[2015] UKFTT 0593 (TC)

Appeal Number: TC/2012/06316

Value Added Tax - Arrangements for topping-up "Pay-as-you go" mobile phones - Whether vouchers had been supplied to, and then by, the Appellant - Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

PHONE NATION LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE HOWARD M. NOWLAN

MOHAMMED FAROOQ

Sitting in public at Centre City Tower in Birmingham on 10 November 2015

Liban Ahmed of Controlled Tax Management Ltd on behalf of the Appellant

Lucy Wilson-Barnes, counsel, on behalf of the Respondents

DECISION

Introduction

1. This was a case in which it seems, regrettably, that the Appellant has fallen into a costly trap. This is because it has become liable to account for equivalent payments to VAT, when it now emerges that its role, in assisting in obtaining and then passing on the codes or vouchers that enabled holders of Pay-as-you-go phones to top up their phones, should have involved VAT being charged only on the Appellant's commissions, with the Appellant neither obtaining nor supplying the vouchers as a principal.

2. At times in the dispute between the Appellant and HMRC considerable attention has been given to the issue of whether, in the absence of the Appellant actually holding any VAT invoices issued by any possible supplier to it, HMRC should have accepted alternative evidence that input tax should be conceded to the Appellant. It has also revolved around the provisions dealing with the issue, and later redemption of vouchers. In the event, however, the real issue at stake appears to be the simple one of whether companies such as O2 and Vodafone make direct supplies of the top-up vouchers to the ultimate phone customers and users, with two intermediate companies (one being the Appellant) simply acting as agents or whether instead the vouchers were supplied to each of those intermediates in turn such that for VAT purposes there were supplies to and by the Appellant. The unfortunate conclusion is that the two intermediates were (certainly as the first one had always appreciated) simply agents. The reason why the Appellant ends up suffering a loss is that, having invoiced its customers on a VAT-inclusive basis, with certainly the wholesalers amongst those customers claiming the benefit of the apparent input tax disclosed in the VAT invoices supplied by the Appellant, the Appellant is rendered liable for a debt equivalent to VAT even though the technical position is that the Appellant neither received nor made supplies of the vouchers itself.

The facts

3. Since 2001 the Appellant had been operating a mobile phone shop in which phones and SIM cards were sold in a conventional manner. It also began, slowly initially, to develop a line of business in relation to topping up Pay-as-you-go phones. The procedure, if a customer wanted to add £10 of airtime to his phone, was that the customer would pay the Appellant £10, often presumably in cash. A quite distinct company, ePay, had then installed a machine (and eventually several machines) in the Appellant's shop which enabled the Appellant to extract from the machine a small paper receipt with a code number on it. That piece of paper would be handed to the customer and, presumably by using his phone and keying in the relevant number, he could add £10 of airtime to his phone. The machine also enabled ePay to debit the Appellant for £10, that amount, when aggregated with other similar amounts, to be collected by direct debit, ePay also of course paying the £10 to 02, Vodafone or other mobile network provider. The network provider then paid ePay a commission, and in its turn ePay paid the Appellant a commission, presumably being some agreed portion of the commission initially paid by the network provider.

4. As ePay progressively became confident in the Appellant's reliability, the Appellant was granted longer periods before being debited for the aggregate receipts that the Appellant needed to pay ePay. Accordingly the Appellant had the two benefits of being paid commissions and having the cash flow benefit of having received cash from customers prior to having to pay the equivalent, less the commissions in practice, to ePay. These benefits enabled the Appellant to render the service of assisting in enabling mobile phones to be topped up more economically than other shops and garages where the smaller turnover perhaps commanded lower commissions, and almost certainly less beneficial delay in having to make the payments on to ePay.

5. The advantages just mentioned enabled the Appellant to start to supply the code numbers or vouchers to other traders. The Appellant therefore ended up supplying blocks of numbers, say 50, to another trader. The actual code number was all that the recipient trader, and then the customer, actually needed, and so the vouchers could be passed on in various ways, either physically or by email, when the customer was based far from the Appellant's shop.

6. While VAT was clearly payable on the commissions received from the phone networks by ePay and then paid to the Appellant by ePay, no invoices or VAT invoices had ever been furnished to the Appellant in respect of the entire supplies of the vouchers. The Appellant considered that it had, however, purchased the vouchers as principal, and that it then supplied them as principal. Since no VAT invoices had been furnished to it, it provided its own input tax invoices by deeming a payment of £10 by it to be a VAT-inclusive payment of £10, such that the net charge would have been roughly £8.40 and the related VAT roughly £1.60. If in practice the commissions due to the Appellant were netted off against the accounting for the £100 (i.e. the VAT inclusive £100), the Appellant would have accounted for, say, £97 on a VAT-inclusive basis if the commission was 3%. Correspondingly when the Appellant handed the vouchers to customers, presumably both the wholesale customers and individual customers unless the latter made it clear that they were not interested in VAT invoices, the Appellant purported consistently to be charging VAT on the supply so that again the net price would have been roughly £8.40 and the VAT-inclusive price £10.00. We were told by HMRC that the registered wholesale traders that had acquired the vouchers had duly claimed the input tax for which they had been invoiced.

The law

7. The outcome of this Appeal revolves principally around the basic legal issue of whether ePay and the Appellant were simply acting as agents to facilitate a direct supply of vouchers, or airtime, from the network providers to the customers, or whether the network providers actually sold the vouchers to ePay that in turn sold them to the Appellant. Whichever of those two possibilities is the correct analysis of the legal relationships, the provision in paragraph 4 Schedule 10A VAT Act 1994 is relevant. This provides that when the vouchers are issued by the network providers the consideration for the issue falls to be disregarded unless it exceeds the face value of the voucher. The explanation for this disregard is that rather than being treated as making its supply of phone services at the point of selling the voucher, the network provider will be treated as making its taxable supplies for VAT purposes as the airtime is used up by the customer. The position is in other words identical to that where a voucher is issued by a shop, and then later goods are purchased on

presentation of the voucher. The supply occurs when the goods are supplied, whether they are paid for in cash or by tendering the voucher.

8. VAT information sheet 12/03 indicates how vouchers should be dealt with if they are ***actually sold*** to VAT-registered intermediates, and those intermediates then sell them in their turn. The treatment in this situation is that the intermediates must certainly treat their on-supply of the vouchers as taxable supplies, so that in order to end up being charged to VAT only on their margin, the original issuer is advised to issue a VAT invoice, annotated to the effect that *"the issuer of the voucher will account for output tax under the face value voucher provisions in Schedule 10A VAT Act 1994"*. The result of course is that the intermediate has an input tax credit, but the annotation enables the VAT-invoice to reflect the true position, namely that no immediate VAT liability is imposed on the issuer of the voucher, but since in due course there will be a liability (on redemption of the vouchers) it is appropriate and coherent that the intermediate should obtain an input deduction at the point of acquiring the voucher.

9. The problem in the present case is that although the Schedule 10A provision would have operated as we have described, had the vouchers been sold to the Appellant, the reason why the Appellant had proved unable to obtain any VAT invoices either from ePay or the network providers is that both asserted that they were not actually supplying the vouchers to the intermediates, i.e. first to ePay and then to the Appellant. Their proposition was that ePay and the Appellant (and if they were right, then strictly the same would apply to the subsequent wholesale purchaser from the Appellant) were all acting just as agents. The network providers asserted that they were supplying vouchers directly to customers, via the two agents. Paragraph 4 Schedule 10A still applied so that the VAT would only be payable as the airtime supplied was used up, period by period, and if any user customers requested VAT invoices from the network providers, they would indeed be provided. Critically, however, the network providers (certainly O2 and Vodafone, both of whom provided letters to this effect) asserted that they were certainly not supplying or selling the vouchers to anyone other than the customer users.

Our decision

10. The primary question for us is thus whether the legal position was indeed one of a direct supply by the network providers straight to the customer users, via the agents, or whether the Appellant's claim was right and the Appellant acted as a principal, buying and supplying the vouchers.

11. We conclude that the network providers' analysis is correct and that the two intermediates were simply acting as agents. The reasons for this conclusion are as follows:

- While we never saw any contract between the network providers and ePay, it seems obvious that there must have been a contract and that that must have clarified that ePay would have been acting as agent. We say this because the network providers did not supply any form of VAT invoice (i.e. in practice it would have been the one annotated in the manner described in paragraph 8 above) to ePay, and in their turn ePay asserted to the Appellant that it was not supplying vouchers to the Appellant so

that it would have been entirely improper for it to have issued VAT invoices to the Appellant.

- We were shown the one contract between ePay and the Appellant and although most of the terms threw no light onto the role performed by the Appellant, Recital C appeared to be quite decisive. It provided that *"ePay acts as agent of the Providers for the sale of Products and the parties acknowledge that ePay is not purchasing Products from the Providers for sale, but facilitating the direct sale of products by the Providers to their Customers unless otherwise indicated to you"*.
- The feature that both ePay and the Appellant were being paid commissions for their role again supports the agency analysis. Were the vouchers being sold to ePay as principal, the correct terminology would of course have been that the vouchers with a face value of £10 would have been sold for £9.50, i.e. at a 50p discount, and that reduction in initial sale price would not have been a commission.
- Finally, while there is now no need to quote the letters, both Vodafone and O2 wrote to the Appellant's representative confirming that they were supplying the vouchers, through the two agents, to the end customers, and that they would be accounting for VAT under the machinery in paragraph 4 of Schedule 10A, then duly furnishing VAT invoices directly to end customers, should any request them. While we never saw any contract between the network providers and ePay, it is nevertheless highly significant that the treatment of the transactions at all times by both the network providers and ePay, and of course the crucial Recital C in the contract between ePay and the Appellant, all support the direct supply analysis.

The assumed on-supplies by the Appellant

12. The natural corollary of the decision that we have now reached, namely that there were no supplies of vouchers to the Appellant, is that in its turn the Appellant cannot have made supplies either to end customers or to the wholesalers. Although, thus, it made no taxable supplies for VAT purposes, it did furnish VAT invoices to all of its customers and the consequence of that is that although it was not strictly liable for VAT, it must nevertheless account for the equivalent of VAT in accordance with its invoice. This is a natural provision because the entity that assumes that it is buying on a VAT-inclusive basis will usually, as here, at least in the case of the wholesale entities to which the Appellant issued VAT invoices, have claimed input deductions. The relevant statutory provision is contained in paragraph 5 of Schedule 11 to the VAT Act 1994, which provides as follows:

> *"5 (2) Where an invoice shows a supply of goods or services as taking place with VAT chargeable on it, there shall be recoverable from the person who issued the invoice an amount equal to that which is shown on the invoice as VAT or, if VAT is not separately shown, to so much of the total amount shown as payable as to be taken as representing VAT on the supply.*
>
> *(3) Sub-paragraph (2) above applies whether or not –*
>
> > *(a) the invoice is a VAT invoice issued in pursuance of paragraph 2(1) above; or*
> > *(b) the supply shown on the invoice actually takes or has taken place, or the amount shown as VAT, or any amount of VAT, is or was chargeable on the supply; or*

(c) the person issuing the invoice is a taxable person;

and any sum recoverable from a person under the sub-paragraph shall, if it is in any case VAT, be recoverable as such and shall otherwise be recoverable as a debt due to the Crown."

13. It therefore follows that, having issued VAT-inclusive invoices the Appellant is liable to account for the equivalent of VAT under the provision just quoted, and that having no input deduction to set against the liability, the entire amount invoiced is recoverable as a debt due to the Crown.

14. This result is naturally extremely unfortunate for the Appellant in that the Appellant ends up with a very substantial liability in circumstances where, had the overall structure in fact been as the Appellant supposed, or had the Appellant appreciated that there were no supplies to it or by it, there would have been VAT only on the Appellant's agency services, i.e. only on the commissions. It is not for us to seek to analyse whether the eventual result in this case will, at least in part, be of a double recovery of VAT by HMRC such that the ultimate liability imposed on the Appellant could be diminished as a matter of fairness, but we mention that point in case it is something that HMRC is prepared to consider. As a strict legal matter the liability of the Appellant is as stated in the previous paragraph.

15. This Appeal is accordingly dismissed.

Right of Appeal

16. 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.

TRIBUNAL JUDGE

HOWARD M. NOWLAN

RELEASED: