[2014] UKFTT 0131 (TC)

TC03271

Appeal number: TC/2012/06469

VAT – Input tax – Whether valid claim for recovery of input tax in respect of retail vouchers (as defined by paragraph 4(1) schedule 10A Value Added Tax Act 1994) – Whether the supply of retail vouchers is a standard or zero-rated supply – jurisdiction of Tribunal in case of legitimate expectation

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIMON JAMESON NAGLE & JULIE KEMSLEY
T/A SIMON TEMPLAR BUSINESS CENTER **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
CHRIS PERRY CENG

Sitting in public at Vintry House, Wine Street, Bristol on 13 December 2013

Simon Nagle for the Appellant

Les Bingham of HM Revenue and Customs, for the Respondents

DECISION

1. Simon Nagle and Julie Kemsley, who trade in partnership as Simon Templar Business Center (the "Partnership") appeal against a decision of HM Revenue and Customs ("HMRC"), which was upheld following a review, to refuse a repayment of input tax in the sum of £5,414.76 claimed on its VAT return for the period commencing 1 April 2011 to 30 September 2011 (09/11) on the grounds that the amount claimed as input tax failed to meet the requirements of a right to claim input tax as set out in Regulation 29(2) of the Value Added Tax Regulations 1995.

2. Following the Partnerships appeal to the Tribunal and further correspondence between the parties, HMRC by letter of 23 October 2012 advised the Partnership as follows:

> As you know we consider that some of the amount shown on your VAT return for the period 1 April 2011 to 30 September 2011 should properly be amended as shown on the table below.
>
> The reason for this is:
>
> 1. the input tax claimed fails to meet the legal requirement of a right to claim input tax as set out in Regulation 29(2).
>
> 2. The supplier (ie Sainsbury, Next, Tesco etc) would not have charged VAT on the sale of these vouchers.
>
> 3. as detailed in VAT information sheet 12/03, any supply of gift cards by an intermediate supplier and not the issuer must normally account for VAT at the standard rate of VAT.
>
> As a result of these changes, you are due to pay £26,760 for this period and this letter is our assessment of the tax due.
>
> | | |
> |---|---|
> | 4. VAT reclaimed in this period on purchases and other inputs | Reduced to £0.00 |
> | 5. VAT due in this period on sales and other outputs | Increased to £26,760.00 |
>
> This amount does not include any debits or credits already on your account from other periods.

3. Therefore, in addition to the denial of its input tax claim we also considered, within the appeal, the position with regard to the increase in output tax.

4. In correspondence with HMRC and the Tribunal Mr Nagle stated that he wished the Tribunal to consider other VAT accounting periods in which the same issue had arisen in addition to the 09/11 period with which this appeal is concerned. In a letter to the Tribunal dated 13 September 2013 Mr Bingham of HMRC (who appeared before us) indicated that HMRC did not object to the listing of any hearing for which the Partnership was the proper appellant. In the circumstances, although only the 09/11 period is under appeal we would expect this decision, and the same VAT treatment, to apply to the previous VAT period in which the Partnership traded.

Facts

5. From 2008, in addition to the providing of accounting and taxation advice, the Partnership traded in gift vouchers issued by retailers such as, Tesco, Sainsbury's, Asda, Argos, B&Q, Next and Marks & Spencer which it purchased at a discount and sold at a profit, but below face value, to its customers, eg the Partnership acquires a £100 Tesco voucher for £50, it is then sold to a customer for £75 who redeems the voucher at Tesco by buying £100 worth of goods using the voucher for payment.

6. Mr Nagle explained that the Partnership acquired the vouchers either through an intermediary, Mr Paul Smith who did not charge for his services, or directly from the retailer concerned. He said that before commencing this trade he had telephoned HMRC to ascertain whether the Partnership should be registered for VAT and says he was told that the sale of vouchers was zero-rated but that fees for accountancy and taxation advice were standard-rated and that only if these standard-rated supplies exceeded the VAT registration threshold would registration for VAT be required.

7. On 13 December 2010, following a review of information it held, HMRC wrote to the Partnership stating it had received a tax return reflecting a turnover of £323,290. As this turnover exceeded the VAT threshold and as HMRC could not trace a VAT registration number the letter requested that the Partnership either provide a VAT number or further details to enable the date of registration to be determined. Mr Nagle replied on behalf of the Partnership on 9 January 2011 to explain that the majority of its turnover related to the sale of "discounted food vouchers" and that they had been advised by HMRC's Wolverhampton office that as these were zero-rated supplies registration was not necessary.

8. Mr Ian Hayter of HMRC responded on 21 January 2011 as follows:

> Thank for your letter dated 9 January 2011
>
> I have not been able to trace a copy of a ruling given by the Wolverhampton VAT registration unit in respect of your enquiry about the liability of your supplies and registering for VAT. It would assist me if you could supply a copy of any ruling or agreement to exemption from registration.
>
> If there is no ruling it will be necessary to consider the liability of supplies made. It would be unusual for the sale of vouchers to be treated as zero rated other than vouchers sold by retailers for redemption in their own stores. Third party sales of vouchers are invariably standard rated supplies of goods or services. I would be grateful if you could explain the mechanics of how you purchase and sell these vouchers and supply some example purchase and sales invoices. It would also be useful to see a copy of any contracts you have with voucher suppliers.

9. On 4 March 2011 Mr Nagle replied on behalf of the Partnership explaining that "having searched high and low for the Wolverhampton office letter" he could not find it. The letter also explained that the vouchers were "instore ones (discounted) for Asda, Tesco etc." and enclosed sample copies.

10. On 22 July 2011 the Partnership applied, and was subsequently registered for VAT with an effective date of registration of 1 April 2011. It continued to trade in vouchers and where Mr Nagle was certain that they were used by his customer to purchase a taxable supply from the retailer concerned, eg petrol from Tesco, it was claimed as input tax. The Partnership's first VAT return, which was in respect of the period from 1 April 2011 until 30 September 2011, declared output tax of £3,135 and input tax of £8,549.76 resulting in a claim for repayment of £5,414.76.

11. Before the conclusion of the 09/11 VAT period HMRC had written to the Partnership to arrange a visit to consider the liability of the supplies. The visit by HMRC Officer Melvin Turner took place on 14 November 2011 and Mr Turner spent the day at Mr Nagle's home (from where the Partnership traded) where he considered the business records of the Partnership.

12. Subsequent to the visit, on 20 December 2011, Mr Turner wrote to Mr Nagle stating that there was no evidence to support the claim for input tax and that the onward sale of vouchers was subject to output tax. Following further correspondence between the parties, in a letter of 14 March 2012, HMRC informed the Partnership that the repayment of £5,414.76 claimed in the 09/11 would be withheld. This position was upheld following a review by HMRC. The Partnership was notified of the outcome of this review by letter dated 26 April 2012.

13. The Partnership appealed to the Tribunal against this decision on 15 June 2012 and, as noted in paragraph 2 above, HMRC varied the decision by a letter dated 23 October 2012.

14. 15 November 2012 HMRC wrote to the Partnership stating that the effective date of registration was amended to 6 December 2008.

Law

15. Under s 2(1)(a) of the Value Added Tax Act 1994 ("VATA") VAT shall be charged:

> on the supply of goods or services by reference to the value of the supply as determined under this Act.

The value of a supply of goods or services is determined by reference to the consideration for that supply in accordance with s 19 VATA.

16. Insofar as applicable for the purposes of this decision, "input tax" is defined by s 24(1)(a) VATA as:

> VAT on the supply to him of any goods or services

Under s 25(2) VATA a taxable person:

> … is entitled at the end of each prescribed accounting period for credit for so much of his input tax as is allowable under section 26 and then deduct that amount from any output tax that is due from him.

17. It is clear from s 25(3) VATA that if no output tax is due, or the amount of input tax exceeds the output tax, any excess shall be paid to the taxable person by HMRC.

18. Section 26 VATA provides:

> (1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—
>
> > (a) taxable supplies;
> >
> > (b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;
> >
> > (c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.
>
> (3) The Commissioners shall make regulations for securing a fair and reasonable attribution of input tax to supplies within subsection (2) above, and any such regulations may provide for—
>
> > (a) determining a proportion by reference to which input tax for any prescribed accounting period is to be provisionally attributed to those supplies;
> >
> > (b) adjusting, in accordance with a proportion determined in like manner for any longer period comprising two or more prescribed accounting periods or parts thereof, the provisional attribution for any of those periods;
> >
> > (c) the making of payments in respect of input tax, by the Commissioners to a taxable person (or a person who has been a taxable person) or by a taxable person (or a person who has been a taxable person) to the Commissioners, in cases where events prove inaccurate an estimate on the basis of which an attribution was made; and
> >
> > (d) preventing input tax on a supply which, under or by virtue of any provision of this Act, a person makes to himself from being allowable as attributable to that supply.
>
> (4) Regulations under subsection (3) above may make different provision for different circumstances and, in particular (but without prejudice to the generality of that subsection) for different descriptions of goods or services; and may contain such incidental and supplementary provisions as appear to the Commissioners necessary or expedient.

19. Regulation 29 of the Value Added Tax Regulations 1995, made under, inter alia, s 26 VATA, provides:

(1) Subject to paragraph (1A) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim on the return for the first prescribed accounting period in which he holds that document or invoice.

(1A) Subject to paragraph (1B) the Commissioners shall not allow or direct a person to make any claim for deduction of input tax in terms such that the deduction would fall to be claimed more than 4 years after the date by which the return for the first prescribed accounting period in which he was entitled to claim that input tax in accordance with paragraph (1) above is required to be made.

(1B) The Commissioners shall not allow or direct a person to make any claim for deduction of input tax where the return for the first prescribed accounting period in which the person was entitled to claim that input tax in accordance with paragraph (1) above was required to be made on or before 31st March 2006.

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;

(b) a supply under section 8(1) of the Act, hold the relative invoice from the supplier;

(c) an importation of goods, hold a document authenticated or issued by the proper officer, showing the claimant as importer, consignee or owner and showing the amount of VAT charged on the goods;

(d) goods which have been removed from warehouse, hold a document authenticated or issued by the proper officer showing the claimant's particulars and the amount of VAT charged on the goods;

(e) an acquisition by him from another member State of any goods other than a new means of transport, hold a document required by the authority in that other member State to be issued showing his registration number including the prefix “GB”, the registration number of the supplier including the alphabetical code of the member State in which the supplier is registered, the consideration for the supply exclusive of VAT, the date of issue of the document and description sufficient to identify the goods supplied; or

(f) an acquisition by him from another member State of a new means of transport, hold a document required by the authority in that other member State to be issued showing his registration number including the prefix “GB”, the registration number of the supplier including the alphabetical code of the member State in which the supplier is registered,

the consideration for the supply exclusive of VAT, the date of issue of the document and description sufficient to identify the acquisition as a new means of transport as specified in section 95 of the Act;

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct.

(3) Where the Commissioners are satisfied that a person is not able to claim the exact amount of input tax to be deducted by him in any period, he may estimate a part of his input tax for that period, provided that any such estimated amount shall be adjusted and exactly accounted for as VAT deductible in the next prescribed accounting period or, if the exact amount is still not known and the Commissioners are satisfied that it could not with due diligence be ascertained, in the next but one prescribed accounting period.

[(4) Nothing in this regulation shall entitle a taxable person to deduct more than once input tax incurred on goods imported or acquired by him or on goods or services supplied to him.

20. Schedule 10A VATA provides, insofar as it applies to this appeal, :

1 Meaning of "face-value voucher" etc

(1) In this Schedule "face-value voucher" means a token, stamp or voucher (whether in physical of electronic form) that represents a right to receive goods or services to the value of an amount stated on it or recorded in it.

(2) References in this Schedule to the "face-value" of a voucher are to the amount referred to in sub-paragraph (1) above.

2 Nature of supply

The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act.

3 Treatment of credit vouchers

(1) This paragraph applies to a face-value voucher issued by a person who –

(a) is not a person from whom goods or services may be obtained by the use of the voucher, and

(b) undertakes to give complete or partial reimbursement to any such person from whom goods or services are so obtained.

Such a voucher is referred to in this Schedule as a "credit voucher".

(2) The consideration for any supply of a credit voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face-value of the voucher.

(3) Sub-paragraph (2) above does not apply if any of the persons from whom goods or services are obtained by the use of the voucher fails to

account for any of the VAT due on the supply of those goods or services to the person using the voucher to obtain them.

(4) …

4 Treatment of retailer vouchers

(1) This paragraph applies to a face value voucher issued by a person who–

(a) is a person from whom goods or services may be obtained by the use of the voucher, and

(b) if there are other such persons, undertakes to give complete or partial reimbursement to those from whom goods or services are so obtained.

Such a voucher is referred to in this Schedule as a "retailer voucher".

(2) The consideration for the issue of a retailer voucher shall be disregarded for the purpose of this Act except to the extent (if any) that it exceeds the face value of the voucher.

(3) Subparagraph (2) above does not apply if –

(a) the voucher is used to obtain goods or services from

a person other than the issuer, and

(b) that person fails to account for any of the VAT due on the supply of those goods or services to the person using the voucher to obtain them.

(4) Any supply of a retailer voucher subsequent to the issue of it shall be treated in the same way as the supply of a voucher to which paragraph 6 applies.

5 …

6 Treatment of other kinds of face-value voucher

(1) This paragraph applies to a face-value voucher that is not a credit voucher, retail voucher or a postage stamp.

(2) A supply of such a voucher is chargeable at the rate in force under section 2(1) (standard rate) except where sub-paragraph (3), (4) or (5) below applies.

(3) Where the voucher is one that can only be used to obtain goods or services in one particular non-standard rate category, the supply of the voucher falls in that category.

(4) Where the voucher is used to obtain goods or services all of which fall in one particular non-standard rate category, the supply of the voucher falls in that category.

(5) Where the voucher is used to obtain goods or services in a number of different categories–

(a) the supply of the voucher shall be treated as that many different supplies, each falling in the category in question, and

(b) the value of each of those supplies shall be determined on a just and reasonable basis.

7 …

7A Exclusion of single purpose vouchers

Paragraphs 2 to 4, 6 and 7 do not apply in relation to the issue, or any subsequent supply, of a face-value voucher that represents a right to receive goods or services of one type which are subject to a single rate of VAT."

8 Interpretation

(1) In this Schedule—

"credit voucher" has the meaning given by paragraph 3(1) above;

"face value" has the meaning given by paragraph 1(2) above;

"face value voucher" has the meaning given by paragraph 1(1) above;

"retailer voucher" has the meaning given by paragraph 4(1) above.

(2) For the purposes of this Schedule—

(a) the "rate categories" of supplies are—

(i) supplies chargeable at the rate in force under section 2(1) (standard rate),

(ii) supplies chargeable at the rate in force under section 29A (reduced rate),

(iii) zero-rated supplies, and

(iv) exempt supplies and other supplies that are not taxable supplies;

(b) the "non-standard rate categories" of supplies are those in sub-paragraphs (ii), (iii) and (iv) of paragraph (a) above;

(c) goods or services are in a particular rate category if a supply of those goods or services falls in that category.

(3) A reference in this Schedule to a voucher being used to obtain goods or services includes a reference to the case where it is used as part-payment for those goods or services.

Discussion and Conclusion

21. Although Mr Nagle was somewhat vague and rather evasive when asked how the Partnership acquired the vouchers from the retailers concerned, for the purposes of our decision we have taken his explanation at face value and accepted that these were either issued directly, or indirectly through Mr Smith acting as agent, by the retailer to the Partnership.

22. It is clear that these vouchers are "face-value vouchers" as defined by paragraph 1(1) of schedule 10A VATA and, as these are issued by the retailer from whom goods or services may be obtained by use of the voucher, it is also a "retailer voucher" within paragraph 4(1) of that schedule.

23. Therefore, the consideration for the issue of that retailer voucher by the retailer to the Partnership is to be disregarded under paragraph 4(2) of schedule 10A VATA. The effect of this is that the supply of the retailer voucher is to be treated as a supply for no consideration and, as such, no charge to VAT can arise under s 2 VATA.

24. Given that "input tax" as defined by s 24(1) VATA is "VAT on the supply" to a taxable person of any goods and services, in the absence of any charge to VAT on the supply of the voucher to the Partnership it must follow that there cannot be any input tax for the Partnership to claim.

25. As such the claim for repayment of input tax cannot succeed.

26. Turning to the issue of the rate applicable to the supply of vouchers by the Partnership to its customers it is clear that under paragraph 4(4) of schedule 10A VATA that as the supply by the Partnership is "of a retailer voucher subsequent to the issue of it" it is to be treated in the same way as the supply of a voucher to which paragraph 6 of the schedule applies.

27. Mr Bingham, for HMRC contended that the supply should be chargeable at the standard-rate under paragraph 6(1) however, in our view, this ignores the fact that the Partnership supplied vouchers for supermarkets which sell not only standard-rated goods but also goods which are either exempt or zero-rated and therefore paragraph 6(5), which requires the value of the supplies to be determined on a "just and reasonable basis", is applicable.

28. While we appreciate that it is not a simple task to make such a determination it should not be beyond the parties to resolve this issue themselves with an option of reverting to the Tribunal in the event that this is not possible.

29. However, before making appropriate directions we first consider the statement by HMRC in the letter of 21 January 2011 that it "would be unusual for the sale of vouchers to be treated as zero rated other than vouchers sold by retailers for redemption in their own stores."

30. Mr Nagle submitted that, as the vouchers sold by the Partnership were vouchers that had been sold by retailers for redemption in their own stores, this was a ruling by HMRC that the subsequent sale of these vouchers by the Partnership was a zero-rated supply. Although Mr Bingham did not accept that HMRC had made a ruling we directed that the Partnership be given an opportunity, but not be required, to make further written submissions as to the jurisdiction of the Tribunal to consider the issue of legitimate expectation in the light of the decision of the High Court in *Oxfam v HMRC* [2010] STC 686 and that of the Upper Tribunal in *HMRC v Abdul Noor* [2013] UKUT 71 (TCC) and, with the agreement of the parties allowed it until 13 January 2014 (one month from the hearing) to do so. However, in the event the Partnership chose not avail itself of this opportunity or make any application for the time to make such submissions to be extended.

31. In the circumstances, we did not consider it necessary to request any further submissions from HMRC (although we had directed that they be given a chance to

respond to any submissions of the Partnership) in relation to the issue of the Tribunal's jurisdiction to consider whether the HMRC's letter of 21 January 2011 amounts to ruling giving rise to a legitimate expectation that that the sale of vouchers by the Partnership were zero-rated as, in our judgment, even if Mr Nagle is right and that letter does amount to a ruling, it would be contrary to the legislation, namely schedule 10A VATA.

32. This provides, as we have stated in paragraph 26 above, that a supply "of a retailer voucher subsequent to the issue of it" is to be treated in the same way as the supply of a voucher to which paragraph 6 of the schedule applies. Under paragraph 6 this depends on type of goods or services that may be obtained by the voucher and cannot mean that all supplies should be treated as zero-rated.

33. Given the VAT treatment of such a supply is prescribed by law it would not have been within the powers of HMRC to make a ruling that is contrary to this. In such circumstances it is clear from the decision of the Upper Tribunal in *Abdul Noor v HMRC*, which is binding on us, that we do not have the jurisdiction to consider the public law issue of legitimate expectation where HMRC had gone beyond its statutory powers. Therefore, even if the letter of 21 January 2011 does amount to a ruling we cannot consider whether the Partnership has a legitimate expectation such that HMRC are bound by it.

Decision and Direction

34. In view of our conclusion in paragraph 27 above, we direct that the parties use their best endeavours to determine the treatment of the supply of vouchers in accordance with paragraph 6(5) of schedule 10A failing which an application may be made to the Tribunal for this purpose.

35. However, for the above reasons we dismiss the claim for repayment of input tax.

Right to Apply for Permission to Appeal

36. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 29 January 2014