TC08030

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/01656
TC/2016/05161

BETWEEN

COWDENBEATH TAXI SERVICES LIMITED

APPELLANT

and

THE COMMISSIONERS FOR HER MAJESTY`S REVENUE AND CUSTOMS

RESPONDENTS

TRIBUNAL: JUDGE PETER HINCHLIFFE

The Tribunal considered the appeals on 22 January 2021 without a hearing with the consent of each of the parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") having first read the Notice of Appeal dated 23rd February 2018 (with enclosures), HMRC's Statement of Case dated 6 August 2020 (with enclosures) and the extensive submissions, correspondence and supporting documents provided by the parties in a 549 page bundle relating to these appeals. On 27 Jan 2021, the Tribunal invited the parties to submit additional representations on certain specific matters. Further submissions were received from the Appellant and the Respondents. The Tribunal completed its deliberation on 10 Feb 2021.

DECISION

INTRODUCTION

1. The Appellants, Cowdenbeath Taxi Services Limited (hereinafter referred to as "CTS"), appeal in TC/2018/01656 against the decision of the Respondents, ("HMRC"), to reject an Error Correction Notice submitted by CTS and giving rise to a claim pursuant to Section 80 of the VAT Act 1994 ("the Act") for the repayment of £40,832 of VAT payments made by CTS. CTS' claim for the repayment of VAT paid during the period 8/13 to 04/17 inclusive (the "Relevant Period") was received by HMRC on 29 June 2017 and related to the provision of services by CTS to the following companies:
   - Fife Cars Limited
   - Fife Private Hire Limited
   - Taxi Hire Fife Limited

   (the "Fife Companies").

2. This appeal proceeded in parallel with appeal ref TC/2016/05161 until CTS confirmed in late 2020 in its undated Response to the Tribunal that it withdrew that appeal and accepted that it had been properly assessed to VAT on the whole turnover of CTS and the Fife Companies. CTS has confirmed that it is no longer pursuing appeal TC/2016/05161.

3. Appeal TC/2018/01656 (the "appeal") is the last remaining unresolved element of a long-running dispute between the parties regarding the liability to VAT of CTS and the Fife Companies arising out of their respective roles in the provision of a range of taxi services.

THE APPEAL

4. CTS submitted the appeal dated 23 February 2018 against HMRC's rejection of a claim made in an Error Correction Notice dated 23 June 2017 for the repayment of £40,832 in VAT. This amount had originally been paid by CTS during the Relevant Period on the basis that it was providing services to the Fife Companies during this time.

5. CTS asked that this appeal be considered alongside four other appeals, including TC/2016/05161, relating to the VAT liability of CTS and the Fife Companies. CTS stated that the repayment claim arose from an acceptance of a change in the VAT position of CTS from acting as agent of the Fife Companies to acting as a principal in the provision of taxi services. CTS sought recognition by HMRC of credit notes issued by CTS to each of the Fife Companies in respect of the services that it had invoiced to the Fife Companies and on which it had levied VAT and asked for repayment of a total of £40,832 in VAT payments.

   HMRC responded to the appeal with a statement of case on 6 August 2020. HMRC confirmed that they had rejected the Error Correction Notice submitted by CTS under s.80 of the Act. HMRC stated that CTS was first registered for VAT on 1 March 2011. Its main business was the provision of taxi services. HMRC formed the view that CTS had provided car rental, telephony services and fuel to the Fife Companies as a principal and that VAT output tax was due on these supplies. HMRC clarified that it was not stating that CTS provided taxi services to the Fife companies. HMRC had set out its final decision on the claim by CTS for repayment in a review letter of 24 February 2018 and it continues to regard this as correct in its reasoning and in law.

6. CTS stated that they now accepted the position advanced by HMRC in appeal TC/2016/05161 that CTS acted as principal in providing taxi services through the Fife Companies. As a consequence, CTS state that they and the Fife Companies formed a de facto VAT group. CTS quoted extensively from HMRC's arguments in appeal TC/2016/05161 and stated that CTS had acted as a principal and not an agent in its dealings with the Fife Companies. CTS stated that the effect of this argument is that VAT was not due on the invoices that CTS issued to the Fife Companies during the Relevant Period. CTS issued credit notes for all such invoices. CTS argues that it is entitled to a refund of the VAT paid in respect of such invoices.

7. CTS also argued that the refund that they had claimed under s.80 of the Act had to be paid in order to avoid unjust enrichment by HMRC and set out their reasoning and the legal precedents that supported their case.

The Law

8. Section 80 of the VAT Act 1994 provides:

> *"***80 Credit for, or repayment of, overstated or overpaid VAT**
>
> (1)Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> (1A) Where the Commissioners—
>
> (a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, have brought into account as output tax an amount that was not output tax due,
>
> they shall be liable to credit the person with that amount.
>
> (1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of—
>
> (a) an amount that was not output tax due being brought into account as output tax, or
>
> (b) an amount of input tax allowable under section 26 not being brought into account,
>
> the Commissioners shall be liable to repay to that person the amount so paid.
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> (2A)Where—
>
> (a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and
>
> (b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,
>
> the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.**]**
>
> (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.
>
> (3A) ……..
>
> (4)……
>
> (6)A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases."

9. Section 34 of the VAT Regulations 1995 refers to Error Correction Notices and provides:

"Correction of errors

34. —

(1) This regulation applies where a taxable person has made a return, or returns, to the Controller which overstated or understated his liability to VAT or his entitlement to a payment under section 25(3) of the Act.

(2) In this regulation—

(a)"under-declarations of liability" means the aggregate of—

(i) the amount (if any) by which credit for input tax was overstated in any return, and

(ii) the amount (if any) by which output tax was understated in any return;

(b) "over-declarations of liability" means the aggregate of—

(i) the amount (if any) by which credit for input tax was understated in any return, and

(ii) the amount (if any) by which output tax was overstated in any return.

(3) Where, in relation to all such overstatements or understatements discovered by the taxable person during a prescribed accounting period, the difference between—

(a) under-declarations of liability, and

(b) over-declarations of liability,

does not exceed £2,000, the taxable person may correct his VAT account in accordance with this regulation.

(4) In the VAT payable portion—

(a) where the amount of any overstatements of output tax is greater than the amount of any understatements of output tax a negative entry shall be made for the amount of the excess; or

(b) where the amount of any understatements of output tax is greater than the amount of any overstatements of output tax a positive entry shall be made for the amount of the excess.

(5) In the VAT allowable portion—

(a) where the amount of any overstatements of credit for input tax is greater than the amount of any understatements of credit for input tax a negative entry shall be made for the amount of the excess; or

(b) where the amount of any understatements of credit for input tax is greater than the amount of any overstatements of credit for input tax a positive entry shall be made for the amount of the excess.

(6) Every entry required by this regulation shall—

(a) be made in that part of the VAT account which relates to the prescribed accounting period in which the overstatements or understatements in any earlier returns were discovered,

(b) make reference to the returns to which it applies, and

(c) make reference to any documentation relating to the overstatements or understatements.

(7) Where the conditions referred to in paragraph (3) above do not apply, the VAT account may not be corrected by virtue of this regulation"

Findings of Fact

10. The position of the parties has evolved in the course of this appeal and the appeals with which it was originally linked. The wider background is known to both parties and I have sought to address only those facts that are relevant to this appeal.

11. The following matters of fact are not in dispute between the parties:
- CTS is currently registered for VAT under reference 108 189 019.
- CTS' Principal Place of Business is Foulford House, Foulford Road, Cowdenbeath, Fife.
- CTS was registered for VAT with effect from 1st March 2011.
- Its main business activity is described as Taxi Services.

- The directors of CTS are Mr William and Mrs Wilma MacDonald, who both now suffer with poor health;
- At the start of the Relevant Period the Fife Companies took over activities previously undertaken by CTS;
- Mr MacDonald and his family controlled and managed CTS and the Fife Companies during the Relevant Period.
- The Fife Companies were not VAT registered during the Relevant Period.
- CTS Limited had invoiced the Fife Companies for services throughout the Relevant Period.
- The Fife Companies ceased trading with effect from 30th June 2017.
- From 1 July 2017 onward the business activities of CTS and the Fife Companies were operated solely through CTS.
- The appeal was submitted in time.
- CTS, through their representative, submitted an Error Correction Notice (form VAT 652), notifying a claim under Section 80 of the Act, for the recovery of over-declared Output Tax, in respect of supplies CTS Limited made to the Fife Companies as an "agent", rather than as a "principal".

12. The parties are now also in agreement that CTS acted as principal in the provision of taxi services during the Relevant Period. However, they have different views on the practical and legal implications of such a position.

13. In order to resolve this appeal, it is necessary to assess and determine the following matters of fact on which the parties disagree:
    - What services, if any, were provided by CTS to the Fife Companies during the Relevant Period?
    - What payments were properly invoiced and made for these services?
    - What was the value of such services?

14. In determining what services were provided by CTS to the Fife Companies during the Relevant Period, I reviewed the evidence and submissions of each of the parties. The internal review that HMRC conducted into the decision to reject CTS's Error Correction Notice came to a clear conclusion in the letter of 24 January 2018 reporting their decision to uphold the initial decision to reject the Error Correction Notice:

    > "It is my view that the company have properly charged and accounted for the output tax concerned, regarding the services which were provided to three other companies in respect of car rental, telephones and recharges of fuel.
    >
    > I am therefore, satisfied, for the reasons previously stated within this letter, that in this instance, HMRC were correct to reject the company's 'claim' for over declared output tax in respect of supplies which the company made as an 'agent', rather than as a 'principal'. "

    The reference to "three other companies" is to the Fife Companies.

15. I note that in the equivalent review letter dated 1 September 2016 setting out HMRC's position in relation to the dispute with CTS over its assessment for VAT in appeal TC/2016/05161, HMRC came to the following conclusion:

    > "I would therefore confirm I am upholding the decision of HMRC that CTS Ltd are acting as a principal in relation to all taxi supplies, they are involved in, including those which it has been

disputed are being made by the companies known as Fife Cars Limited (FC Ltd), Fife Private Hire Limited (FPH Ltd) and Taxi Hire Fife Limited (THF Ltd).
Consequently, the decision to assess for the amounts equal to the combined turnover of these 3 companies in the corresponding period is correct and in line with Section 73(1) VAT Act 1994."

16. The two decisions by HMRC appear contradictory in that it concludes that, on the one hand, all of the turnover of the Fife Companies from the provision of taxi services was in fact attributable to CTS, which provided these services as a principal, whilst, on the other hand, concluding that CTS supplied cars, fuel and telephony to the Fife Companies. It is clear from the submission of the parties that the cars, fuel and telephony were only provided to the Fife Companies so as to enable the Fife Companies to provide taxi services. If CTS were providing those taxi services itself as principal, then it is difficult to accept that it was providing the cars, fuel and telephony with which the taxi services were provided to the Fife Companies. The effect would be that the Fife Companies bore most of the expense of providing the taxi services but received no income for this activity.

17. In the skeleton argument submitted by HMRC, they appear to argue at one point that the services that gave rise to the VAT payments that are the subject of this appeal were made by CTS to the drivers appointed by the Fife Companies. HMRC state that these services are taxable whether they were provided by CTS as a principal or agent. However, in the remainder of their submissions, HMRC refer to such services being provided to the Fife Companies, rather than the drivers. For example, HMRC assert that CTS cannot issue credit notes to the Fife Companies in respect of supplies made to the Fife Companies as there has been no reduction in the consideration received by CTS. HMRC also refer to the services having been provided to the Fife Companies in their arguments dismissing CTS' claim regarding unjust enrichment.

18. Having reviewed the evidence and the submissions of the parties on these points, I issued a request for further submissions and invited the parties to clarify their final positions on the following questions:
    (i) Is it accepted that car hire, telephony and fuel services were provided by the Appellant to Fife Cars Limited, Fife Private Hire Limited and Taxi Hire Fife Limited (the "Fife Companies") during the period 2013-17 and that these gave rise to output VAT?
    (ii) Were invoices issued for such services with a description of the service?
    (iii) Is it now accepted that all services provided by the Fife Companies to third parties during the period 2013-2017 were, in law, provided by or on behalf of the Appellant as the principal of the Fife Companies?
    (iv) If the answer to (iii) is that such services were provided by the Appellant as principal, what was the basis for, or purpose of, any services referred to in (i) above?
    (v) Is it accepted that the Error Correction Notice submitted by the Appellant was in the wrong format but that it could now be resubmitted or corrected?

19. CTS responded by saying "yes" to each of questions (i), (ii) and (iii) above. In response to (iv) CTS state that the issuing of invoices by CTS to the Fife Companies was an error, which they now accepted was no longer appropriate and for this reason they have now issued credit notes for all such invoices. CTS repeated their submission that CTS and the Fife Companies should be regarded as a de facto group for VAT purposes. They referred to the various factual conclusion that HMRC had recorded when coming to the conclusion that CTS was acting as a principal and not an agent in supplying taxi

services through the Fife Companies and confirmed that they now accept HMRC's conclusion that CTS acted as principal.

20. CTS responded to question (v) by accepting that the format of the Error Correction Notice was "marginally incorrect". They argue that the repayment claims for £40,832 should be unaffected by this and that they are entitled to the repayment of this sum on the basis that otherwise HMRC would be unjustly enriched.

21. HMRC respond to the request for further submissions. In response to question (i) they referred to their investigation into CTS in December 2015 from which HMRC had concluded that CTS acted as a principal in providing all taxi services notionally provided by CTS or the Fife Companies. In response to question (ii) HMRC provided copies of invoices issued by CTS to each of the Fife Companies during the Relevant Period. These periodic invoices referred to "phone rental", "hire of cars" and "fuel recharge" provided by CTS. HMRC confirmed that they believed that CTS provided all taxi services as principal and they had assessed CTS for amounts equal to the combined turnover of CTS and the Fife Companies. In response to question (iv), HMRC confirmed their view that output VAT at the standard rate was due on the taxable supply of vehicles, telephony and fuel by CTS to the Fife Companies.

22. HMRC repeated that the Error Correction Notice had not been submitted in the prescribed format but gave no new details.

23. On the basis of the evidence provided by the parties and the evolving submissions of the parties in this appeal, I reach the following conclusion on the three question of fact set out at 13 above:

    (i) On the balance of probabilities, I conclude that CTS acted as principal in providing taxi services to third parties, notwithstanding its earlier arguments that it was merely acting as the agent of the Fife Companies in respect of such services. HMRC argued in appeal TC TC/2016/05161 that these taxi services were provided by CTS and during the course of this appeal, CTS has come to accept that conclusion. HMRC have reiterated their position when questioned. In the light of this conclusion, I must address the difficulties implicit in deciding both that; CTS provided the car hire, telephony and fuel services to the Fife Companies that were required to permit the Fife Companies to provide taxi services to third parties and also, that CTS was itself responsible for providing such taxi services to those third parties. I find that such conclusions make no commercial sense and would be irrational. If CTS provided taxi services using its own cars, phone services and fuel and received all of the revenue from such taxi services, there is no purpose or value for the Fife Companies in receiving or paying for such cars, phone services or fuel. The provision of such cars, fuel and telephony to the Fife Companies was either valueless or illusory.

    (ii) Invoices were issued for services provided by CTS to Fife Cars Limited, Fife Private Hire Limited and Tax Hire Fife Limited during the period 2013-17. These were issued on the basis that CTS was providing car hire, telephony and fuel services to the Fife Companies. CTS confirm that such invoices were raised and paid.

    (iii) I am informed by CTS that credit notes have been issued in respect of the invoices for the provision of cars, fuel and telephony. I have not seen such credit notes. HMRC assert that these are invalid as there has been no reduction in the consideration received by CTS for the services provided to the Fife Companies. In the light of my conclusion at (i) above, I am unable to identify any services of any value provided by CTS to the Fife Companies during the Relevant Period.

Findings of Law

24. I conclude that CTS had indicated that it did not wish to pursue its appeal in TC/2016/05161 and that this appeal fails.

25. I note that HMRC state that the format of the Error Correction Notice was not submitted in a valid format in accordance with Regulation 34 (6) (b) of the VAT Regulations 1995, with the exception of the format of the claim for the VAT period 10/13. CTS accept that they should have made a claim that identified the repayments they sought in each individual quarter. I find that CTS submitted their claim in a form provided for this purpose by HMRC. All sections are completed accurately. The only fault in the contents of the Error Correction Notice is that of the eight periods that are identified as being the subject of a claim, only that for the period ending 10/13 was for a three-month period, the remainder were for periods of six months. HMRC accept that the claim for one quarter ending 10/13 was valid and argue that the others are not. I do not agree, in the specific context of this appeal, that the requirement in Regulation 36 (6) (b) that a claim must make reference to the returns to which it applies is satisfied by referring to a three-month period, but not by referring to consecutive six-month periods. HMRC have had no problem in identifying the specific returns to which the claim related and there is no ambiguity.

26. The burden of proof is on CTS to establish that they are entitled to the amounts claimed. In this case, it is clear that the position of the parties has changed since this appeal commenced. In reaching my decision, I take account of the final position of the parties on the issues in dispute in this case. Where that position has inconsistencies, that may weaken the weight I give to the contention of the relevant party.

27. Both parties now agree that CTS acted as a principal in providing taxi services to third parties and that CTS did not act as the agent of the Fife Companies in so doing. HMRC also contend that CTS acted as a principal in providing services to the Fife Companies that were used to provide the taxi services. As a matter of law, the Fife Companies cannot have acting as the agent of CTS in dealing with CTS. I must therefore consider if the Fife Companies agreed to pay for phone services and fuel supplied by CTS, which CTS then used to provide taxi services to third parties without any payment to the Fife Companies. Such a conclusion would raise doubts over whether there was any consideration for any agreement by the Fife Companies to pay CTS for services it did not use. I find that either no car hire, telephony or fuel services were provided by CTS to the Fife Companies in order to enable them to supply taxi services to third parties, or if they were provided, they were of no value. I conclude that it would not be appropriate to pay VAT on services that were either valueless or illusory.

28. I am aware that my conclusion on the facts and the law in this appeal does not reflect the position advanced by either of the parties. I therefore sought to give the parties an additional opportunity to respond on the factual issues on which I base my conclusions.

Conclusion

29. In all of the circumstances of this case, I find that on the balance of probabilities, no services for the provision of cars, fuel or telephony of any value were provided by CTS to the Fife Companies during the Relevant Period. VAT was therefore not properly due

in respect of such services The Error Correction Notice submitted by CTS was sufficient to make a claim for the repayment of VAT paid by CTS in respect of the provision of services to the Fife Companies. HMRC has not been able to provide a valid reason for rejecting such claim. Therefore, the claim for repayment of VAT in the Error Correction Notice is valid.

30. In the light of this finding, there is no need to consider the claim for unjust enrichment or further consider the status of the credit notes issued by CTS to the Fife Companies.

DECISION

31. For the reasons set out above appeal TC/2016/05161 is dismissed.

32. Appeal TC/2018/01656 is upheld. HMRC should now reconsider the Error Correction Notice submitted by CTS and refund the VAT payments that were paid by CTS in respect of the telephony, car hire and fuel services ostensibly provided to the Fife Companies and referred to in the invoices issued by CTS to the Fife Companies during the Relevant Period.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. 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.

PETER HINCHLIFFE
TRIBUNAL JUDGE

Release date: 12 FEBRUARY 2021