[2015] UKFTT 0363 (TC)

TC04547

Appeal number: TC/2012/09381

Rental of taxis – optional insurance – whether separate and exempt supply – Yes – VATA 1994, Section 31 and Schedule 9, group 2 – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WHEELS PRIVATE HIRE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
MISS SUSAN STOTT, FCA, CTA

Sitting in public at Leeds on 28 and 29 May 2015

Appellants:- Mr Ian Bridge, of Counsel

Respondents:- Mr Brendan McGurk, of Counsel

DECISION

Introduction

1. The appellants run a taxi business. They provide a radio support service to a fleet of about 280 vehicles. About 200 of these are owner-driver vehicles and the appellants also rent a further 74 or so cars together with the radio service. The drivers who hire these cars have the option of purchasing insurance cover protecting them against third party liability while driving the vehicle. The rental for a car and radio facilities is £120 per week. The option of inclusion in the appellant's vehicle insurance policy costs a further £45 per week. The issue for our determination is whether the payment for insurance is for a separate supply and exempt for VAT purposes, as the appellant submits, or part of one multi-supply, which is liable to be standard-rated, as contended for by HMRC. A supplementary assessment to VAT of £66,859 was made in November 2011, and that is the subject of this appeal.

2. An incidental issue arose. It was suggested on behalf of the appellants that HMRC had treated a similar supply of insurance made by a business competitor of the appellant as exempt. This was denied. It was the subject of an earlier preliminary hearing noted in Section II of the Bundle of documents. In the event some disputed evidence was led about this allegation, but we did not consider it material in reaching our conclusion.

The Law

3. The list of authorities produced is set out in the Appendix hereto. In the course of the hearing particular reference was made to VATA 1994, Schedule 9, group 2, the commentary in Public Notice 701/36, and the decisions in *Card Protection Plan* [1999] BVC 155 and *Global Self-Drive Limited* [2006] BVC 2,020. In our conclusion we have referred also to *Ford Motor Co* [2008] BVC 157..

The evidence

4. On behalf of the appellant company Mr Bridge called two witnesses, **Stephen Howard,** a director of the company, and **Colin Woodward**, CTA, his instructing agent. Each of them read and confirmed as accurate the terms of their witness statements.

5. Mr Howard spoke to joining the taxi business as a driver in 2002 (p64 *et seq*). In the following year he became its transport manager. There was then additionally an insurance business but he was not involved personally with this. A limited company took over the taxi business in 2008, of which Mr Howard is now a director and shareholder. His present role in the company is that of its manager. There are about 280 vehicles, mostly owned by their drivers, but 70-80 or so are owned by the company and hired out to self-employed drivers at a rate of about £120 per week. That includes servicing and maintenance of the vehicle and the provision of a radio. Mr Howard explained the importance of ensuring that all vehicles are properly insured to meet local licensing requirements. The drivers have the option of arranging

this themselves or of buying insurance from the appellant company for currently £45 per week. The rate is comparatively favourable. The insurance was formerly arranged with a company, Collingwood. At the annual review of the policy the appellant would send to Collingwood the details of all the insured drivers. In the intervals between renewal new drivers could be added by the appellant without reference to Collingwood if they met criteria as to age, licence points, etc. If a new driver did not meet the criteria prescribed, the insurers had to be advised immediately.

6. In its earlier stages, pre-incorporation, there had been a VAT dispute about insurance cover. After arrangements were made for payment for insurance to be made separately from car hire, the insurance payment was treated as VAT exempt. Mr Howard stressed that the drivers who rented vehicles did not have to buy insurance via the appellant company.

7. Mr Howard complained that HMRC had in fact treated another competing taxi business more sympathetically inasmuch as they did not dispute that a similar insurance provision represented a separate, exempt supply. He felt that the appellant had been unfairly "singled out".

8. In a second witness statement (p80A-C) Mr Howard explained the dispute he had with Collingwood and its cancellation of his policy. This seemed to arise out of the present VAT dispute and apparently HMRC had approached Collingwood. There had been some concern about Insurance Premium Tax liability. The appellant's insurance is presently dealt with by another broker. Mr Howard insisted that the appellant company's profit was derived from vehicle hire and not from the provision of insurance.

9. In elaboration of the contents of his witness statements Mr Howard emphasised that he would not allow an uninsured driver to take out a taxi. There was no "link" between a particular vehicle and insurance cover. For instance a vehicle requiring long-term repair or surplus to needs in a "quiet" period could be removed from the policy. No profit was derived by the appellant from the insurance provision. While one payment was made by the driver, the three elements for vehicle rental, radio provision, and insurance were accounted for separately. Vehicle hire provided the profit. Mr Howard referred to the style of car rental agreement at p77-78. The service provided by the new insurer was, he considered, more professional.

10. In cross-examination by Mr McGurk, Mr Howard explained that each driver signed a fresh contract every 90 days. (We noted that the hire contract at p77-78 makes no provision for termination by the appellant although it may be terminated by the driver on giving one week's notice.) The contract may continue with an equivalent replacement vehicle. If rent is unpaid, then radio contact will be cut off by the company. The business has had a low turnover of drivers. Mr Howard explained further that insurance costs were minimised with repairs being carried out by the company and insurance extending to "third party" risks only.

11. Mr Howard was then asked about licensing (p168 *et seq*). There were three types of licence required and these in turn required specific insurance cover. Each

driver required a private hire driver licence. This was personal to the driver, requiring a medical examination and disclosure. Each vehicle required to have a private hire vehicle licence. The vehicle has to comply with MOT standards, certain accommodation requirements, and has to be less than seven years old. Thirdly, the company had to have a Private Hire Operator Licence. This required public liability insurance, satisfying disclosure and other criteria to meet the public interest. Insurance cover had to be produced to obtain a Private Hire vehicle licence which had to be maintained while the vehicle was on road and being used. Use was for "hire and reward", ie journeys were pre-booked, as distinct from "black" hackney cabs which could ply openly for hire. At the point of hire from the appellant the driver obtained a fully insured and licensed vehicle.

12. Mr Howard then discussed the Data Terminal. Sunday was the first day of the rental week. If rent were unpaid on the Sunday evening, then the driver would be suspended. His radio contact would be cut off. However, if there were an accident the vehicle would still be insured until recovery, which in practical terms, Mr Howard explained, would be effected promptly. While the appellant was the insured in terms of the RTA insurance cover, the driver got the practical benefit of this.

13. Mr Howard was then asked about the correspondence which passed between Collingwood, the insurers, and HMRC in April 2014 (docs SH2-2 and 217a). As he understood it, Collingwood was concerned about a possibly increased tax bill in relation to Insurance Premium Tax. Mr Howard was insistent that he had seen the policy in favour of his trade competitor and that its terms were similar to his company's policy. Finally, Mr Howard acknowledged that the appellant company was not authorised to sell insurance by the FCA.

14. In re-examination Mr Howard confirmed that on the annual renewal of the insurance policy he would send copies of all the drivers' licences to the broker. He assumed that Collingwood wanted them. He explained that if a driver incurred "points" on his licence then he would be allocated to a particular vehicle and the insurance for that vehicle would be endorsed accordingly. He stressed that he had to give specific permission for insurance cover to extend to a particular vehicle. He made it "drivable" by giving insurance cover.

15. We then heard from **Colin Woodward**, CTA, who instructed Mr Bridge in the appeal (see witness statement at p80D-F). He confirmed his belief and understanding that the appellant company was being treated less favourably than another trade competitor. In the other case a similar insurance provision was accepted as an exempt supply for VAT according to documents of which he had had sight. For reasons of confidentiality he did not wish to divulge further details. In the concluding paragraph of his witness statement Mr Woodward noted that earlier the respondents had accepted that the supply of insurance was exempt at a stage when "insurance receipts were put through a separate company (reference should be made to pages 119-120 of the Bundle). In Mr Woodward's opinion the matter of exemption depending on payment via a separate company seemed inconsistent.

16. In cross-examination he conceded that as a chartered tax adviser he was not a lawyer. He did not draft the car hire agreement at p77/78 but he thought that it closely resembled one produced by Mazars, who are chartered accountants. He accepted that he was not present at certain meetings with the respondents' officers relating to the dispute. He seemed to accept that a claim of unfair treatment relating to one other business could require investigation of a group of about 151 or so businesses.

17. After some hesitation the respondents decided to call one of their tax officers, **Miss Linda Braham**, to give evidence. She confirmed the terms of her witness statement (p20-24) subject to a correction of para 13: the appeal noted in lines 4 to 6 had in fact been withdrawn rather than determined and lost. Miss Braham has worked as an assurance officer with the respondents at Leeds since about 2006. She noted from records pertaining to the appellant company that assessments had been made in respect of a supply of insurance, which had been treated by the appellant as exempt. Miss Braham discussed the matter with the appellant's representatives. In her view the insurance was one element of a multi-supply which in its entirety should be treated as standard-rated. Miss Braham considered it significant that the insurance was provided by the appellant company itself, as well as the car and radio. An assessment was raised accordingly. Miss Braham explained that the business records of the appellant did not support its contention that there was separate pricing for vehicle rental and insurance. In her witness statement there is some, apparently extraneous, reference to the export of expensive cars to Thailand.

18. In cross-examination Miss Braham insisted that she had not been reluctant to give evidence. Having been referred to para 13 of Mr Howard's first witness statement (p23) she agreed that she had considered the evidence of Mr Richardson (a previous visiting officer in 2007 – p119) and his visit report. There were then two separate companies. This was material in that insurance was paid directly by the drivers to one of them. Miss Braham had noted this in her letter of 26 April 2012 (p120-121) after her own visit in September 2011. There was then no separate company receiving insurance payments. In that letter she had described the taxpayer company's behaviour as "deliberate". That categorisation, she explained, reflected new penalty provisions: the same error had been made on two previous occasions, resulting in supplementary assessments. Finally, she accepted that the appellant company was in effect re-charging for insurance.

Parties' Submissions

19. Both parties lodged in advance skeleton arguments and revised these in response to each other's replies. Additionally we heard oral argument from them in turn during the hearing. The dispute is whether the additional payments of insurance by the drivers who hire their cars from the appellant company, are for an exempt supply for VAT and, moreover, a separate supply from the hire of the vehicle with a radio facility.

20. On behalf of the appellant company Mr Bridge submitted that the provision of insurance was a separate supply by the appellant to the driver which fell within

group 2 of Schedule 9, VATA 1994, and accordingly was exempt. The question was essentially one of law. The evidence showed that the insurance payments were additional to but separate from the payments for vehicle hire and radio facilities. It was not one combined supply. Drivers had the option of obtaining the necessary insurance cover to satisfy RTA requirements elsewhere. Most did not as the rate charged by the appellant was very competitive, and it did not derive any profit from it. There was a separate account kept for insurance payments. It was in fact and in law a separate supply, Mr Bridge submitted.

21. The provision of "third party" insurance cover protected the interests of both the appellant and the driver. The nature of the provision was from the driver's viewpoint "insurance". It met his liability under the RTAs. If he were sued as a result of a road traffic accident, his home and other assets were protected. The driver's contract of hire of the vehicle did not begin until he signed the form of hire agreement with the appellant (p77-78). Permission to use the vehicle is not granted until then, when the insurance cover is extended to the driver. Regard had to be paid to the requirements of the local authority licensing regulations affecting private taxis.

22. Mr Bridge referred us to the opinion of the ECJ in *Card Protection Plan* and the extended definition of insurance: this did not require an authorised insurer and extended the sense of insurance and insurance transactions to the circumstances of this appeal:-

> "… the expression 'insurance transactions' is broad enough in principle to include the provision of insurance cover by a taxable person who is not himself an insurer but, in the context of a block policy, procures such cover for his customers by making use of the supplies of an insurer who assumes the risk insured."

We refer to paragraphs 22 and 25 of the Judgement. Mr Bridge argued that the contract between the appellant and each driver was "insurance" for the purposes of group 2. He founded also on HMRC's publication, Public Notice 701/36 (p218-226). The term "block" policy is described therein as satisfying four criteria set out at para 2.5.1. The term could otherwise be described as a "master policy" and also, Mr Bridge submitted, a "fleet policy". What was important was satisfying the four criteria, not meeting a descriptive term, Mr Bridge suggested. The four key characteristics desiderated were satisfied in the present case.

23. In that context the letter of Collingwood of 10 July 2014 (p217A) should be viewed with caution. It sought to draw an unreal distinction between a "block" policy and a "fleet" policy. However, that had been written in a context in which Collingwood was facing the risk of substantial additional IPT liability. The respondents' proposed treatment of the payments could result in double taxation with a liability to standard rate VAT on the total payments made by the driver and an additional IPT levy on the insurer.

24. Mr Bridge then referred to the First-tier Tribunal decision in *Global Self Drive Limited*, the facts and circumstances of which, he suggested, closely resembled those

of the present appeal. Significantly, he commented, it had not been appealed by HMRC.

25. Paragraphs 22 and 29 emphasise the broad interpretation of "insurance transactions" proposed in *Card Protection Plan*.

26. Finally, in respect of the allegation of preferential treatment afforded to a trade competitor, Mr Bridge urged us to accept Mr Howard's evidence on the matter as frank and candid. It was not surprising that he preferred to be reticent about the other taxpayer's identity.

27. For all of these reasons Mr Bridge urged us to allow the appeal.

28. In reply on behalf of the respondents Mr McGurk agreed that the question for the Tribunal to address was how to categorise the supply by the appellant to the drivers. He rejected the view that the insurance provisions represented a separate exempt supply. Indeed, it was not an insurance transaction and did not fall within the scope of group 2 of Schedule 9.

29. Mr McGurk also relied on Card *Protection Plan* in support of his contentions. There indemnities were provided. These were insurance transactions. CPP's customers became named insured. By contrast the insurer in the present application, Collingwood, could not be bound by the appellant. The appellant could not arrange insurance cover for other drivers, Mr McGurk continued. Rather, the policy could not override the requirements of the Road Traffic Acts as to "third party" insurance provision. Crucially the drivers' names were not added to the policy. All they obtained was the benefit of the insurance cover, he submitted This benefit was not derived from any contract between the appellant and the drivers. The appellant company was not an insurer, or an intermediary, or in a position akin to *CPP Limited*.

30. Account had to be taken of the local authority licensing requirements. Vehicles and fleets had to be insured to satisfy these. Even if the appellant did not add a charge for insurance, a driver taking a fleet vehicle was pre-insured, and that by Collingwood. The appellant did not provide any additional service.

31. Having regard to the criteria in Notice 701/36, this was not a "block" policy, Mr McGurk submitted. The four suggested criteria were not satisfied. In particular a driver did not have title to sue on the policy. While a driver derived a benefit arguably, he did not have a direct contractual right as in *CPP*. The contract between the appellant company and the drivers was one of hire, not of indemnity. There was a re-charging arrangement for insured vehicles. Mr McGurk questioned the separation of the supply of the vehicle and the supply of insurance.

32. *Global Self Drive Ltd*, Mr McGurk submitted, was distinguishable and in any event the decision was wrong. There, there had been no licensing process to be complied with. The contractual arrangements between *Global* and its customers differed from the present case. Alternatively, if there was a separate supply of insurance, then it was ancillary and part of a composite supply, which should be standard-rated for VAT in its entirety.

33. Finally, Mr McGurk considered the assertion as to unfair treatment in that there had been discrimination on the part of the respondents between the taxation of the appellant and that of a trade rival. The onus of proof, he insisted, remained on the appellant to prove this. Documentary evidence of the discriminatory action complained of should be produced by the appellant. It was not appropriate to seek to transfer this burden onto the respondents.

34. Accordingly, he submitted, the appeal should be refused.

Decision

35. We found both Mr Howard and Mr Woodward credible and reliable witnesses. They gave their evidence candidly. We accept their account of the running of the business and the scheme for charging the drivers. Their account on the material issues is consistent with the documentation provided and our narration of it *supra* may be viewed as findings-in-fact. For the avoidance of doubt on the material issues we find as follows, *viz*:-

(i) The appellant company runs a taxi-hire business. It provides radio support for customer hire requirements, which it then relays to the drivers.

(ii) Most of the drivers own their own vehicles. However, the appellant hires to other drivers 70-80 vehicles. In addition to rental for the vehicle and a further sum for radio support the drivers may elect to purchase insurance cover from the appellant company to satisfy the RTA's requirements. It is at a competitive rate and the appellant does not derive any significant profit from providing it. The receipt of any additional sums for insurance cover is accounted for separately by the appellant.

(iii) The appellant is the insured in terms of the insurance policy. Cover notes are issued in respect of individual vehicles identified by registration number. The persons entitled to drive must be authorised by the appellant as policy holder. Vehicles may be removed if not in use and restored as appropriate. The appellant determines who may drive a particular vehicle. The insurers require details annually about the drivers, their licences and driving records. In the interim additional drivers may be added to the cover by the appellant provided that their driving records satisfy certain criteria prescribed by the insurers. Otherwise reference must be made to the insurer.

(iv) Leeds City Council, being the local authority within whose area the appellant's taxi service operates, imposes various requirements as to licencing which are met by the appellant and its drivers.

36. One aspect which loomed large throughout the hearing (and at an earlier procedural stage) was whether the respondents had treated a business competitor of the appellant more sympathetically, regarding a somewhat similar insurance provision as being a separate exempt supply for VAT purposes. We have noted Mr Howard's and Mr Woodward's evidence about this *supra*. While we have no reason to disbelieve either of them, we hesitate to accept their conclusions. We did not have sight of any of the documentation referred to and, in any event, a conclusion on this

aspect is not necessary for us to determine the present appeal. That has to be decided on the basis of its own facts and the law applicable.

37. Another somewhat extraneous matter raised was the terms of the correspondence from Collingwood Insurance. (We note particularly its letter dated 10 July 2014 to the respondents – p217a.) It seeks to distinguish a "block" policy from a "fleet" policy. Whether there is such a distinction and its basis are again matters for this Tribunal to form a view on. We understand that this letter was written in the context of the possible prospect of Collingwood having to bear extra liabilities in IPT.

38. We agree with parties' joint view that the issue essentially is whether the insurance provision made available by the applicant company was a separate supply and hence exempt from VAT as falling within Group 2 of Schedule 9, VATA. In determining this we follow the guidance set out by the ECJ in *Card Protection Plan*. There holders of credit cards were offered for payment of a certain sum, protection against financial losses resulting from the loss or theft of their cards and other items. In that decision (see especially para 13) the nature and classification of the insurance provision for VAT purposes was dealt with as a preliminary question. The sense of a "block" insurance policy is considered there, and the respondents have set out their interpretation of this in the public Notice 701/36. The respondents' interpretation was indeed accepted by Mr Bridge (albeit on his reading of its terms). He argued that its terms clearly included an insurance policy such as the appellant held in the present case. The term "block policy" is not defined but the description is not restrictive in our view. The suggested characteristics are a contract between insurer and policy holder, who in turns can procure insurance or insurance cover for third parties with whom they in turn have a contractual relationship. We consider that, in the context of Group 2 it is capable of including a "fleet" policy of the type featuring in the present dispute.

39. The ECJ in *Card Protection Plan* adopts a broad interpretation of "insurance" as qualifying for exempt status. We have noted in para 22 *supra* the interpretation of "insurance transactions" set out by the ECJ.

40. We would observe also the ECJ's further guidance in *CPP* (at para 25) –

"… art 13(b)(a) of the Sixth Directive is to be interpreted as meaning that a taxable person, not being an insurer, who, in the context of a block policy of which he is the holder, procures for his customers, who are the insured, insurance cover from an insurer who assumes the risk covered performs an insurance transaction within the meaning of that provision."

41. Such a broad interpretation was adopted by the Court of Appeal in *Ford Motor Co Ltd*. We note in particular at para [61] –

"… there is nothing to suggest that the expression 'insurance transaction' is a particularly narrow one. It plainly includes both situations where the provider, or procurer, of the insurance cover, is not himself the underwriter of that cover … and

situations where the service supplier is acting as an agent or broker only. All this suggests that it may not be helpful to raise salami-slicing definitional issues as between the insurance contracts in their most straightforward form on the one hand and services provided by agents and brokers for the purposes of effecting insurance contracts on the other hand."

42. Earlier in that decision (para 58) the approach of the Tribunal in *Global Self Drive Limited*, which suggested that even a "block policy" might be unnecessary to qualify for securing the VAT exemption, seems to have been noted without criticism.

43. The extra payment for insurance in the present case is optional. While a rental is paid for the vehicle and radio support, a driver may negotiate his own insurance cover personally, and a few drivers do indeed do this. We appreciate that most prefer to elect for the appellant's cover given that its cost is competitive. (The appellant does not derive any "significant" profit from providing it.)

44. We consider that the nature of the insurance provision here under the "fleet" policy falls naturally within the extended sense of "insurance" set out by the ECJ and Court of Appeal. The provision here protects the interests of the driver against liabilities to third parties which is required in terms of the Road Traffic Acts. It is inconceivable, in our view, that the insurers would not meet such claims and that, if necessary, the appellant company would not assist its drivers in pursuing indemnification. In this context we are unimpressed by Mr McGurk's seeking to distinguish being insured and having the benefit of insurance, which latter, he claimed, was the consequence here. Given the pronouncements of the courts which we have noted, such a distinction seems strained. It is necessary to identify the vehicles by their registration numbers to satisfy the RTA's insurance provisions, but that should be viewed in conjunction with the appellant's strict regulation of who is permitted to drive them. Thus the drivers become insured against third party liability. They have a defence to any prosecution for driving uninsured.

45. Accordingly we agree with the stance of Mr Bridge that the insurance provision made by the appellant here did qualify for exemption in terms of Schedule 9, Group 2. It is in our view a separate and independent supply, optional from the viewpoint of the driver, and separate from the supply of the vehicle and the supporting radio service. Whether the driver obtained his own independent insurance cover or not, the supplies of the vehicle and the radio service could be enjoyed similarly.

46. For these reasons we uphold this appeal against the supplementary assessment.

47. 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.

KENNETH MURE, QC
TRIBUNAL JUDGE

RELEASE DATE: 21 JULY 2015

APPENDIX

Authorities Bundle

Legislation and Public Notice 701/36 extract
Group 2 of Schedule 9 VATA 1994
Ford Motor Co. v R&CC
G M Craddock & B M Walker
Card Protection Plan
Peugeot Motor Co. Plc v CE Comms
Global Self Drive Ltd
Westinsure Group Ltd v R&CC
R&CC v InsuranceWide.com Services Ltd
Royal Bank of Scotland v R&CC
Kumar v AGF Insurance Ltd & Others
Extract from Notice 701/36
Article 135 of principle VAT Directive
K Oy
Tyco Fire v Rolls Royce Motor Cars