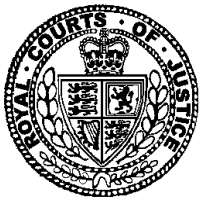

Neutral Citation Number: [2023] EWHC 1621 (Admin)

Case No: CO/2330/2019

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2023

Before:

Sir Ross Cranston sitting as a High Court judge

- -

Between:

THE KING **on the application of** **GLINT PAY SERVICES LTD**	**Claimant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS	**Defendant**

- -
- -

DAVID BEDENHAM and CHRISTOPHER LEIGH (instructed by **KPMG LLP**) for the **Claimant**
ANDREW MACNAB (instructed by the **Solicitor and General Counsel for HM Revenue and Customs**) for the **Defendant**

Hearing date: 20 June 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30 am on 30 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR ROSS CRANSTON:

INTRODUCTION

1. The claimant, Glint Pay Services Ltd ("Glint"), challenges the decision of the Commissioners for His Majesty's Revenue & Customs ("HMRC") in March 2019 that its supplies of gold bullion are to be treated as exempt from VAT pursuant to Group 15 of Schedule 9 to the Value Added Tax Act 1994 ("VAT Act 1994"), not zero-rated pursuant the Value Added Tax (Terminal Markets) Order 1973, SI 1973/173 (the "TMO"). This has the consequence that Glint is not entitled to deduct input tax attributable to the making of those supplies.

2. On receipt of the March 2019 decision, Glint asked HMRC to conduct a statutory review. In June 2019, HMRC notified Glint that its decision had been upheld on different grounds, namely that Glint makes supplies of gold under Item 1 or 2 of the Investment Gold Exemption, not Item 3.

3. Glint appealed to the First-tier Tribunal (Tax Chamber) ("FTT") under section 83 of the VAT Act 1994. Glint withdrew the FTT appeal in October 2021. The upshot is that the March 2019 decision is to be treated as upheld without variation for all purposes as if the FTT had determined the appeal: VAT Act 1994, s. 85(1); *Meridian Defence & Security Ltd* [2014] UKFTT 300 (TC), [23]. HMRC has made an assessment to VAT if the supplies are treated as exempt, which has not been appealed to the FTT.

4. Consequently, Glint accepts that as a matter of VAT law its supplies of gold are exempt. However, based on its public law arguments it maintains that it supplies should be treated as zero-rated. Glint's claim turns on what is contained in a Memorandum of Understanding between the London Bullion Market Association ("LBMA"), the London Platinum and Palladium Market ("LPPM"), and HMRC ("MOU"). Glint claims (1) that the MOU gives it a legitimate expectation of a zero-rating for VAT, frustration of which is an abuse of power, and (2) that in light of it, HMRC's March 2019 decision is irrational.

5. There is no issue that the High Court is the appropriate forum for Glint's public law challenge to the March 2019 decision.

BACKGROUND

6. Glint was incorporated in 2016 under the laws of England and Wales. At all material times it has been registered for VAT. It is regulated by the Financial Conduct Authority and is an Electronic Money Issuer institution. It is head-quartered in the UK but operates internationally. Glint is not a member of the LBMA.

Glint's contracts

7. There are a set of contracts providing the context for Glint's services.

Glint-client relationship

8. As part of its business Glint enables its clients (who are individual members of the public) to buy, hold and sell gold and, if they so choose, to use the proceeds to finance

spending on a linked Mastercard account. The gold has been refined by refineries accredited by the LBMA and assayed for its purity and fineness.

9. In the pack given to customers and on its website, Glint described itself as providing "reliable money":

> "Invest in Glint: the world's first multi-currency payments solution that gives instantaneous ownership of gold and the ability to use it as money digitally through an app and debit card."

10. In this material Glint's "market validation" is stated as: "Glint is unique and differentiated." It is said that Glint is providing a global currency: "Spend gold digitally for the very first time". "Buy gold…save gold…spend gold", the description continued. Under the heading "Reliability and Choice", Glint states: "Through our innovative app and Mastercard you can now use physical gold as money. Glint also allows you to buy, save and spend British pounds, Euros, and US dollars." It owns its technology and it "uniquely enables gold to be used as money."

11. The Glint-client relationship is governed by a standard form contract which clients enter with Glint, the "Gold Account Terms & Conditions". Glint supplies gold to its customer pursuant to these terms and conditions. None of this takes place on the London Bullion Market and none of the terms and conditions of that market are incorporated by reference in Glint's standard form contract.

12. Glint supplies its clients with gold as principal. It does this over the counter electronically by way of the bespoke mobile application ("the app"). The app operates and interacts with the Mastercard system. In essence, it works by allocating to Glint's clients e-money accounts in various currencies (e.g., USD, EUR or GBP) and a separate gold account. All of these accounts are linked to a Mastercard account and a Mastercard prepaid debit card which is issued by Glint to its client. A client can transfer funds into their e-money account through a debit card transaction or bank transfer. Once they have done so, the funds are held at Lloyds Bank and the client may use available funds to either pay for spending transactions using the Glint Mastercard or purchase gold in their gold account.

13. When a client wishes to purchase gold, they submit a request to do so via the app and a real-time spot price for the transaction is instantly published in the app. Should the client wish to proceed based on the quoted spot price, they complete the purchase and the client's gold account is immediately credited with the appropriate amount of gold. Subsequently, Glint aggregates the gold trades which have been made by its clients as a whole and it settles on a spot rate with the liquidity provider. It then purchases the necessary amount of gold to meet the credits already made to the client's gold account. At the relevant time, the aggregated trades occurred, on average, twice a day. The procedure is largely mirrored in reverse when a client wishes to sell gold.

14. Glint's clients also have the ability to sell gold to settle a Mastercard transaction. When the client requests this via the app, Glint automatically removes the specific value of the Mastercard transaction from the Client's gold account, sells that quantity of gold and uses the proceeds to settle the Mastercard transaction.

15. Ownership of the gold, together with all transaction details, is recorded by the app, which is the ledger of record for the gold purchased and sold by Glint's clients. There is nothing in the "Gold Account Terms & Conditions" for anything to be done by any other party to effect or evidence Glint's transactions of gold with its customers.

Glint-StoneX contracts

16. StoneX (formerly known as INTL FCStone) provides its customers with execution, clearing and advisory services in the financial and commodities markets. It is a member of the LBMA.

17. Glint has contracts with StoneX under which StoneX provides various services to Glint. First, StoneX has custody of the gold, which it provides to Glint as part of a larger stock which is has available: Custody Agreement for Previous Metals, 2017, preamble. StoneX is Glint's sole liquidity provider. Glint and StoneX act as principals with each other.

18. Secondly, when one of Glint's client wishes to purchase or sell gold the spot rate is quoted by StoneX. It generates a spot price using the prevailing market value of the gold at the date and time on which the client requests the transaction. That spot rate is then supplied to the client.

Glint-Brink's contracts

19. The gold which Glint buys and sells to its client is at all times physically held in vaults operated by Brink's Global Services Limited ("Brink's") in Zurich, Switzerland. It is stored within a segregated section of the vault. Brink's has ultimate liability for the gold's preservation and protection.

20. Brink's is a member of the LBMA.

The MOU

21. The LBMA, LPPM and HMRC entered into the MOU in April 2013. The MOU is entitled "Memorandum of Understanding between [HMRC] and the London Bullion Market Association and London Platinum and Palladium Market on the transactions effected by their members and the VAT issues arising". There was no evidence before the court about the origins of the document.

22. Section 1 of the MOU states as a purpose to assist members of the LBMA, LPPM and HMRC to understand the transactions that take place on the London Bullion markets; determine the supplies that take place for VAT purposes; determine the liability to VAT of supplies that take place for VAT purposes in respect of the different precious metals and markets; and confirm those transactions that need to be reported on quarterly statistical reports of cross-border services.

23. That section adds that the reliefs from VAT that the markets enjoy are an integral part of their success, and that it is recognised that "markets are ever changing and legislation is static; we are grateful for the opportunity to assist HMRC in ensuring that the reliefs are still relevant and up to date."

The MOU's terms

24. Section 3 of the MOU is headed "Transactions Undertaken". Paragraph 3.1 of the MOU provides that:

> "3.1 Relief from VAT on the London Bullion and London Platinum and Palladium Markets is provided by the [TMO] which applies the zero rate of VAT to sales of goods ordinarily dealt with on the market…Together, the Terminal Markets Order and the Investment Gold Directive relieve nearly all transactions traded on the two markets from a positive rate of VAT. Whilst the Investment Gold Directive applies to gold of a specified quality, the TMO applies to goods ordinarily dealt with on a market."

25. Falling within section 3 of the MOU entitled "Transactions undertaken", paragraph 3.4 is headed "Control of Metal by Members". It provides:

> "3.4 Where a Member retains physical control over a metal (i.e. it is stored within a Member's vault), any transactions undertaken have historically been treated as benefiting from reliefs available under the Terminal Markets Order. This has applied specifically to transactions between non-members. At paragraphs 4.3, we have set out that Members are within the supply chain in these transactions and therefore the relief continues to apply. It follows that relief under the Terminal Markets Order is in practice available when the metal is under the control of a Member, but not available when:
>
> Metal is not under the control of a Member; and
>
> Metal leaves the control of Members and is taken to use or consumption."

26. Section 4 is headed "The Basic Types of Trade" and sets out the VAT treatment for five different types of trade. One of these are "Non-Member Transactions" at paragraph 4.3:

> "Non-member Transactions
>
> The TMO applies the zero rate to supplies between Members, or a Member and a non-member, of the LBMA. A transaction between two non-members in which the metal concerned is under the physical control of a Member will invariably include a Member, specifically a clearing member, to transfer the interest in the metal. Although the sale is agreed between two non-members that sale is assigned to enable clearing and settlement to take place. Therefore, the transactions are entered into between non-members and Members, and thus conditions set out in the TMO are met.

> If there is no involvement of an LBMA Member then the relief cannot apply.
>
> VAT Analysis
>
> In order for relief under the TMO to apply, a member of the LBMA must be one of the parties to a transaction – a supply must be made by or to a member for the zero rate to apply. As the member is holding title to the metal then it is making a supply of that metal to the receiving party …"

27. Annex 4 of the MOU contains a "VAT Liability Matrix". Box 4.3 of the matrix concerns transactions where the first and last parties are non-members. It provides that where the gold is under the control of a member or has been assigned to a member for clearing, the supply is zero rated.

Glint, the MOU and HMRC

28. HMRC do not admit but cannot deny the fact, terms, nature, and extent of Glint's reliance on the MOU. Glint does not allege that it or KPMG approached HMRC concerning these matters at any material time.

29. LBMA hosted a webinar in January 2021. Andrew Tucker, head of VAT reliefs, deductions and financial services at HMRC participated. During the webinar, Mr Tucker discussed the MOU and invited discussions on amendments in the light of Brexit.

30. In June 2021 there was an email exchange between Andrew Tucker and David Fitzgerald of HMRC policy. They confirmed to the LBMA that the MOU is an agreed and accepted interpretation of the TMO legislation.

THE LEGAL FRAMEWORK

VAT law and guidance

31. There is no need to set out the detail of VAT law as regards investment gold since there is no dispute about its application in this case.

32. In summary, the investment gold exemption is contained in Group 15 of Schedule 9 of the VAT Act 1994. (HMRC accept that the Glint customer gold held in the vault in Switzerland, which is bought and sold, meets the definition for investment gold in terms of its purity.) Note 4 of Group 15 states:

> "This Group does not include a supply (a) between members of the London Bullion Market Association, or (b) by a member of that Association to a taxable person who is not a member or by such a person to a member."

33. Article 4 of the TMO provides for the supply of investment gold to be zero rated. Article 4 states:

> "Supplies between taxable persons which but for Note 4(a) to Group 15 of Schedule 9 to the Act (exemption for investment gold) would have fallen within that Group are hereby zero rated."

34. HMRC's published guidance is consistent with this. The relevant guidance is in Notice 701/9 and Notice 701/21.

35. So, too, is HMRC's VAT Gold Manual. It states that zero rating under the TMO only applies to transactions on the market between LBMA members. As well, it provides that supplies of investment gold between LBMA members and non-members who are taxable persons are standard-rated and subject to the conditions of the special accounting scheme for gold - the reverse charge. Supplies of investment gold between LBMA members and private individuals, it adds, are exempt.

Law of legitimate expectation

36. Apart from one point, the relevant principles of legitimate expectation applicable in this case were not in dispute. A taxpayer must have an expectation of being treated in a particular way caused by HMRC's words or conduct. These must be "clear, unambiguous and devoid of relevant qualification": *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569, per Bingham LJ. The hypothetical representee is the "ordinarily sophisticated taxpayer" irrespective of whether he is in receipt of professional advice: *R (on the application of Aozora GMAC Investment Ltd) v Revenue and Customs Commissioner* [2019] EWHC Civ 1643, [27], per Rose LJ (as she was).

37. In *R (on the application of Hely-Hutchinson) v Revenue and Customs Commissioners* [2017] EWCA Civ 1075 Arden LJ (as she was) helpfully gathered together the legitimate expectation principles relevant in the taxation context: HMRC is a public body invested with the power to collect tax, and taxpayers must expect to pay the right amount of tax; a taxpayer's only legitimate expectation is, prima facie, that they will be taxed according to statute, not concession or a wrong view of the law; in assessing the meaning, weight and effect reasonably to be given to statements of HMRC, the factual context, including the position of HMRC themselves, is all important; a statement formally published by HMRC to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them; there was a distinction between a decision that amounted to "mere unfairness" (conduct 'a bit rich' but understandable), and a "decision so outrageously unfair that it should not be allowed to stand": [37], [40], [42].

38. As to unfairness, Rose LJ explained in *Aozora* that it "has to reach a very high level; it has to be outrageously or conspicuously unfair." She also said:

> "47…There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers. There is also a real public interest in the revenue making known the general approach which it will adopt, and the practice which it will normally follow, in specific areas … But there are likely to be few cases where a taxpayer can plausibly claim that a representation made in general

> material of this nature is so clear and unqualified that the taxpayer is entitled to rely on it and to be taxed otherwise than in accordance with the law."

39. Rose LJ added that the fact that the taxpayer instructed an external tax adviser is not fatal to a taxpayer's claim, but is relevant to the fact, terms, nature and extent of the reliance and to the question of unfairness: [54]-[55].

40. The one point of disagreement between the parties concerned whether the burden was on Glint to show unfairness. Rose LJ indicated that the burden was on the taxpayer: [52]. Mr Bedenham contended that this was said per incuriam, a decidedly bold submission. There is no need for me to decide the point in the circumstances of this case.

GLINT'S GROUNDS OF CHALLENGE

Ground 1: legitimate expectation

Glint's case

41. Glint's case rests on the MOU which, it contends, contains clear and unequivocal representations, devoid of relevant qualification, that transactions of the same type as Glint's supplies of gold will be zero-rated. Glint's supplies are indistinguishable from the types of supply described in the MOU as being subject to zero-rate VAT and, as a result, an ordinarily sophisticated taxpayer would expect the MOU to apply and the supplies to be zero-rated. The MOU contains a statement about a carve out wider than that already set out in Group 15 of Schedule 9, of VAT Act 1994, and the TMO. In the absence of any evidence from HMRC about the MOU, it is possible to draw an inference about this.

42. First, Glint points to paragraph 3.4 of the MOU, that the zero-rate is available in transactions between non-members provided that a member of the LBMA retains physical control over a metal (i.e., it is stored within a member's vault). Glint's supplies meet this condition since they are between non-members of the LBMA (Glint and its clients) and gold is physically stored in the Brink's vault under the custody of StoneX. As well the MOU says at paragraph 3.4 that "relief under the TMO is in practice available when the metal is under the control of a member", and that is the position with Glint: the gold it supplies is under the control of a member, namely Brink's, and it does not leave Brink's vault.

43. Secondly, Glint submits that it falls within paragraph 4.3 of the MOU, in that the gold is always physically held at Brink's, and StoneX is intimately involved in the transaction as the supplier of the gold and at all material times after that its custodian. Finally, Glint refers to Box 4.3 of Annex 4, which says that zero rate will apply in the supply of investment gold "if a member is involved in transaction." Again, Glint's supplies meet this condition given that StoneX and Brink's, two members of the LBMA, are intimately involved in the supplies.

44. Glint contends that the MOU was published with the imprimatur of HMRC and that HMRC has continued to endorse it, as evidenced in the January 2021 webinar and the email exchange in June 2021 referred to earlier in the judgment. The ordinarily

sophisticated taxpayer would read the MOU as being authorised by HMRC and setting out HMRC's position. The MOU contains policy about a further carve out than provided in the law, not just guidance or a statement of opinion.

45. Moreover, Glint contends that while the MOU is said to be intended to assist members of the LBMA, its intended scope is clearly wider given it expressly considers the proper VAT treatment of LBMA gold supplies between non-members. Referring to the recognition of ever changing markets in section 1 of the MOU, Glint contends that its innovative business model is a paradigm example of market development and it would be contrary to the purpose of the MOU to seek to exclude Glint's supplies on the basis that Glint was not making those supplies at the time that the MOU was produced. Glint adds that the MOU is clearly designed to introduce certainty and to aid both HMRC and taxpayers, including non-members, when determining the proper VAT treatment of supplies of gold.

46. As to fairness, Glint contends that from the outset it relied on the MOU, in relation to the overall planning of its business, its assessment of the commercial viability of the supplies of gold, its growth strategy, forecast modelling and the completion of its VAT returns. Glint will suffer significant hardship if HMRC is permitted to resile from it. If the MOU is wrong as to aspects of the law, that does not assist HMRC: *R (Alliance of Turkish Businesspeople)* [2020] EWCA Civ 553, [49]. Moreover, the MOU cannot be said to be mere guidance of the sort considered by Rose LJ in *Aozora* [2019] EWCA Civ 1643: it is deliberately published to a wider audience and not just an internal manual; it is a record of a formal agreement between HMRC and an industry body setting out the approach HMRC will take; and it intends to create a bright line in a complex area of VAT law. Moreover, the carve out in the MOU is within HMRC's collection and management powers given the statement of purpose in section 1 of ensuring that reliefs are relevant and up to date and are an integral part of the success of the London bullion market. HMRC has not explained how the MOU is applied in other cases, as it presumably is, which makes it unfair to depart from it in Glint's case.

Discussion

47. In my view Glint's case falls at the first hurdle. On its face the MOU does not state in terms which are clear, unambiguous, and devoid of any relevant qualification that Glint's supplies of gold would benefit from any additional carve out in addition to what is provided by law. The terms of the MOU simply do not cover what counsel for HMRC accepted was a clever system enabling retail customers to buy gold while it remains protected in Brink's vaults.

48. At a general level, section 1 orients the MOU to proprietary dealing of LBMA and LPPM members, or trades on behalf of others, on the wholesale bullion and precious metals markets. Glint is a not a member of the LBMA or LPPM, LBMA and LPPM members are not part of the transactions it engages in with its customers, either on these markets or otherwise, and its dealings with customers are at the retail level. Its "multi-currency payments solution", where its customers can "spend gold digitally", is far removed from "assist[ing] members of the LBMA and LPPM" in what they ordinarily do on the bullion markets. In short, the MOU is not addressed to those like Glint or its customers; it does not contemplate the retail transactions engaged in.

49. As to the specific provisions of the MOU, Glint does not unambiguously fall within their terms, quite the opposite. Section 3 describes the transactions undertaken, and section 3.1 refers at the outset to the relief from VAT applying to dealings on the London wholesale markets. These are not Glint's retail sales. As to section 3.4, and the reference to the benefit of the reliefs applying to transactions between non-members where there is a control of metal by a member (as in Glint's case), there is the qualification by reference to paragraphs 4.3 that "members are within the supply chain in these transactions and therefore the relief continues to apply." That is not Glint's product; neither StoneX nor Brink's as LBMA members are a party in the retail transactions which Glint enters with its customers. They do not have title to the gold transferred, they do not clear transactions, and they do not record them – transactions are recorded digitally through the app.

50. Neither section 4.3 nor the Annex (box 4.3) takes the matter further. Section 4.3 certainly covers transactions between non-members with the metal concerned being under the physical control of a member – Glint's case. But it goes on that the transaction "will invariably include a member, specifically a clearing member, to transfer the interest in the metal…that sale is assigned to enable clearing and settlement to take place", and "therefore" the conditions in the TMO are met. That is certainly not Glint's product. That a member must be somehow involved in the transaction for the TMO to apply is underlined by the "VAT Analysis" which follows as part of section 4.3 ("a member of the LBMA must be one of the parties to a transaction – a supply must be made by or to a member for the zero rate to apply"). Box 4.3 is to the same effect: for zero rating a member must be "involved in the transaction".

51. The reality is that there is no provision in any of Glint's contracts outlined above for an LBMA member, be it StoneX or Brink's, to be a party to its transactions with its customers, and certainly not as a clearing member for the transfer of an interest in the gold between it and its customers, whether by assignment or otherwise. The first essential for a claim in legitimate expectation is not met: there is no promise or representation by HMRC made to Glint through the MOU, either as an identifiable defined person or a member of an identifiable defined group, which is clear, unambiguous, and devoid of qualification that its supplies will be zero rated. Neither the January 2021 webinar nor the email exchange go anywhere: there is no reference to gold in the first, and the June 2021 email is a hearsay account by those not involved in this litigation, which is ambiguous in its content at best.

52. In any event it would not be conspicuously unfair or an abuse of power to frustrate any legitimate expectation Glint might have had, given the public interest in HMRC collecting VAT in accordance with what the law clearly provides. To my mind that is especially the case when against the background that neither Glint nor KPMG as its advisers ever approached HMRC to seek clarification that the MOU provided a carve out for Glint's business model. In other words, I accept HMRC's submission that the fact that Glint did not approach HMRC is a compelling reason why it would not be an unjust exercise of power for HMRC to frustrate any expectation Glint might have. As to Glint's other points regarding fairness, the evidence is unclear about whether Glint will suffer significant hardship although there will no doubt be a financial impact.

Ground 2: irrationality

53. As Mr Bedenham fairly accepted, Glint could not argue irrationality given the conclusions I have reached on ground 1.

CONCLUSION

54. For the reasons given Glint's claim is dismissed with costs.