[2016] UKFTT 0622 (TC)

TC05358

Appeal number: TC/2015/03280

VALUE ADDED TAX – supplies of transportation services (taxis) to contract customers – whether supplied as principal or agent – as agent.

FIRST-TIER TRIBUNAL
TAX CHAMBER

KHALID MAHMOOD — **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at City Exchange, Leeds on 1 September 2016

The Appellant in person

Mr Bernard Haley, Presenting Officer, for the Respondents

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DECISION

1. This was an appeal by Mr Mahmood ("the appellant") against a decision of 7 July 2014 by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") that the appellant should have registered for VAT from 1 April 2009 and against a penalty under s 67 Value Added Tax Act 1994 ("VATA") for failing to register.

2. An assessment to VAT of some £77,000 had been raised on the appellant for all VAT periods from 1 April 2009 to the appellant's deregistration, but as he had not filed returns for that period there was, I was told, no right of appeal against that assessment. Nonetheless Mr Haley said that if I were to find for the appellant in the appeal the assessment would be withdrawn.

Evidence

3. I had a bundle of documents prepared by HMRC which included an agreed statement of facts. It also contained a witness statement from Ms Denise Scrivener, the officer of HMRC who conducted the enquiry into the VAT affairs of the appellant. Unfortunately Ms Scrivener had been taken to hospital with a serious foot problem and was unable to attend the hearing. Mr Mahmood, who was assisted (ably I may say) by an interpreter, told me that he had no questions for Ms Scrivener so I took her evidence as read.

4. Mr Mahmood gave evidence and was questioned by Mr Haley and me. I accept his evidence as honest and credible.

Facts

5. There was no real dispute about the facts, and I find as follows.

6. The appellant carried on business as a taxi firm base in Halifax, trading as Metro Cars. He had worked as a taxi driver but took over the business of Metro Cars in or around 2008. There were some cars owned by the business and he also engaged the services of self-employed drivers who had their own cars, kept the cash fares and paid the appellant rent for the use of the base.

7. The appellant also took over some account business and he had obtained more. He had put in as evidence statements from a number of the account customers including Calderdale Council, South Yorkshire NHS authority and others. From these and answers given by the appellant to the Tribunal and in the course of correspondence I find that these customers were contracting with the appellant. He invoiced them monthly for the fares incurred by them, with the invoices payable 14 days after issue. These invoices were based on "dockets" given to him by the drivers. The dockets were the basis on which the appellant paid the drivers in cash.

8. The appellant would be the one contacted if for example a cab failed to turn up. He had no instances of non-payment and I did not learn who would have borne the loss had there been one.

9. The appellant said he paid the drivers the cash fares for the account jobs by set off against the rentals due. Six drivers had signed statements, which had been prepared by his previous accountant. These statements all read as follows (verbatim):

> "To whom it may concern.
>
> This is to confirm that [*driver's name*] am a private hire driver using Metro Cars as a Base and I also confirm that Mr Khalid Mahmood of 19 Carlton Street Halifax HX1 2AL Always pay our Dockets from account holders on weekly basis after Deducting Base Rent due to him. Metro Cars deal direct with the account holders for submitting their Invoices on regular basis and reimbursed direct.
>
> Our payments always Paid in cash on weekly basis by Metro Cars if balance due to me or I pay them the difference between Base Rent less docket(s) amount provided to Metro Cars for that period."

10. These statements were signed with name and address, registration plate number and taxi licence number and dated 5 March 2015. They are consistent with the appellant's evidence and I accept them as true. None of the drivers were registered for VAT.

11. The appellant said that he received no commission from the drivers and nothing over and above the rental payments. He said in answer to my question that he himself made no profit from the contracts. A letter in the bundle from his then tax adviser, BDO LLP, dated 20 January 2015, said:

> "We would reiterate that Mr Mahmood does not receive any income in relation to the contract work and 100% of the income goes to the drivers. From a commercial perspective this arrangement is aimed at attracting drivers to make use of Mr Mahmood's taxi base and therefore pay rent for doing so in a competitive marketplace."

12. In a meeting with Mr Symes of HMRC who was enquiring into the income tax side of the appellant's activities and in answer to Mr Symes' question why he would not take a cut from contract work, the appellant had stated that:

> "Halifax was a relatively small town with many taxi firms – if MM [Mr Mahmood] did not offer 100% of the contract income to the driver they would simply go elsewhere."

13. I accept Mr Mahmood's evidence that he did not return any of the fares as true and I accept the explanation given by him to Mr Symes for doing this.

14. So far as not covered above, the statement of agreed facts shows that the appellant ceased to trade in 2014 (he told me he had transferred the business to a third party) and that his main source of income was the radio hire rentals and the hire of cars. He had negotiated the contracts, but he told me the price was standard (I assume it was fixed by the local authority).

Law

15. HMRC's Statement of Case referred to three articles of Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax ("PVD"), namely Articles ("art") 24, 28 & 73, and quoted s 4 Value Added Tax Act 1994 ("VATA"):

> "**4** *Scope of VAT on taxable supplies*
>
> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

16. At the hearing Mr Haley produced a copy of a case from the VAT & Duties Tribunal *Akhtar Hussain t/a Crossleys Private Cars v Commissioners of Customs & Excise* [1999] (VTD16194) ("*Akhtar Hussain*").

17. No statute law, cases or VAT Notices were produced by HMRC relating to the obligation to register, the ability of HMRC to raise "central assessments" to VAT, the liability to a penalty for failure to register or about the treatment of agents in general and in the taxi business in particular. I have researched what is available in this regard and consider it below where relevant.

18. As set out at §20 the appellant had previously referred to two VAT Tribunal cases and I have considered the one I was able to find as well as *Akhtar Hussain*.

Submissions

19. I take the appellant's Mr Akhtar's submissions from his notice of appeal prepared by BDO LLP:

(1) The application of VAT to taxi firms is complicated and merits consideration on a case by case basis.

(2) The issue is "who is making the supply, and what is it a supply of?".

(3) In this case the supply of transportation services to the parties to the contracts is made by the self-employed drivers. Metro Cars acts as an "invoicing house" for the drivers.

(4) HMRC Notice 700/25 at section 3 deals with a case where a business takes on self-employed drivers to work under a contract for services. Section 3.3 says:

> "**3.3 Agent or principal?**
>
> As a taxi or private hire car business you may perform two different types of work. These are:
>
> - cash work, where individual customers pay cash to the driver on completion of the journey and

- account work, where regular customers, particularly companies and institutions, are allowed to settle their bills periodically

If all your drivers are employees you are a principal and must follow paragraph 3.2 when accounting for VAT. However, if your drivers are self-employed you may, depending on the agreements you have with them, be acting as their agent for cash work and in some cases for account work as well.

(5) Section 3.4 says:

"**3.4 Agent for both cash and account work**

Whether you are acting as an agent depends on the terms of any written or oral contract between you and the drivers, and the actual working practices of your business. For further information on how to decide whether you are acting as an agent or a principal see the section dealing with agents in Notice 700 The VAT Guide. Typically in acting as an agent for your drivers you will:

- relay bookings to the drivers (usually on a rota basis) for an agreed fee
- possibly also provide them with other services such as the hire of cars or radios and
- collect fares on their behalf from account customers

If you act as an agent, the drivers are entitled to the full fares paid by the customers, even though the charge for your agency services may be deducted from the account fares you collect for them."

(6) In this case the appellant provides all of these services on behalf of the self-employed drivers, and so falls to be treated as an agent in relation to both cash and contract work.

20. I also note that in correspondence BDO referred to two cases, *Triumph & Albany Car Service v Commissioners of Customs & Excise* ("*Triumph*") and *F G Carless v Commissioners of Customs & Excise* [1993] STC 632 ("*Carless*"), which they regarded as being on all fours with the appellant's situation. I was unable to find a report of *Triumph*, although a post hearing note is given in VAT Tribunal Decisions 1004.

21. For HMRC Mr Haley submits:

(1) The appellant undertook contract work for Calderdale Council and South Yorkshire NHS [in fact there were others]

(2) These contracts were negotiated by the appellant

(3) The appellant invoices the contract customers and receives payment from them in his business account

(4) The appellant is therefore a principal, and the income from the account customers was correctly included in his turnover.

Discussion

22. In one of the cases cited by the appellant, *Carless* (the only one of the three to be of binding authority), Hutchison J quoted from the VAT Tribunal decision which said:

5 > "We also accept the evidence of [the taxpayer] that there was a contractual commitment to provide regular transport for the staff of the Commercial customer. That does not necessarily mean that [the taxpayer] is actually supplying the service for VAT purposes. We must now examine the evidence to determine who supplied the service and
10 the effect upon VAT."

and then added:

> "This last sentence is of crucial importance, since both counsel in this appeal are agreed that it posed the relevant question."

23. In this case I therefore have to decide who it was that made the supplies of
15 transportation to the contract customers: was it the appellant, acting as principal ie on his own behalf, or was it the drivers for whom the appellant was their agent in arranging the jobs?

24. Since it is accepted by HMRC that in relation to cash customers the appellant is acting as agent for the self-employed drivers, it follows that there is an evidential
20 burden on HMRC to point out those features of the account business which differ from the cash business and why the differences are relevant and material to the question: is this account business carried on by the appellant as principal.

25. HMRC say that the answer is determined by the three features of the arrangements that they mention, negotiation by the appellant, invoicing by the
25 appellant and receipt of payment in his business account. Therefore, they say, the presence of those features means that appellant is the person making the supply as principal.

26. I do not accept this for a moment. Those features show that there are differences between the account business and the cash business. But two of the
30 features are ones which are inevitably present in account business, which cannot be carried on without contract negotiations or invoicing. The third feature is, from a practical point of view, inevitably going to be present when invoices are issued. The only alternative would be for the appellant to identify on the invoices which drivers carried out which journeys, how much they should be paid and what each driver's
35 bank details are (assuming always they have bank accounts). This is exactly why an account basis is so much more preferable for a regular and substantial customer: they deal with one person and pay one amount. But this feature is not one that can only be present in business with a principal, rather than with an agent. It is simply a feature of account business.

40 27. All three features, including the fact that payment is made to the appellant's business account, are perfectly compatible with both possibilities, that the appellant is

a principal or that he is the agent for the (undisclosed) principal, the drivers. Agents habitually negotiate contracts, issue invoices and receive payment. So do principals of course, but those features are not the ones that distinguish a principal from an agent.

28. The only other string in HMRC's bow is the case of *Akhtar Hussain*. This case is a VAT Tribunal case and is not binding on me. It is an example of a case where the fact finding Tribunal has found the facts and considered the features that HMRC say are relevant differences between account and cash business and decided on those facts whether the supply was made as principal or as agent.

29. It is in my view of relevance to my task only in a negative sense. If, as it did, it found that Mr Hussain was acting as principal, and the differences that made this so in the Tribunal's eyes are the same as in this case, then it shows only that another judge has considered that those features are determinative, but does not bind me if I am of a different view of whether in law those features mean that the appellant is a principal. On the other hand if the determinative features were different then it is of no assistance at all. So I turn to the facts of *Akhtar Hussain* and the reasoning.

30. The case also concerned a taxi firm in Halifax using self-employed drivers for cash work. As in this case those drivers paid a rent to Mr Hussain, and it was accepted by HMRC, as it is in this case, that Mr Hussain was the agent for the drivers in arranging the cash work.

31. Mr Hussain also carried on some account work with publicans who wanted safe transport home for staff. HMRC argued that in relation to this work Mr Hussain was a principal (as in this case). (This is also recorded at [19] as being the appellant's submission as well: this must be wrong). HMRC are recorded at [24] as pointing to five features that made this work different from cash work:

(1) The appellant bore the risk of bad debts in that drivers were allowed to set off their rental payments against sums due to them for account work before invoicing.

(2) The appellant offered discounts, but did not change the fare paid to the driver

(3) The appellant set the fares for account work

(4) The appellant maintained a record of all account work

(5) The rosters were marked showing that "if you can't make it in for 6 am too often, look for another job", thus demonstrating control over drivers.

32. The Tribunal accepted at [27] that these five features put account work in a "different category" from cash work. The Tribunal's reasons for saying that Mr Hussain was a principal were the bad debts issue, the discounted fares and that the appellant expected to receive free advertising from the account customers (a card in the pub) to offset his losses (although in practice this was not common (see [14]).

33. The Chairman (Rodney Huggins) then added at [29] that, unlike the position in *Triumph* and *Carless* (also cited to him on behalf of Mr Hussain) where the taxi firm was held to be an agent for both cash and account work, in *Akhtar Hussain* there are differences “and that is why the appellant is a principal.”

5 34. With respect I do not find the reasoning in this decision very satisfactory. It appears to say that the mere fact that are differences justifies principal treatment and does not explain why those differences justify different VAT treatment. But it appears that in fact the Chairman considered only two of Customs’ five differences to be relevant, the bad debts and the discounts. They are certainly pointers to the 10 account operation being undertaken by the appellant in that case as principal, in that the appellant is bearing risks that an agent might not. But item (1) in §31 is not really evidence of the drivers or the appellant bearing the cost of bad debts. There is nothing said there about what would have happened if an account customer had default in paying an invoice and whether the driver would bear any consequences, eg 15 would have to pay back the fare or to have later payment due reduced to compensate.

35. If the actual bearing of bad debts is a pointer towards principal and the giving of discounts not reflected in the payment to drivers is also such a pointer, then in this case I see neither. I had no evidence that there had been bad debts, indeed Mr Hussein denied it, and the sort of accounts suggest that that would not be a problem. 20 Mr Haley did not follow up Mr Mahmood's denial that there were bad debts by asking hi what would have happened if there had been. Nor did I have any evidence that discounts were offered: the contrary in fact.

36. I turn now to the appellant’s case, bearing in mind that the burden is on the appellant to show that HMRC’s decision as to registration is incorrect.

25 37. The appellant’s argument is that in this case HMRC are ignoring the pointers shown in their own guidance, in VAT Notice 700/25. The appellant in his notice of appeal pointed out the last sentence of Section 3.3. and the whole of section 3.4 of that Notice (see §19(4) & (5)).

38. The appellant is on the facts that I have found doing those things that are listed 30 in section 3.4 as the hallmarks of an agency operation. It is also clear and I have found as a fact that all of the fare goes to the driver. Setting the fares against the hire charge is immaterial as section 3.4 points out (and is not there shown as making the driver run the risk of bad debts).

39. In one of the appellant’s cases, *Carless,* Hutchinson J recorded that:

35 > “the commissioners asserted that, in cases where the taxpayer fulfilled hire-car engagements to account customers by securing that the service was performed by drivers not employed by him he was acting not as a principal but as an agent for the drivers concerned, to whom he therefore made supplies which should have been the subject of 40 invoices on which value added tax (VAT) had been charged.”

40. This of course is the opposite to what HMRC allege here. The VAT Tribunal had concluded that the appellant was an agent in respect of both account and cash customers, and the appellant disputed their decision. They had said:

> "We looked at the VAT leaflet No 700/25/84 and particularly the extract quoted earlier. We do not find that there was any special arrangement with the self-employed, be they journeymen or owners, when providing transport for credit customers. In the case of credit journeys they deducted the value of that journey when calculating the sum they paid to [the taxpayer]. It was not a variation in terms. To the actual vehicle driver it was no different from any other journey apart from the fact that it was on a regular basis. Although we said earlier that there was a difference between [the taxpayer's] operation for credit customers and that explained in the *Triumph & Albany* appeal that difference is not such as to distinguish the two businesses."

41. This is of course what the VAT Tribunal said, not the High Court, and so is not binding on me any more than *Akhtar Hussain*. But in the appeal to the High Court Hutchison J said:

> "[The appellant's submissions] have failed to persuade me that the tribunal here fell into an error of law, either by posing the wrong question, or by failing to take material considerations into account. On the contrary, it posed the correct question and answered it in a way which was open to it."

42. This endorsement by the High Court (though not necessarily of the precise reasoning) makes me more inclined to follow *Carless* rather than *Akhtar Hussain*. It is clear that the VAT Tribunal in *Carless* understood the distinction between showing different features as between account and cash business and showing material and relevant such differences that would distinguish principal from agency business.

43. But I cannot simply take the wording of VAT700/25 as if it was law. Nonetheless it seems to me that the last paragraph of section 3.4 is a correct statement of the law. A principal is carrying on business for themselves and would expect to generate a profit for themselves from a difference between the consideration they receive for the services supplied to customers and the amounts they have to pay get the services performed. In a taxi business where what happens is that the firm is contracting as principal one would not expect an exact correlation between the receipts for any one journey and the payment to the driver.

44. The appellant had said to HMRC that he gave 100% of the fares from account business to drivers, as if he did not they would go elsewhere. Mr Haley did not seek to question him on this statement.

45. But where the taxi firm is acting as an agent that is exactly what one would expect, with the agent being remunerated not by making a profit on the fares but by receiving a commission or a reward akin to commission. In this case where HMRC agree that the appellant is acting as agent of the drivers in relation to the cash business there is a reward to the agent in the form of the "rental", which is akin to a commission or fee. I had no evidence to suggest that the rental differs according to

whether the driver does cash or agency work, or by reference to the proportions of each.

46. In *Akhtar Hussain* as I have noted the Chairman, Mr Huggins, held that by giving "credit" to the drivers (by paying them before he received payment of the invoices) Mr Hussain was running the risk of bad debts which Mr Huggins thought was an indicator of his being a principal. It may be an indicator, and in a case where there is a history of bad debts, a failure to seek to recover losses in any way from the driver may well show that the business is done as principal. But it is also possible for an agent to be engaged on *del credere* terms (see eg *Weiss, Biheller & Brooks Ltd v Farmer (HM Inspector of Taxes)* [1918 & 1919] 8 TC 381). In such a case the agent will receive an additional commission for assuming the risk of non-payment.

47. But in this case there was no history of bad debts and nothing to show that had an account holder not paid, the driver would not have been required to recompense the appellant. It is therefore a very faint pointer to the business being carried on as principal and it is heavily outweighed by the fact that all the material features of the account business point to it being agency business, in particular the 100% correlation of fares and payments to the drivers, albeit not simultaneously, and the fact that the same rental is paid irrespective of the nature of a driver's work in the week concerned.

48. In my view therefore the appellant has discharged the burden of showing that the decision of HMRC requiring registration from a date in 2009 was wrong as the supplies of services made to the account customers were not made by the appellant but by the drivers.

49. This would normally have marked the end of my decision, but for my being intrigued by one of the articles of the PVD that HMRC had cited, art 28:

> "Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself."

50. Taken literally this would seem to apply to the appellant's account business and for that matter the cash business, as in both cases the fact that the principal is the driver is unknown to the customer who is dealing with, in this case, Metro Cars, the trading name of the appellant. So why, I asked myself, did HMRC not use this article as a knockout blow?

51. Mr Haley did not in fact make any submissions on the effect of this article on the case. But the wording did remind me of s 47(2A) VATA, a provision which has featured in many recent cases dealing with the purchase of iPhones from Apple stores using "runners" (see eg *Scandico Ltd v HMRC* [20915] UKFTT 0036 (TC)). Section 47(2A) is however limited to goods. It provides:

> "Where, in the case of any supply of goods to which subsection (1) above does not apply, goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and as a supply by the agent."

52. Section 47(1) applies a similar approach to cases where goods are acquired from another member State by a non-taxable person but where a taxable person acts in relation to the acquisition and supplies the goods as agent to the non-taxable person. It also applies where the goods are acquired from outside the EU, in the opposite situation.

53. But there is a subsection in s 47 on services, ss (3):

> "Where … services, other than [*irrelevant services*], are supplied through an agent who acts in his own name the Commissioners may, if they think fit, treat the supply both as a supply to the agent and as a supply by the agent."

54. VAT Notice 700 paragraph 22.6 shows that the circumstances in which HMRC treat s 47(3) as applying are where the agent for an undisclosed principal and the counterparty are both registered for VAT and the supplies are taxable. This is not the case here and there was no suggestion in the papers that HMRC had ever contemplated short cutting their enquiry by invoking s 47(3) – of course it may be that it cannot be invoked retrospectively.

55. But the fact that HMRC see s 47(3) as both discretionary and relieving stands in contrast to the, on the face of it, mandatory nature of art 28. But as HMRC did not make anything of the tax law they cited I do not need, and am not equipped, to get to the bottom of the issue, and my conclusion in §48 stands.

56. In the light of that conclusion, I know that Mr Haley will ensure that the central assessment is corrected to show no VAT due. I merely add that I find it somewhat surprising that there is apparently nothing in VATA that expressly provides for this.

57. In view of the penalty charged under s 67 VATA I asked the appellant why he had not registered for VAT. He said again that he had been told by his accountant that everything would be taken care of and that HMRC were wrong and he wouldn't have to pay. He trusted him to do that. He himself had no idea about VAT.

58. Having heard this, Mr Haley informed me that he was no longer seeking confirmation of the penalty and he would allow 100% mitigation. I consider this was an appropriate reaction to what I had been told, and is the decision I would have reached.

Decision

59. The decision by HMRC to compulsorily register the appellant for VAT is cancelled.

60. So far as necessary to do so, I also reduce the penalty to nil by virtue of s 70(1) VATA.

61. 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.

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RICHARD THOMAS
TRIBUNAL JUDGE

10 **RELEASE DATE: 6 September 2016**