TC03755

Appeal number: TC/2013/00625

VAT – Place of supply – hotel accommodation supplied to non UK travel agents; EC Sales Lists

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR & MRS BALDWIN t/a VENTNOR TOWERS HOTEL **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
MR CHRISTOPHER JENKINS

Sitting in public in Newport Isle of Wight on 25 April 2014 with further representations from the Appellant by letter of 6 May 2014

The Appellants in person

Mr Hayley for the Respondents

DECISION

1. This decision replaces one issued in early May. That original decision was set aside because it was made without taking into account a letter of 6 May 2014 from Mr & Mrs Baldwin to the tribunal. The circumstances are explained below. This decision incorporates the material in the earlier decision but also addresses the contents of that letter.

2. We should start by expressing our gratitude to Mr & Mrs Baldwin for attending a hearing. At the time set for the hearing they had not appeared and our clerk telephoned them. It appeared that they had not received notice of the hearing and were packing their bags to go to a wedding on the mainland. After our clerk's telephone call they revised their plans, left their packing half done, and travelled across the island to Newport to attend the hearing. Naturally this meant that they were not as well prepared as they might have been so we directed that they should (if they wished) make further written representations and adduce further evidence within 14 days after the hearing.

3. Mr& Mrs Baldwin took up this invitation and wrote to the tribunal on 6 May 2014. Initially their letter was misfiled. It came to our attention on 27 May 2014 but by that that time we had issued a decision which did not take account of the letter. We therefore set aside out original decision and now make this decision taking into consideration the contents of that letter.

4. This appeal concerns an assessment made by HMRC to recover VAT which they say was wrongly repaid after Mr and Mrs Baldwin had made an adjustment to their October 2011 VAT return to reclaim VAT which they thought had been wrongly accounted for on their supply of hotel accommodation to EU travel agents not established in the UK.

5. Mr & Mrs Baldwin run the Ventnor Towers Hotel on the Isle of Wight. Their visitors include both those who book directly and those who come as a result of bookings made by travel agents. Some of those travel agents are established outside the UK and some within the UK.

6. It seems that until the autumn of 2011 Mr & Mrs Baldwin's VAT returns were prepared on the basis that all their supplies of accommodation - whether directly to individuals or to travel agents established within and without UK - were liable to VAT at the standard rate.

7. However it appears that in late 2010 HMRC telephoned Mr & Mrs Baldwin and then sent them an EEC Sales Statement to complete. As we shall explain later such a statement is required to be made when a business makes supplies of particular services to another non-UK but EC business which is itself registered for VAT. (In fact, as we shall explain later, the legislation did not require Mr & Mrs Baldwin to supply this statement. But that was not apparent to them at the time). It is not clear

why Mr & Mrs Baldwin were sent this form but it may have been because of an entry they made on one of their preceding VAT returns.

8. With the EC statement was an HMRC advice note and Mr Baldwin noticed that part of it read:

> "The services you provide to other businesses are charged VAT where your customer is based, not where your business is established. If you are supplying services to private customers, VAT is charged where the customer is based.
>
> "In most cases, you and your customers can use the VAT reverse charge procedure to get your VAT back."

9. This caused Mr Baldwin to write to HMRC to ask whether the supplies of hotel accommodation they had made persons outside the UK should not bear VAT. He wrote explaining that if they charged VAT on invoices to foreign travel agents there would be a double charge because the travel agent would then have to account for VAT on the full amount of the package he provided to his customer. It was therefore his understanding that, as the notice said, "the services we provide to other businesses are charged VAT where our customer is based, not where our business is established."

10. On 8 December 2010 David Connolly replied on behalf of HMRC. At the end of the first page of his letter Mr Connolly said:

> "May I now refer you to section 6 of the Public Notice 741 Place of supply of services which explains that the supply of land-related services, such as hotel accommodation, is where the land itself is located, regardless of where you or your customers belong"

11. Later, and no doubt after the receipt of more of those EC Sales Statements, Mr & Mrs Baldwin submitted a VAT return for the period ending October 2011 in which they made a claim for the refund of VAT previously accounted for on supplies to foreign travel agents. We understand that this claim was made on the basis that the supplies of accommodation they had made to travel agents established outside the UK but in the EC, were not liable to UK VAT. A repayment of the VAT was made following the submission of return.

12. This reclaim, and possibly the effect of abnormal items arising from a landslip and insurance claim, triggered a visit in June 2012 by two of HMRC's officers to conduct a VAT audit.

13. It appears that during that visit there was some discussion between the officers and Mr Baldwin about the correct treatment of Mr & Mrs Baldwin's supplies to non-UK travel agents, and also about whether or not an EC Sales List was required to be returned. In their letter of 6 May Mr and Mrs Baldwin say that the officers said they thought that the VAT treatment they had adopted was right but that due to the complex nature of the VAT rules they would seek advice and refer the ruling to them. What is clear is that the officers were uncertain of the correct position and admitted the possibility that Mr Baldwin might be right.

14. But on 6 July 2012 Karen Date, one of the officers who had taken part in the visit, wrote to Mr & Mrs Baldwin. In relation to the question of whether VAT was due on the supplies to the overseas travel agents, she said that she was consulting HMRC's experts and was waiting for their advice. In relation to the need to return an EC Sales List, she said that she had spoken to HMRC's Intrastat expert who had said that Mr & Mrs Baldwin did need to complete it.

15. There was then an exchange of correspondence which seemed to have been precipitated by the advice received by Ms Date from the VAT treatment expert. In a letter of 31 August 2012 Ms Date concludes that "we feel ... your hotel is making wholesale supplies ... and VAT [is] is to be charged on the supply value.".

16. On 9 October 2012 Ms Date wrote to Mr & Mrs Baldwin formally stating the conclusion that VAT was due on the accommodation the hotel had supplied to travel agents not established in the UK, so that as a result the refund claim should not have been paid. She did not enclose the text of the internal advice she had received. On 24 October 2012 HMRC issued an assessment in the sum of £20,374 to recover the VAT which had been repaid.

17. In the same letter of 9 October 2012 Ms Date wrote to say that their previous advice in relation to EC Sales Lists had been wrong and that Mr & Mrs Baldwin did not need to include their sales on an EC Sales List (although they said that they did need to render nil returns!).

18. The discussions between HMRC and Mr & Mrs Baldwin were complicated by a consideration of the Tour Operators' Margin Scheme ("TOMS"). This was unfortunate because, for reasons we shall explain, the scheme was not relevant to Mr & Mrs Baldwin's supplies.

19. There was then correspondence between the parties which gave rise to a letter of review in which the assessment was upheld.

The grounds of appeal

20. Mr & Mrs Baldwin's appeal, in formal terms, is against the assessment and conclusion of the review letter. But their concerns are somewhat wider than simply the question of whether or not their supplies were liable to VAT. In correspondence with VAT and before us and Mr & Mrs Baldwin raised the following concerns:

(1) the legislation is complex and difficult to access and understand;

(2) even HMRC's own officers were uncertain about its meaning and effect and at times gave differing advice;

(3) HMRC's publications did not give advice consistent with the officers' views;

(4) they had been plagued by a confusing requirements from HMRC to make EC Sales Statements;

(5) the very requirement to make EC Sales Statements implied that some of their supplies were not liable to UK VAT; and

(6) there had been omissions from some of the correspondence which made things more confusing

21. Parliament has not given us the power to address the breadth of Mr & Mrs Baldwin's concerns. This tribunal is constituted by statute (the Tribunals, Courts and Enforcement Act 2007) and given powers by statute (the VAT Act 1994) to hear certain appeals. We have power only to make decisions in relation to those matters in respect of which appeals may be brought before us. By section 83 VAT Act those matters include a VAT assessment and certain decisions in relation to liability to VAT, but do not generally extend to requiring HMRC to do, or not to do, something, or otherwise regulating or reviewing HMRC's conduct.

22. In the remainder of this decision we start by considering the application of the provisions of the Principal VAT Directive of the EU and the UK VAT Act to the supplies of accommodation made by Mr & Mrs Baldwin. We explain the nature and scope of the Tour Operators' Margin Scheme, and the legislature's requirement to render EC Sales Statements. Finally we consider whether there was anything in Mr & Mrs Baldwin's dealings with HMRC which affected the amount of the VAT which was properly due.

The relevant law and its application.

Place of Supply

23. The provisions of the principal VAT directive 2006/112/EEC in relation to the place of supply are found in Articles 44 onwards. Article 44 provides:

> The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of a taxable person located in a place other than the place where he has established his business, the place of supply of services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides."

24. Article 45 and 46 apply to the supply of services to a non-taxable person and are not relevant.

25. Article 47 provides:

> In the case of supply of services connected with immovable property, including the services of experts and estate agents, the provision of accommodation in the hotel sector or in sectors with a similar function, such as holiday camps or sites developed for use as camping sites, the granting of rights to use immovable property and services for the preparation and coordination of construction work,

such as the services of architects and firms providing on-site supervision, shall be the place where the immovable property is located.

26. In a number of decisions (see for example *Dudda v Finanzamt Bergisch Gladbach* [1996] STC 1290) the Court of Justice of the European Union has held that in relation to predecessors of these provisions, that the rule in article 44 was a general rule which was overridden by the specific rules in article 47 where it applied.

27. As a result under the provisions of the directive the supply of hotel accommodation takes place in the country where the hotel is sited

28. Thus the Directive requires the UK to treat Mr & Mrs Baldwin's supply of accommodation of hotel accommodation as taking place in the UK whether it is supplied to an individual, to a business in the UK, or to a business established outside the UK.

29. The United Kingdom's domestic legislation implements the Directive in Schedule 4A VAT Act 1984 which provided in relation to supplies made after 1 January 2010:

> (1) A supply of services to which this paragraph applies is to be treated as made in the country in which the land in connection with the supply is made is situated.
>
> (2) This paragraph applies to --
>
> > ... (d). The provision in an hotel, inn, boardinghouse or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purposes of a supply of catering.

30. Thus the domestic legislation applies the same rule in relation to hotel accommodation as that it was required to impose under the Directive: under that legislation the supply of hotel accommodation in the UK is made in the UK wherever the recipient is established.

31. A supply of accommodation made in the UK is liable to VAT at the standard rate. Thus Mr & Mrs Baldwin’s supply was liable to VAT at the standard rate.

The Tour Operators’ Margin Scheme.

32. The Tour Operators Margin Scheme (TOMS) is authorised by Articles 3o6 to 310 of the Directive. It applies to “travel agents who deal in their own name with customers and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities." Article 308 provides that the taxable amount for the service provided by the travel agent is the amount of travel agent’s margin and Article 310 provides that VAT charged to the travel agent by other taxable persons shall not be deductible or refundable in any member state.

33. The effect of this provision is that where a person receives a package from a travel agent he will bear VAT on the margin made by the travel agent in the country

of the establishment of the travel agent; and bear VAT on the on the other elements of the package such as accommodation or travel into countries on which in which those services are supplied. There is no double counting.

34. The UK implemented the scheme in the VAT (Tour Operators) Order 1987. Regulation 5 of that Order provides that the travel agent makes his supply where he is established.

35. The TOMS provisions do not affect the operation of Articles 44 to 47 of the Directive as they apply to Mr & Mrs Baldwin's supplies. Nor did they affect the application of the domestic provisions in schedule 4A to those supplies.

EC Sales Lists.

36. The Principal Directive and section 2(3) VAT Act permits Regulations to require the submission to HMRC of statements containing particulars of the services supplied to business persons in a state in the EC other than the UK. They provide a way of policing the reverse charge. The regulations are made in Articles 21 to 21E of the VAT Regulations 1995. Regulation 22A of those regulations provides that:

> Every person who has made a supply of services to a person in a member State other than the United Kingdom in circumstances where the recipient is required to pay VAT on the services in accordance with the provisions of the law of the other member states giving effect to [the reverse charge provisions in Article 196 of the Directive] shall submit a statement to HMRC."

This is the EC Sales Statement.

37. As we have explained under the provisions of article 44 to 47 of the Directive the supply of hotel accommodation made by Mr & Mrs Baldwin to EC travel agents who were established outside the UK is treated by the Directive as made in the UK. That means that the recipients of those supplies were not obliged to account for VAT on them in accordance with the reversed charge procedure in Article 196 of the Directive. In turn that meant that Mr & Mrs Baldwin were not required by UK law (or in any way as a result of the Directive) to submit an EC Sales Statement in respect of them.

Conclusion on the law.

38. We conclude that the supplies at issue made by Mr & Mrs Baldwin were taxable supplies. HMRC's decision that they were so in their letter of 9 October 2012 was therefore correct. VAT had previously been accounted for correctly on the supplies and the reclaim made in the October 2011 VAT return was not correct. The assessment to recover the VAT was therefore based on a correct conclusion. There was no dispute before us about the calculation. We conclude that it was correct.

Other matters

39. Mr & Mrs Baldwin are correct in that the legislation is complex. It has also been the subject of change over the last 10 years or so. However complexity in legislation is not recognised the as providing a reason that it should not be applied.

40. We have also recorded the changes in advice given to Mr and Mrs in the letters of the 6 July 2012 and 9 October 2012 and perhaps to some extent the in the notes that went with the EEC Sales List. These issues emphasise the complexity of the legislation. But unfortunately they cannot assist Mr & Mrs Baldwin in their appeal.

41. As we have explained there was no legal requirement to complete an EC Sales Statement in relation to the supply of hotel accommodation. Mr and Mrs Baldwin were not and are not required to list the supply of such services. However the fact that HMRC sent the form to Mr and Mrs Baldwin cannot affect the application of the law to their supplies. Nor does it affect the VAT which was due on the supplies.

42. In their letter of 6 May 2014 Mr & Mrs Baldwin say:

> "To expect us to understand the rules when tax officers have problems is not reasonable in law. If, and this is the point of order we feel, the VAT officers had prepared their case completely prior to arrival on audit day, and given the ART 47 rule to us at the meeting, that we were given at the tribunal, there would have been no case to argue. They didn't, we therefore consider there is no case to answer.
>
> "We have since received, during many months, correspondence from officers all over the country and it was only during the last few communications that we received written rulings that probably confirm or situation.
>
> "Whilst so many departments and employees have taken views or rulings on this extremely complicated area of taxation, we finally have a letter from Richard Summersgill HMR&C via Andrew Turner out MP and the sixth paragraph states "our reply of 18TH April 2013 again explained that our mistake in providing incorrect information had no impact on the issue of the assessment".
>
> "If no mistake had been made, this whole long drawn out debate or battle over the VAT liability would never have started.
>
> "On the grounds that the VAT department started this claim situation, they agree they made the mistake and subsequently failed to supply correct facts following their audit oat the hotel, we dispute paying any monies back to the revenue department."

43. We fear that these arguments cannot assist Mr and Mrs Baldwin in this appeal

44. . However complex the law, it is still the law, and we are required to make our decision in accordance with it. If HMRC make a mistake or give confusing advice, that does not affect the proper legal classification of the supply.

45. The law does recognise that a public authority such as HMRC may so act as to give rise to a legitimate expectation that a particular treatment be applied, and in these

circumstances the courts may order HMRC to collect tax only in accordance with their representation. But this rule applies only where the representation is clear and devoid of qualification, whereas the statements the officers made to Mr and Mrs Baldwin were hedged by the qualification that that needed to check with specialists; further the making of such orders is the prerogative of the High Court and not within the powers of this tribunal.

46. There is a line of authority under which it might be argued that in determining an appeal against a VAT assessment this tribunal may take into account a legitimate expectation of a taxpayer. But again Mr and Mrs Baldwin could not start on that argument because of the qualified nature of the statements made to them.

47. It is true that sometimes this tribunal may take representations made by HMRC into account in deciding whether a taxpayer may escape a penalty where the statute says that he may do so if he has a reasonable excuse, but even if the taxpayer is thus absolved from a penalty, it will not prevent him from being liable to the tax in accordance with the statute.

48. Thus the arguments put in the letter of 6 May cannot assist Mr and Mrs Baldwin in this appeal.

Conclusion

49. We dismiss the appeal.

Rights of Appeal

50. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 25 June 2014