessively high threshold for raising an assessment – and that threshold is plainly wrong in law.

97. At no stage has HMRC presented any reasons why they consider ULL does not owe unpaid VAT. Matters might be different if HMRC had formed the view that ULL's VAT returns were *correct*. However, this is not the case. The reason for HMRC's inaction stems from a lack of certainty on their part. But that is not the correct test for whether to raise s.73 assessments.

98. Along similar lines, HMRC notes that they continue to seek advice internally and are in regular dialogue with Uber relating to its tax affairs. Neither of these reasons present a

bar to raising best judgment assessments. As a matter of course, HMRC will continue to seek advice internally throughout the progress of any VAT appeal. Moreover, statutory review and alternative dispute resolution processes present opportunities for settlement *as a result of further ongoing dialogue with taxpayers which takes place after the issue of formal assessments*. Accordingly, communication between taxpayers and HMRC does not cease on the issue of an assessment – far from it.

99. Thirdly, HMRC refers to the dissenting judgment of Underhill LJ in *Aslam* as a complicating factor. However, the majority in the Court of Appeal in *Aslam* agreed with the EAT and the ET (in total, four judges and two lay members) as to the economic reality of Uber's arrangements with its drivers and passengers. It is absurd to suggest that this does not present HMRC with sufficient material on which reasonably to act. Existing judicial findings plainly provide reasonable grounds to believe that ULL is the relevant supplier; the fact that there is a dissenting judgment is no reason not to raise an assessment.

Ground 3: Regard to irrelevant factors

100. It is trite law that a decision maker must not have regard to irrelevant factors: see e.g. *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. HMRC has had regard to irrelevant factors in deciding not to issue a protective assessment. In particular:

    a. The fact that HMRC has lost other agency/principal cases does not justify inaction where, as here, the correct VAT is highly fact-specific, those other cases relate to an entirely different industry sector and in the present case, there are comprehensive relevant judicial findings pertinent to the immediate factual context of ULL. This is especially clear in the present case where the Court of Appeal in *Aslam* expressly distinguished *Secret Hotels2*.

    b. The fact that the decision of the Court of Appeal upholding relevant factual finding was by majority, and was not unanimous, is not relevant. A majority decision is just as authoritative as a unanimous decision. It *might* conceivably be relevant if for some reason HMRC genuinely believed the minority

decision to be correct, but that has not at any stage been HMRC's position. It is clear from *Courts* that HMRC can and will raise protective assessments even where they have received judgments directly *against* them.

c. Similarly, the fact that the decision of the Court of Appeal in *Aslam* is under appeal to the Supreme Court is not relevant. A decision under appeal is authoritative unless and until it is overturned. Again, this factor *might* conceivably be relevant if for some reason HMRC genuinely believed the Court of Appeal's judgment to be wrong, but that has not at any stage been HMRC's position.

101. These matters have to be seen in light of the fact that substantial sums are irrecoverably lost every VAT period so long as an assessment is not raised whereas, at worst, if an assessment is raised on reasonable grounds and properly overturned there will be the costs of the appeal.

Ground 4: Failure to apply priorities, charter and guidance

102. It is trite law that a public body must act in accordance with its published policies unless there is a good reason not to: see e.g. *R (Lumba) v SSHD* [2011] UKSC; [2012] 1 AC 245. HMRC's failure to act in the circumstances of the present case is inconsistent with its published priorities, charter and guidance. In particular:

a. 1.7 of the Charter "*We'll identify those who are not paying what they owe*" (a commitment plainly addressed to the public and/or taxpayers generally);

b. The strategic objective to "*maximise revenues due and bear down on avoidance and evasion*"; and

c. VAEC 1143 which provides: "*It is therefore important to remember that the earliest accounting periods may be vulnerable to falling outside the assessing period, during the enquiry time and if in doubt you should consider making an assessment to best judgement, see VAEC1400*".

103. Those published commitments and guidance can be enforced only through an action such as the present claim. It is impossible to understand how the failure of HMRC to raise an assessment here is consistent with any of those statements as to how it will discharge its functions.

104. There are strong grounds to consider that ULL is, in reality, the relevant supplier of services which it has sought to characterise as being provided by its drivers. The clock has been ticking for several years and substantial revenue has already been lost which may never be recoverable. Certainty is not required and VAEC1400 makes clear that "*if in doubt*" consideration should be given to making an assessment to best judgment. At the very least, HMRC must have considerable doubt about the correctness of Uber's VAT returns. HMRC's continued failure to act is inexplicable.

CONCLUSION

105. Fundamentally, HMRC's continued inaction is based on errors of law both as to the correct VAT analysis and as to its own powers of assessment. That is a strong claim, but it is justified on the facts. HMRC does not have to be certain that ULL is responsible for paying VAT in order to raise a protective assessment. It has had ample time – years – to consider and investigate ULL's business model. Publicly available information makes clear the sums at stake and judicial findings of fact make clear how ULL actually operates – as distinct from how its contractual arrangements portray it as operating – and that the economic reality is that it is a supplier of transport services, not a mere agent or intermediary. HMRC has the power to protect its position by issuing an assessment to best judgment in circumstances where there are reasonable grounds to believe that a taxpayer owes VAT. No reasonable basis has been identified for the refusal to exercise that power in the present case. Indeed, it is striking that HMRC has at no stage asserted that ULL does not owe unpaid VAT. The highest that HMRC has put its case is to state that the position is complex and it is continuing its investigations – but against the backdrop of the material already available, and the passing of time limits, these are no good reasons for HMRC's continued inaction.

Hui Ling McCarthy QC

11 New Square

Jack Anderson
39 Essex Chambers

Case No.

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN

THE QUEEN
-on the application of-
GOOD LAW PROJECT LIMITED

Claimant

-and-

COMMISSIONERS OF HER MAJESTY'S REVENUE AND CUSTOMS ("HMRC")

Defendant

UBER LONDON LIMITED

Interested Party

GROUNDS IN SUPPORT OF APPLICATION FOR A COSTS CAPPING ORDER

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1. This is the statement of grounds in support of the Claimant's application for a judicial review costs capping order under Part 46 of the Civil Procedure Rules. The Claimant relies on the information contained in the witness statement of Mr Jolyon Maugham QC in support of this application.

Legal Framework

2. Section 88 of the Criminal Justice and Courts Act 2015 provides:

> "(1) A costs capping order may not be made by the High Court or the Court of Appeal in connection with judicial review proceedings except in accordance with this section and sections 89 and 90.
> (2) A *"costs capping order"* is an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings.

(3) The Lord Chancellor may by regulations amend this section by adding to, omitting or amending the matters listed in subsection (1).
(4) Regulations under this section are to be made by statutory instrument.
(5) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
(6) In this section—
"free of charge" means otherwise than for or in expectation of fee, gain or reward;
"legal representative", in relation to a party to proceedings, means a person exercising a right of audience or conducting litigation on the party's behalf."

4. The present proceedings are plainly public interest proceedings. The issues raised are of general public importance, in several respects. First, the existence and scope of the Defendant's power to raise an assessment to protect against the passing of time is a point of law of general public importance. An unduly restrictive understanding of the Defendant's powers will lead to substantial loss of public revenue. As Mr Maugham explains in his witness statement, a reasonable estimate is that Uber's VAT liability would be in the region of £1 billion over 4 years, an ongoing loss of some £20 million every month that goes by in this case alone. The potential loss arising from the Defendant's error is greater still because a similarly restrictive approach might be taken in other cases. There is also a strong public interest in the maintenance of public confidence that HMRC applies the same rule of law to weak and powerful alike, especially in light of a recorded statement by a senior HMRC official suggesting it had been leant on by HM Treasury not to apply the law to a peer US technology giant. If the claim is successful, the benefits will be widely shared – it is impossible to identify any particular individuals who will benefit or the precise extent of the benefit but the fair operation of the tax system, the maintenance of the law, and the collection of all revenues which are due are obviously in the public interest.

5. The public interest requires the scope of the Defendant's power to raise a protective assessment to be clarified. These proceedings plainly provide an appropriate means of resolving that issue. Indeed, it is difficult to see how the issue can be resolved otherwise than in public interest proceedings brought by a third party: while a person subject to a VAT assessment might seek to argue on appeal that the Defendant has construed its powers *too broadly*, a challenge on the basis that it has construed its powers *too narrowly* could only realistically take the form of a judicial review brought in the public interest by a third party. That there are circumstances where this may be crucial

costs of the Defendant and any costs of the Interested Party), with a reciprocal cap in the total sum of £40,000.