TC04572

Appeal number: TC/2012/06469

VAT – Onward sale of vouchers issued by retailers – Claim for recovery of input tax dismissed by Tribunal which also held output tax due on "subsequent" sale of vouchers – Parties directed to "use best endeavours" to determine proportion of vouches to be standard-rated – Application to Tribunal in absence of Agreement – Schedule 10A Value Added Tax Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIMON 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 28 July 2015

Simon Nagle for the Appellant

Les Bingham of HM Revenue and Customs, for the Respondents

DECISION

1. On 13 December 2013 we heard the appeal of Simon Nagle and Julie Kemsley trading as Simon Templar Business Center (the "Partnership"). Having, with the agreement of the parties, allowed time to give the Partnership an opportunity to make further submissions in writing on the issue of the Tribunal's jurisdiction in relation to legitimate expectation (which in the event it did not avail itself) our decision (the "Decision") was released and sent to the parties by the Tribunal on 29 January 2014 (see *Simon Nagle & Anor (t/a Simon Templar Business Center) v HMRC* [2014] UKFTT 131 (TC)).

2. Other than note that the appeal concerned the VAT treatment of the onward sale by the Partnership of gift vouchers issued by retailers such as Tesco, Sainsbury's, Asda, Argos and Marks & Spencer, we do not consider it necessary to record the underlying facts, relevant legislation and reasons for dismissing the appeal here as these are set out in some detail in the Decision.

3. Although at the December 2013 hearing Mr Bingham, for HM Revenue and Customs ("HMRC"), had argued that the supply of the vouchers by the Partnership should be chargeable at the standard rate under paragraph 6(1) of schedule 10A to the Value Added Tax Act 1994 ("VATA") we found that this did not recognise the fact that the Partnership supplied vouchers issued by supermarkets which sold goods that were taxable at different rates (ie standard rated, zero-rated) and exempt. As such, paragraph 6(5) of the schedule required them to be valued on a "just and reasonable basis".

4. We therefore directed the parties to use their best endeavours to determine the treatment of the supply of vouchers failing which an application could be made to the Tribunal for this purpose.

5. On 28 April 2014 an HMRC Officer, Ian Haytor, wrote to the Partnership referring to the Decision and direction.

6. The letter continued:

> We need to attempt to agree a just and reasonable apportionment of the value of the vouchers which you supplied between those that could be used for standard rated goods or services and those that could be used for zero-rated or exempt goods or services.
>
> It is HMRC's published view that the issuers of vouchers are best placed to provide such information and where there is an established supply chain the reseller would be given this information on request. It would be preferable if you or Paul Smith [who acquired some of the vouchers for the Partnership] could obtain this information from the voucher issuers, for example Sainsbury's or Tesco. However, it is acknowledged that this may not be possible and we are left to agree an apportionment.

> In the absence of any better information it is proposed that 50% of the vouchers you supplied be treated as taxable at the standard rate of VAT. If you agree to this apportionment please reply accordingly within the next 28 days and action will be taken to amend any assessments which were issued on the basis that vouchers were wholly standard rated.
>
> If you do not agree it will be necessary to refer the matter back to the Tribunal.

7. Following a telephone conversation with Mr Haytor, Mr Nagle, who did not supply HMRC with any information regarding the apportionment of the vouchers, replied to HMRC's letter on 11 May 2014, enclosing his calculations showing a VAT repayment due to the Partnership. He wrote:

> I have reviewed the output tax position and as I said on the telephone, its [in] line with the (50%) suggested by you, in line with the Tribunal outcome. So I propose to agree the long outstanding dispute in respect of output tax, but only on the basis that it is half the input tax / which is basically half the VAT refunds claimed from the period 01/06/2008 – 31/03/2014 which complies with the enclose[d] calculations. ...

8. However, as HMRC pointed out in their letter of 4 June 2014 to the Partnership:

> In respect of input tax I would refer you to paragraphs 24, 25 and 35 of the First-tier Tribunal's decision [the Decision] and draw your attention to the Tribunal's decision that no input tax is claimable.
>
> I am therefore unable to agree to an adjustment to output tax being conditional on a claim for input tax.

9. Despite further correspondence between the parties it became clear that a settlement was not possible and an application was made to the Tribunal to determine this issue.

10. At the commencement of the hearing, having explained its purpose to Mr Nagle, it became apparent that he had not read the Decision. Mr Nagle said that he had not received the letter enclosing the Decision that had been sent to the Partnership by the Tribunal in January 2014 and had not read the copy of the Decision included in the bundle of documents supplied by HMRC as he had only recently received it. Having refused our offer of a short adjournment to enable him to read the Decision (which had been available on the Tribunal website shortly after its release on 29 January 2014) Mr Nagle attempted to raise and re-argue the issues which had been determined by the Decision.

11. He offered no evidence in relation to what proportion of the vouchers could justly and fairly be subject to VAT at the standard rate, the issue before us. Instead he argued, as he had unsuccessfully in the December 2013 hearing and contrary to paragraph 6 of schedule 10A VATA, that no output tax should be chargeable on the supply of the vouchers by the Partnership.

12. Mr Nagle maintained this position even after Mr Bingham, who represented HMRC in this hearing as he had in December 2013, explained that the offer to the Partnership to treat 50% of the vouchers as taxable at the standard rate was not a figure "plucked out of thin air" but based on HMRC's experience and knowledge of the retail sector in which the vouchers could be redeemed. However, due to taxpayer

confidentiality, he was unable to adduce any further evidence in support of what, in our view, is an entirely plausible explanation.

13. In the absence of any evidence on the issue from the Partnership we accept Mr Bingham's explanation and find that 50% of the vouchers supplied by the Partnership should be treated as taxable at the standard rate and, as a consequence, the output tax due on supply of the vouchers should be reduced.

14. 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: 31 JULY 2015