[2018] UKFTT 701 (TC)

TC06845

Appeal number: TC/2017/02301

VAT – commercial and economic reality – agency.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALL ANSWERS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MS ELIZABETH BRIDGE.

Sitting in public at Taylor House, London on 20 & 21 November 2018.

Mr. Tom Brown, counsel, appeared for the Appellant.

Miss Joanna Vicary, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction.

1. By a series of assessments dated 16 September 2016, the respondents assessed the appellant to VAT in respect of its VAT periods 1 January 2012 – 30 September 2015. Excluding interest, the assessments cumulatively total £904,168.

2. It has been agreed that there is only one issue for us to determine, that is whether, in principle, the respondent could properly assess the appellant in respect of VAT on 100% of sums of money paid by various students/clients (or others) to it or whether the assessment should have been limited to the appellant's share (commission) of each gross sum paid. The way in which this arises is set out in greater detail below.

3. It is also part of the appellant's case that if it fails as a matter of principle, nonetheless the assessments are overstated because some of the supplies were to clients outside the European Union and so would not have been subject to VAT. We were told that that aspect of the matter need not trouble us because in the event that the appellant fails as a matter of principle, that issue will be revisited once all and any appropriate documentation can be examined, so that it can fairly and properly be ascertained to what extent sums were paid by non-EU clients.

4. At the start of the appeal hearing it was agreed, and common ground, that in so far as the appellant challenges the assessments on the basis that it had a legitimate expectation that only its share of the gross sums paid to it would be treated as including VAT (for which the appellant would have to account), that is a matter presently being pursued by way of an application for Judicial Review and does not fall for consideration by us.

The Appellant's Business.

5. Before we examine the relevant documents, including the contractual documents to which we refer below, it is appropriate to set out the nature of the appellant's business and the way in which it is organised. We do not necessarily adopt some of the terminology or phraseology used in the appellant's contract documents because, as we set out below, they rather obviously contain euphemisms and have been written with a particular outcome in mind and also contain various and varying artificial premises. We will identify at least some of them, below.

6. The appellant's business is essentially Internet based. The appellant trades under various names, one of which is "UK Essays.com", and those who would like to have an essay, dissertation or piece of coursework written for him/her can go onto the appellant's website. The web page is available to the public at large and, as might be expected, invites the client to put in his/her personal details before going on to offer available services. We were not initially provided with a copy or illustration of the appellant's online offering relevant to the VAT periods under appeal. We had to ask for that obviously relevant material to be made available to us, whereupon we were

provided with two pages, said to be the appellant's website at the material time(s), which had been in being since sometime in 2011.

7. When we saw the hard copy of the website, we were able to see that a potential client could choose a particular kind of service. On the document the drop-down box was populated with the word "essay." In evidence we were told that the drop-down options were: essay; coursework; dissertation; marketing; and marketing and proof-reading. It seemed to be common ground that the overwhelming majority of the appellant's business related to essays, coursework and dissertations with marking and/or marking and proof-reading being a trivial proportion.

8. The next box allows the client to specify the "grade required" and the example provided to us is populated with "undergraduate 2:1". In the next box the client is able to state the number of words to be in the piece of written work for which payment will be made and this box, in the example given to us, was populated with "1000 words". There are then boxes dealing with the amount of time for delivery of the product.

9. At the top of the webpage the potential client sees "The U.K.'s original provider of custom essays". Then, on the next page the client has to agree to the appellant's Terms and Conditions which, perhaps unsurprisingly, are referred to as "Our Terms and Conditions of Sale".

10. It could not be stressed more strongly during the appeal before us, and in the documents emanating from the appellant, that its business model is based upon the identity of the client and the identity of the person who is to write the requested piece of academic work, not being made known to one another.

11. The Terms and Conditions to which the client has to agree, appear behind tab 14 in our Appeal Bundle. It is beyond doubt that those Terms and Conditions have been fashioned quite deliberately to portray the appellant as doing nothing more than acting as an agent for the client, with a view to locating an expert "*in order to carry out research and/or assessment services (the "Work*") ……..". "Research" is an excellent example of the use of a (misleading) euphemism in the appellant's Terms and Conditions.

12. Clause 1.2 of the agreement between the appellant and its client provides that "*The Customer appoints UK Essays (the "Agency") to locate an expert (the "Expert") in order to carry out research and/or assessment services ……".*

13. Then by clause 1.6 it is provided that "*the Customer is not permitted to make direct contact with the Expert – the Agency will act as an intermediary between the Customer and the Expert."*

14. As will appear below, the contention within the Terms and Conditions that the appellant is to locate somebody to undertake "research and/or assessment services" is at best a euphemism and, in reality, misleading in the sense that that is not the intention behind either the client requesting the work or the appellant placing it with a writer.

15. The Terms and Conditions then go on to provide for the appellant to use reasonable skill and judgement in allocating "*a suitable expert"* and, as would be expected, to contain provisions about payment.

16. Clause 7.1 of the Terms and Conditions provides that the appellant gives a "plagiarism guarantee" whereby the client will receive £5,000 if the client "*detects"* plagiarism in the work provided to him/her. Strangely clause 7.2 provides that this £5,000 will be paid to the client by the chosen "*expert*".

17. There are then provisions about what will happen if plagiarism is detected but the "expert" refuses to pay the £5,000. This is identified as one of the only, or exceptional, circumstances in which the appellant will disclose the identity of the expert to the client.

18. Clause 11 provides that "*The Agency's commission charges for their services, the Expert's charges for their services and charges for VAT are shown as an aggregate amount on the Agency's website."*

19. So far as copyright is concerned clause 16.1 requires the client to acknowledge that he/she does not obtain the copyright in the work (essays, dissertations and coursework) *"supplied through the Agency's services."*

20. Then, in clause 16.2 we see a glaring example of artificiality and disingenuousness where it is provided that "*The Customer accepts that the Agency offers a service that locates suitably qualified experts for the provision of independent personalised research services in order to help students learn and advance educational standards and that no Work supplied through the Agency may be passed off as the Customer's own or as anyone else's, nor be handed in as the Customer's own work, either in whole or in part."* During his evidence, the appellant's witness, Mr Spencer, acknowledged that in reality the appellant knows that clients hand in work provided to them through the appellant as if it was their own work. If he had contended otherwise we would not have believed him. That is particularly so given that clause 17.5 of the Terms and Conditions states that where a client requests a refund on the basis that the work provided through the appellant has not reached the required standard "*we require a copy of tutor feedback and a copy of the work submitted."* Thus, the appellant's own Terms and Conditions envisage that the work provided through them will be submitted, because otherwise there could be no tutor feedback which a student could provide so as to satisfy clause 17.5.

21. Clause 18.1 of the Terms and Conditions contains a prohibition against the client passing the work off as his/her own although, as set out above, that is a magnificent example of the artificiality of the Terms and Conditions and runs entirely contrary to that which everybody knows will happen and is intended to happen.

22. Significantly, clause 19.14 provides that no other party has, or is intended to have, any rights arising from the contract pursuant to the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act").

23. Once a client has ordered a piece of work of a particular length and to a particular standard, the appellant posts that on a different portal which is only accessible by

"researchers" who can bid to undertake the identified assignment. This person, who we refer to as "the writer", receives one third of the gross fee paid by the client to the appellant. The appellant's contention is that it has to account for VAT only upon its share of the overall fee, which is two thirds thereof, but not on the one third thereof which it pays to the writer.

24. The Terms and Conditions between the appellant and the writer provide, in clause 4, that the appellant acts as the writer's agent to sell his/her services and to enter into "*relationships"* with clients on the writer's behalf and to collect payment on the writer's behalf. There are then Terms and Conditions about the quality of the work to be produced before the writer comes to section 8, headed "Confidentiality".

25. The agreement between the appellant and the writer binds the writer "*not to make direct contact with clients"* and then in clause 8.8 it contains an undertaking by the appellant that it will not reveal any confidential information about the writer to any third party without the writer's consent. This may well be important to the writers because they are unlikely to want the academic institutions for which they work to know that they are moonlighting by writing essays, dissertations and/or coursework which will subsequently be used by dishonest students when it is passed off as their own work.

26. Strangely at clause 12.3 the "plagiarism guarantee" is referred to and instead of the writer giving an indemnity to the appellant in respect of a sum of £5,000 which the appellant must pay to a client, it contains the strange provision that "*you undertake that you are liable personally to the client to the sum of £5,000."* Given the clause specifying that the 1999 Act has no application, this can be small comfort to the client.

27. At clause 14.1 the writer agrees that the intellectual property rights in the work produced, transfers to the appellant upon it being uploaded or submitted to the appellant.

28. It was explained during the evidence that where a client requests a piece of work, the client will be quoted a price which will vary according to the standard and length required. In other words, if a client wants a dissertation which should attract a first class mark, the price will be higher than if that same student is prepared to settle for a mark which would attract a third class mark. That is hardly surprising, on the basis that one gets what one pays for.

29. It was explained to us during the evidence that in some very infrequent situations, perhaps 1– 2% of the appellant's business, the pricing might need to be bespoke if the requested piece of work is to contain non-standard content.

30. Thus it is readily understood that the appellant's business model, despite the provisions set out in its Terms and Conditions which are designed to deflect attention from inevitable conclusion, is that it assists those who have little or no academic ability and/or are lazy, to cheat. It is beyond doubt that the appellant's business thrives upon providing essays, dissertations and coursework to cheats. It is equally apparent that the business involves recruiting writers who, we were told, comprise lecturers, teachers, and sometimes PhD students seeking to earn money as they themselves continue their

studies, to write such essays, dissertations and coursework in circumstances where they cannot but understand that the ultimate recipient of such work intends to pass it off as his/her own. There can be no rational explanation for any such person to want to obtain essays, dissertations and/or coursework written by a supposedly competent third-party other than to pass it off as his/her own. In that way the dishonest students, the appellant and the collaborative academics/writers contrive and conspire to debase academic achievement by those who act honestly and honourably when they put in their own work after appropriate study and application.

31. It is for the foregoing reasons that we are entirely satisfied that the appellant's contractual documents, which are designed to prevent the client and the writer ever having contact with one another or even knowing each other's identity, are designed to disguise the nature of the business and, in turn, deflect attention from it being unethical.

32. Notwithstanding what we say in paragraph 31 above, we make it clear that there is no suggestion that what the appellant does is illegal. We also record that it is no part of the respondent's case that the appellant's contractual documents, or either of them, should be categorised as sham documents. However, an agreement which is not a sham may nonetheless be artificial and intended to deflect attention from the true positions taken by both the client and the writer, to whom the appellant profitably lends a willing hand, with no concern for ethics or morality. Having said that, we remind ourselves that our view is relevant only to the limited extent that it is capable of bearing upon:

> (1) The extent to which we can or should place any significant reliance upon the terminology adopted by the appellant's Terms and Conditions (both those with the client and those with the writers).
>
> (2) The extent to which the appellant is prepared to introduce artificiality into its business relationships with a view to bettering its own reputation and/or financial position,
>
> and thus seek to influence our assessment of both the commercial and economic reality of the situation.

The Competing Arguments.

33. The respondent argues that when a client orders a piece of work using the online portal and agrees to pay, let us say, £240 for a 3000 word essay to be written to upper second class standard, the economic reality is that it is the appellant who is charging the price for the product which it agrees to supply. The respondent argues that the notion of agency, so carefully woven into the appellant's two sets of Terms and Conditions, lacks both factual and economic reality because the only service provider is the appellant who chooses to use a sub-contractor to provide it with the work which the appellant will ultimately supply to the client (once it has acquired the copyright therein).

34. The appellant argues that the Tribunal should look no further than the contract documents because each, upon its face, states that the appellant acts as an agent for, on the one hand, the client and, on the other hand, the writer; and in circumstances where neither agreement can properly be characterised as a sham, that is substantially the end of the matter. This is put on the basis that in this country people are free to contract as they see fit and it is not for the Courts or Tribunals to re-write contracts that have been freely negotiated at arm's length. There is an air of unreality about that starting point because the contracts to which we have referred above are not, in truth, freely negotiated. They are presented to the client and to the writers on a "take it or leave it" basis.

Discussion.

35. Mr Brown, for the appellant, took us to the decision of the Court of Appeal in CCE v Music and Video Exchange Ltd [1992] STC 220 to stress the point made by Mr Justice McCullough that the construction of any given contractual document cannot differ "depending on whether the issue comes before the court in the context of an appeal from a value added tax Tribunal or in an action for damages for breach of contract." He then referred to various clauses in the agreement which the judge had to consider in a bid to contend that several of the clauses in the Terms and Conditions relevant in this appeal have significant similarities. He plainly relies upon the proposition that the judge did not consider some of these clauses, with similarities which he identified, to be inconsistent with a principal/agent relationship.

36. Mr Brown also placed heavy reliance upon the decision of the Supreme Court in Secret Hotels2 Ltd v HMRC [2014] UKSC 16. That is a well-known decision relating to what has become known as the tour operators' margin scheme, whereby a tour operator who packages tours for consumers, earns a margin on the various components within the tour package provided to the consumer. The actual decision turned upon whether the facts in that case fell within article 306 (1) (a) or (b) of Council Directive 2006/112, generally known as the Principal VAT Directive.

37. Nonetheless, Mr Brown sought succour from the observations of Lord Neuberger who emphasised that the effect of the relevant contractual documentation is to be taken as the starting point in and about determining the nature of the relationships between the various parties involved in any transaction. Although we need not set them out Mr Brown took us in particular to paragraphs 36 – 44 in Lord Neuberger's judgement. In our judgement, of equal importance is what his Lordship said in paragraph 30 of his judgement to the effect that "when assessing the issue of who supplies what services to whom for VAT purposes, regard must be had to all the circumstances in which the transactions takes place." Lord Neuberger was there drawing upon a line of established authority to the effect that the whole of the relationships between the various parties must be considered in the round.

38. Mr Brown also submitted that we could take little, if any, guidance from the recent decision of the Court of Appeal in Adecco UK Ltd v HMRC [2018] EWCA Civ

1794. That was a case involving temporary staff being obtained through an agency. After setting out what it considered to be the relevant contractual provisions, the Court of Appeal digested the relevant legal principles in paragraphs 38 – 44 of its judgement.

39. For the appellant, Miss Vicary points to various factors which she contends demonstrate that the economic reality of the instant arrangement is that the appellant provides a service to the client, but chooses to sub-contract obtaining the work which it has agreed to supply to the client. So much is almost inevitable, given that the appellant does not have staff qualified to write essays or dissertations or coursework in the vast number of subjects and specialisms which might be requested by a diverse range of clients intent upon cheating within the academic system.

40. She heavily relies upon the fact that the intellectual property rights in the written work pass to the appellant and remain with the appellant; the fact that the appellant is solely responsible for pricing; the fact that anonymity must be maintained (subject to very limited exceptions); and the lack of any contractual nexus between the client and the writer. Miss Vicary argues that when one stands back and looks at the commercial and economic reality of the supply it is undoubtedly a supply made entirely by the appellant and that this is reflected in the way in which the appellant has chosen to express itself in both its web advertising and its Terms and Conditions (with the client) where it refers to work which it provides.

41. Unsurprisingly, Miss Vicary then took us through the various factors which Lord Justice Newey identified in Adecco as relevant to the Court's decision that, on the facts of that case, the taxpayer was liable to account for VAT on 100% of the fees/consideration recovered by it from the various organisations for which the temporary workers worked. We have reminded ourselves of the content of paragraph 49 of that judgement, but need not set it out at length.

42. We have not yet referred, at any length, to the witness evidence given by either Mr Dennehy or Mr Spencer. Each of them adopted the content of his witness statement as his evidence in chief. There was little by way of cross-examination concerning primary facts. The primary facts are not in dispute. The content of the relevant documents is not in dispute. When cross-examined, Mr Dennehy acknowledged that the appellant does not disclose the fee to be paid by the client, to the writer or disclose to the client the fee to be paid to the writer; but contended that a writer could probably discover that for himself/herself by going on to the website and pretending to be a client requesting an identical piece of work. He claimed that most of the writers know that of the fee charged by the appellant, they receive one third thereof. It was his evidence that the appellant has about 400 active writers, being teachers, lecturers and graduates.

43. Mr Spencer's evidence had spoken about the appellant's "Quality Control" department. Upon one or two questions being asked by us it emerged that the appellant's quality control department does little more than ascertain that any given piece of work has the required word count and is presented in a reasonably presentable format. As Mr Spencer had to acknowledge, no quality control department could be staffed with employees of sufficient expertise in the vast array of academic subjects upon which the appellant might be requested to provide written work. Thus, despite the

written evidence suggesting that there was an element of quality control concerning the content of the work itself, that was plainly incorrect.

44. Mr Spencer also conceded that the appellant well knew that in reality students were handing in work provided to them by the appellant as his/her own work. If he had said otherwise we would not have believed him.

45. We also record that Ms Georgina Thomson gave evidence and adopted her witness statement dated 6 June 2018 as her evidence in chief. There was no significant cross examination, in that none of the primary facts dealt with in her evidence was challenged.

46. When we stand back and consider the totality of the relevant evidence in the round, we are left in no doubt that both the commercial and the economic reality of the factual situation that we have set out above, dictates that there is only one supply to the client and that that supply is made by the appellant. We agree with Miss Vicary that notwithstanding the smokescreen which the appellant has attempted to create when it drafted the two different sets of Terms and Conditions, to which we have referred above, the commercial reality leans heavily in favour of there being only a single relationship which is a contractual arrangement between the client and the appellant for the supply of a finished product, for which the client pays a single price to the appellant. In our judgement, the introduction of the notion of agency is wholly artificial and was/is intended to disguise the reality that the appellant engages a sub-contractor to produce each product which it has contracted to supply. We acknowledge that each set of Terms and Conditions is deliberately written so as to dictate a different outcome. Those Terms and Conditions are not, in the strict sense, shams, but if we are convinced, as we are convinced, that they have been deliberately honed by the appellant in a bid to achieve an outcome which is wholly artificial, we need not be beguiled by the content thereof.

47. The factors which, in our judgement, are important when we stand back and look at matters in the round, are as follows:

(1) Any client who looks at the appellant's website (or the website as it stood during the years relevant to this appeal) inevitably believes that he/she is to be supplied with the contracted piece of work by the appellant. If such a client is sufficiently assiduous to click on the "Terms and Conditions" link (which opens in a new window), he/she might read that the appellant is to act only as his/her agent but, frankly, would not care provided that he/she obtained the required piece of work with which to practice deception at his/her academic institution.

(2) Except in the most limited and exceptional circumstances the appellant ensures that the identity of the client and the identity of the writer who provides the work for the client, is withheld from the other party. There may be good commercial reasons for this to be done because obviously the appellant does not want to be cut out of the loop should the client wish to commission further work if satisfied with the original product. Nonetheless, the opacity built into and seen as a crucial element in the business model, is contra-indicative of the appellant genuinely acting as an agent to bring together two other parties who wish to contract with one another.

(3) During the closing submissions we tried to tease out of Mr Brown the nature and/or extent of any contractual relationship which, on his case, came into being between the client and the writer, given that the appellant claims to be acting merely as an agent for each. The usual function of an agent, certainly in such circumstances, will be to bring together persons who then wish to contract with one another. Mr Brown contended that the scope of the appellant's authority to act as an agent is to be divined from the Terms and Conditions between the client and the appellant. Similarly, the scope of the appellant's authority to act as agent for the writer is to be divined from the applicable Terms and Conditions between the appellant and the writer. The difficulty with that argument is that neither set of Terms and Conditions contains any provision expressly defining the scope of the agent's authority. The factual circumstances would not permit reliance upon any concept of ostensible or implied authority. In our judgement, such authority as the agent is to have must be found in the express words of the Terms and Conditions agreed between the supposed agent and the supposed principal. Thus it is surprising to find that there is no contractual provision dealing with the scope of the supposed agent's authority in either set of Terms and Conditions.

(4) When we invited Mr Brown to identify the terms of the contract said to come into existence between the client and the writer, facilitated by the appellant agent, he was initially unable to do so. With a little assistance from us, his position became that a contract was to be implied between the client and the writer notwithstanding that he was unable to identify the terms to be found within this implied contract - save to the basic extent that this implied contract would be for the writer to provide the requested piece of written work, to the requested standard, within the required time frame, for an unspecified consideration. He also contended that because each set of Terms and Conditions referred to the £5000 plagiarism guarantee, that guarantee was to be carried forward into this implied contract. The submission overlooked the fact that a guarantee is not binding unless section 4 of the Statute of Frauds 1677 is satisfied.

(5) We acknowledge that the fact that the Terms and Conditions between the appellant and the writer permit the appellant to collect money on behalf of the writer and permit the appellant to obtain suitable work for the writer, are entirely compatible with agency law. However, clause 3.3 in the agreement between the appellant and the client is inconsistent with an agency relationship because it provides that "*Once the Agency has located a suitable Expert and obtained payment from the Customer, the Customer acknowledges that the Order is binding and no refund will be issued."* The question arises as to the parties upon whom the order is binding. It might be the appellant or it might be the client and the writer (or each of them). If it is binding on the writer then Mr Brown characterises the £5,000 plagiarism payment as a liquidated damages clause. The difficulty with that analysis is that the fiction contained within the appellant's Terms and Conditions is that this work will not be handed in or produced or passed off as the client's work. Thus it is difficult to imagine how, if that is intended to reflect the truth of the situation, the client could possibly suffer any loss and damage, let alone loss and damage justifying liquidated damages in the sum of £5,000. The client, who seemingly wants the product for no other purpose than to receive it and perhaps read it without disseminating it or passing it off as

his/her own, can suffer no significant loss and damage if the work contains plagiarism or is otherwise not to the required standard.

(6) Despite a degree of imagination being deployed by Mr Brown, we consider it entirely artificial to maintain that any contractual relationship arises between the student and the writer. Even if one can overcome the requirement that each of them must intend to enter into legal relations with the other, any contract between those parties would require its terms to be certain, or to be capable of being ascertained. In our judgement that does not apply in the imagined contractual circumstances contended for by the appellant.

(7) The payments made to the writers are made by the appellant, in its own name and from its own bank account. The sample invoices, behind tab 17 in the first bundle, show beyond doubt that the sample invoices generated by the appellant, show that its writers invoice the appellant. The writer's imagined client, with whom he/she has allegedly forged a contractual nexus through the agency of the appellant, is not invoiced or even mentioned on the invoice (which is generated by the appellant).

(8) Whilst we acknowledge that there may be good commercial reasons for an agent to act for a disclosed but unidentified principal, we cannot think of many other circumstances in which there will be good commercial reasons for the identity of both the "purchaser" and the "vendor" to be withheld from one another, assuming the nature of the arrangements between those people to be legitimate. One such situation might arise in the art world where X may not want others to know that he has sold a masterpiece and where Y will not want others to know that he has bought it. That is to be contrasted with circumstances where the contracting parties are indifferent about the identity of each other.

(9) Under the applicable Terms and Conditions the appellant is to be the arbiter of whether payment under the £5,000 plagiarism guarantee is or is not to be made. The relevant provisions do not read, and do not amount to, an Arbitration Clause agreed between contracting parties (the client and the writer), included in the implied contract (referred to above). Any such a clause would have to be clear and unequivocal.

48. Accordingly, this appeal is dismissed.

49. 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.

GERAINT JONES QC.
TRIBUNAL JUDGE

RELEASE DATE: 03 DECEMBER 2018