



TC06963

Appeal number: TC/2018/418

VAT – Taxi services for account customers – whether VATable supply by firm – whether firm acted as principal or agent – whether consideration received by firm or driver

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRYNWILLIAMS

Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
SIMON BIRD**

Sitting in public in Cardiff on 16 January 2019

Mr Thomas and Mr Monk of TM Sterling for the Appellant

Mr Haley, for the Respondents

DECISION

1. On 7 December 2007 HMRC issued a VAT assessment to Mr Williams under section 73 VAT Act 1994 ("VATA") for the period 1 March 2009 to 16 August 2016. This assessment was made on the basis that Mr Williams should have registered as a taxable person in respect of this period and accordingly that he should have made VAT returns and paid VAT. At the same time as this assessment Mr Williams was assessed with a penalty for failing to register under section 67 VATA.

2. Mr Williams appealed to this tribunal. In his notice of appeal he said that his grounds for appeal were that he should not be VAT registered as he was under the VAT threshold. Initially his appeal also related to his income tax position but this was settled prior to the hearing.

The issues in the appeal.

3. Section 83 VATA provides that a person may appeal against: (i) his registration under the Act, (ii) "in respect of the period for which the appellant has made a [VAT] return," the amount of an assessment under section 73 or the assessment of that amount, and (iii) liability to a penalty under section 67.

4. Before us Mr Haley indicated that the penalty assessment had been withdrawn. Accordingly that issue does not arise in this appeal.

5. Mr Williams made no VAT returns in relation to the period of assessment. As a result no appeal lies in respect of the amount of the assessment. But the tribunal has jurisdiction in relation to the registration issue. This decision therefore concerns only whether or not Mr Williams was registrable in respect of the period.

6. Mr Williams operates a taxi business. Part of that business relates to the provision of taxis under contracts with local authorities and government departments ("local authorities"). In this decision we call such work for local authorities "account work".

7. HMRC's assessment was made on the basis that in relation to this work Mr Williams supplied the taxi services to local authorities for consideration (and was in turn supplied with services by the taxi drivers to whom he also supplied services). As a result HMRC say that the gross amount of the payments received by Mr Williams from the local authorities constituted consideration for taxable supplies by him, and on that basis he was registrable from 1 March 2009.

8. Mr Williams contends that in relation to these contracts to the account work he acted as agent for the drivers so that the gross receipts from the local authorities were the taxable consideration for the supplies made by the drivers and that the value of his taxable supplies was limited to the amounts he charged the drivers for the services he supplied to them.

9. Mr Thomas and Mr Monk accepted that if Mr Williams acted as principal rather than as agent then HMRC's calculation of the value of Mr Williams supplies and HMRC's determination of the date upon which he became registrable were correct. As a result the only issue before us was whether or not in relation to the account work Mr Williams made supplies for the consideration received from the local authorities.

10. The question is who supplied what to whom, and for what consideration. The parties' submissions before us were mainly couched in terms of whether or not Mr Williams acted as principal or agent in relation to the account work: the tacit understanding being that if he acted as agent the supply of taxi services was made by the drivers and not him. As we indicate in our review of the law below, that is one way to approach the analysis of what taxable supplies Mr Williams made but it is not the only way.

The Evidence.

11. We had a bundle of material which included notes of a meeting between HMRC and Mr Williams in November 2013, signed statements from Mr Williams and from Mr Nash, the officer of HMRC who made the assessments, statements from 6 of Mr Williams' drivers, and a copy of the contract between one of the drivers and Mr Williams.

12. Mr Monk and Mr Thomas provided oral evidence of discussions they had had with Mr Williams about the operation of his business. We found them frank and careful witnesses and accepted their evidence.

Our findings of fact.

13. Two types of driver undertook work in connection with Mr Williams' business: owner drivers who owned and maintained their own cars, and drivers who used cars which were owned and maintained by Mr Williams. Each type of driver entered into a contract with Mr Williams. The contract in our bundle covered both types of driver and we consider it likely that it was used for all the drivers. Although the contract is not dated contracts of this nature were said to be extant at the meeting in November 2013 and we think it likely that they were put into place before drivers started working with Mr Williams..

14. The relevant provisions of the contract were these:

"This agreement is to cover a Joint Venture in tendering for transport services to be provided to Local Authorities, and other Government departments in the area of North East Wales.

"It is agreed that Mr Williams will undertake the responsibility for completing the tendering process, with the appropriate authorities, in order to secure contracts, either short or long term, at a rate which is beneficial to all parties.

"In order to ensure successful performance of the contract, Mr Williams will maintain sufficient records to enable determination of work completed by each driver.

“Owner drivers will be credited with a value, for each job completed, which represents 90% of the agreed (tender) price for the appropriate job. The remaining value will represent the management fee due to Mr Williams for the service provided.

“Drivers who use cars provided by Mr Williams will be credited at a lower rate in order to reflect a cost of vehicle rental.

“In the event that nominated drivers are unable to complete the agreed service then the work will be offered to other drivers in the pool. If there are no alternative drivers available the work may be passed to other transport operators, which may result in a charge which is greater than the tender price for the job, this may result in a penalty to the nominated driver which may be deducted from future payments.

“Work completed by drivers will be evaluated on a monthly basis and appropriate payment will then be made to the driver representing his share of the contract monies received from the Authorities concerned.”

15. We find that the relationship between Mr Williams and drivers was conducted in accordance with the terms of these contracts.

16. Cars provided to non-owner drivers were generally kept at the drivers' home addresses when not in use: a non-owner driver would generally always use the same car. The cars were insured and licensed by Mr Williams who held the taxi operators licence necessary for the contract work. Mr Williams either provided, or bore the cost of, fuel for account work undertaken by the drivers.

17. When local authorities had need of regular taxi services (such as taking children to school) they would publish an invitation to tender. Mr Williams would submit tenders in response. If his tender was successful the local authority would offer the contracts to him stipulating a period in which to accept or decline.

18. Mr Thomas and Mr Monk did not know whether, on receipt of notification of a successful tender, Mr Williams contacted any of the drivers before accepting it. We find that he would accept an offer without prior reference to any driver and that, having accepted the offer, he would then approach a particular driver with a view to allocating the contract to him or her.

19. We understood from Mr Thomas and Mr Monk that a job would not be split between drivers (so that for example one driver would do Mondays to Wednesdays and other Thursdays and Fridays).

20. When Mr Williams approached a driver there would generally be some discussion with that driver: (i) as to whether the driver would accept the job - for the driver was not obliged to accept it and (ii) as to the retention Mr Williams was to make from the sums received from the local authority. For non-owner drivers Mr Williams normally kept about 60% of the sum received, leaving the driver with 40%; and for owner drivers Mr Williams took 10% and the driver 90%.

21. The local authority would pay Mr Williams and Mr Williams accounted to the driver for the balance after deducting his retention. If for some reason the local authority did not pay then neither Mr Williams nor the driver would receive anything. There was no evidence which suggested that in those circumstances the driver would be obliged to pay Mr Williams the relevant percentage of the fee which should have been received but was not: we find that each party would bear the loss of what they would have received had payment been made.

22. If the allocated drivers for an account job could not undertake the work Mr Williams would arrange for another person to undertake it (as the penultimate paragraph of the contract terms set out above indicates that would happen). This meant on occasion using another taxi firm (which would generally receive 90% of the fee paid by the local authority). The contract indicates that a defaulting driver could be penalised in such cases but it was not clear whether this had happened or what the amount of the penalty would be. There was no evidence given of an instance where a defaulting driver had been penalised

23. When conducting contract work drivers were required to adorn their vehicle with magnetic (removable) signs indicating the name of Mr Williams' business. These could be removed when the car was no longer being used for contract work, and if desired even replaced by another logo.

24. Apart from the contract work accepted by a driver Mr Williams imposed no set working hours on the drivers: they were free to take on other private hire work.

25. Mr Williams kept records of all contract receipts and payments.

The relevant law.

26. Article 2 of the Principal VAT Directive provides that the following transactions shall be subject to VAT:

"1(c) the supply of ... services for a consideration ... by a taxable person"

Article 24 provides that:

"1. 'Supply of services' shall mean any transaction which does not constitute a supply of goods ..."

(In passing we note Art 28: When a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself.")

Article 73 provides that:

"...the taxable amount shall be ... everything which constitutes the consideration which has been or is to be obtained by the supplier, in return for the supply, from the customer or a third party ..."

These provisions are enacted in domestic law in the VATA 1994. Of particular note is section 5(2)(a) which provides that " 'supply' ... includes all form of supply, *but not anything done otherwise than for a consideration.*"[our emphasis].

27. A single course of conduct can provide something of benefit to two or more persons. It may thus potentially be a supply of services to two or more persons. Whether or not what is done is a taxable supply will depend on whether consideration is received "for" doing it. If consideration for doing what is done is received from one or both of those persons it will be a taxable supply.

28. Where a taxi firm has agreed with a customer to provide taxi services the procuring of those services by the firm may be a supply by the firm to the customer, and the provision of those services by the driver may be both a supply of something to the customer and a supply to the firm; whether any of those supplies are taxable supplies will depend on whether any consideration is received *for* the services provided. There are thus two ways of looking at the question of what taxable supplies the firm made: the first is to look at the nature of the obligations undertaken by the parties: whether the firm undertook to procure services for the customer or merely undertook to introduce a driver who would undertake the service; and the second is to examine what the consideration was paid for.

29. In relation to that second approach the issue is not to whom the money was actually paid but to whose benefit the payment was intended to accrue: if it was received and belonged to the driver then it is likely to be consideration for what he or she did; but if it was paid to the firm there are three possibilities: (i) that it belonged to the firm and was paid to it for its procuring the service, (ii) that it was paid to the firm for the benefit of the driver or (iii) that it was paid to the firm at the behest of the driver (for example to satisfy a debt of the driver to the firm). The choice between these alternatives rests on the commercial relationships between the parties. In (i) there is a taxable supply by the firm, and in (ii) and (iii) a taxable supply by the driver but no taxable supply of taxi services by the firm.

30. In *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [\[1994\] STC 509](#), para 14, the Court of Justice said that "a supply of services is effected 'for consideration' ... only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance", which it explained as meaning "the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient". In the context of the supply of goods, the Court made the same point in *Primback Ltd v Customs and Excise Comrs* (Case C-34/99) [\[2001\] 1 WLR 1693](#), para 25, where it described "the determining factor" as "the existence of an agreement between the parties for reciprocal performance, the payment received by the one, being the real and effective counter-value for the goods furnished to the other".

31. In *Revenue and Customs Comrs v Newey* (Case C-653/11) [\[2013\] STC 2432](#), para 40, the Court of Justice again emphasised "that a supply of services is effected 'for consideration', within the meaning of article 2(1) of [the Sixth] directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the

remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient”.

32. The court then observed in paras 42-43 that “consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT” and that “the contractual position normally reflects the economic and commercial reality of the transactions”. An exception to the normal rule that the contractual relationship is central was then identified by the court as being where “those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions” (para 45).

33. If A enters into a contract with C as agent for B, then a legal relationship exists between B and C for the supply of a service to C. And it is by reference to that agreement in the first instance that the question of whether B makes a supply for a consideration must be determined. Such an agreement will also indicate to whom the consideration belongs and what it is paid for. That is why the question of whether or not the firm acted as principal or agent is relevant. But the VAT nature of a supply is to be determined by the whole facts of the case. It may be a consequence but is not a function of the contracts entered into by the relevant parties, and in particular the contract terms will not prevail where those terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.

34. Relevant to the question of the nature of the relationship between the contracting parties (after having considered the contract) are:-

- (i) the degree of control exercised but although control may be consistent with agency it does not create an agency
- (ii) the commercial situation in which the parties operated
- (iii) the risks borne by the parties
- (iv) advertising, fee setting, the use of a name, and freedom to refuse or to provide services

HMRC's arguments.

35. Mr Haley argued that the following factors pointed towards Mr Williams acting as principal in making supplies to the local authorities rather than as agent for the drivers:

- (1) Mr Williams owned and maintained the vehicles;
- (2) the running costs of the contract work were born by Mr Williams;
- (3) the contracts were negotiated by Mr Williams;
- (4) Mr Williams received monies and then paid the drivers;

- (5) the cars bore Mr Williams' logo;
- (6) Mr Williams kept records of the contract work;
- (7) the price paid to the drivers for the contract work was set;
- (8) Mr Williams held the relevant operator's licence.

The taxpayer's arguments.

36. Mr Thomas and Mr Monk argued that the facts pointed towards an agency relationship between the drivers and Mr Williams. In particular they stressed:

- (1) That the non-owner drivers had free use of the vehicles and kept them at home; they paid for that use by surrendering some of the fee they earned from the local authorities;
- (2) the precise level of fee retained by the driver was set by negotiation with Mr Williams;
- (3) the risk of bad debts fell on both Mr Williams and the driver;
- (4) the signs affixed to the vehicles were removable;
- (5) Mr Williams exercised no control over the use of the vehicles outside contract work;
- (6) drivers could set their own fees for other work.

37. They relied in particular on the decisions in *Lafferty v HMRC* [2014] UKFTT 358 (TC) and *Khalid Mahmood v HMRC* [2016] UK FTT 622 (TC)

Discussion

38. A person acts as a principal's agent if he has authority to affect that person's legal relationships with others. An agent may disclose his agency to a third party or act as an undisclosed agent, but whether disclosed or undisclosed he is an agent of his principal only if he has actual or implied authority to bind his principal.

39. If Mr Williams had a driver's authority to bind the driver to a contract with the local authority, then, by accepting a local authority's offer he could bind the driver to a contract under which in return for payment from the authority the driver was bound to provide taxi services. In these circumstances the driver would have a contractual relationship with the local authority under which he would supply his services for the remuneration offered by the local authority. In that case, unless the terms of that contract "constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions" the taxable supply to the local authority would be by the driver.

40. (And, although it would remain possible in that case that Mr Williams did something for the authority by arranging for the contract with the driver, that would not have been done for a consideration given to Mr Williams for so doing because the moneys from the local authority would not (as a result of the contract formed, on this

hypothesis, between the driver and the local authority) belong to him, and as a result no *taxable* supply would be made by him.)

41. However, on the facts of the case it did not seem to us that Mr Williams was acting as agent for a driver in making a contract with the local authority. That is because, at the time when the contract with the local authority was entered into, the driver would not have been identified to perform the contract. There was thus no particular person who at that time could be said to be the principal for whom Mr Williams was acting and who was bound by his actions. The identification of the driver followed the making of the contract. That later identification may have created an obligation on the driver to undertake that work, but that obligation can have been owed only to Mr Williams.

42. There was thus no contractual nexus between the driver and the local authority which specified performance by one in consideration for payment by the other. Unless the absence of such a contract “constitute[d] a purely artificial arrangement which [did] not correspond with the economic and commercial reality of the transactions”, the driver cannot be taken as supplying his services in consideration for the payments from the authority and there would be no taxable supply by him or her to the local authority. By contrast there was a contract between Mr Williams and the authority for the provision of taxi services in consideration for the payments made by the local authority to, and for the benefit of, Mr Williams and, subject to the same caveat, Mr Williams was making a taxable supply to the authority.

43. Even if the agreement between Mr Williams and the driver could be construed as giving Mr Williams authority to act for driver in securing contracts for the driver with the local authorities, that authority can not have been exercised at the time the contract was made because at that time the driver to whom the work would be allocated had not been identified.

44. Nor can we conclude that there was a partnership between the drivers and Mr Williams pursuant to which Mr Williams had authority to bind the drivers in partnership affairs. Although there was some sharing of risk in relation to non payment, the contracts between the drivers and Mr Williams did not disclose a sharing of profits between them or sufficient intention to be in business in common. Further, it was never argued on behalf of Mr Williams that he was in a partnership (in its literal meaning) with any of the drivers he engaged.

45. Was there anything purely artificial arrangement which did not correspond with the economic and commercial reality of the transactions? We found none: the commercial deal was plainly one in which, having obtained an offer from the authority, Mr Williams engaged a driver to fulfil it. The drivers were free to accept or decline the role. While fulfilling the role the driver’s car bore Mr Williams’ logo but at best that indicates that while performing the role the driver was acting for Mr Williams. The risk of non-payment was not borne wholly by the driver but jointly.

46. Mr Monk and Mr Thomas relied on *Lafferty and Mahmood*.

47. In *Lafferty* the taxpayer owned and maintained a fleet of cars which he hired out to drivers. The hire price was fixed by reference to weekly mileage. The drivers took cash fares directly. They also took payment by credit card which was settled through the taxpayer's office. It was accepted that in these cases (cash and credit cards) the driver acted as principal and made the supply to the customer. The firm also had account customers. When an account customer phoned for a taxi the firm would organise one of the drivers to provide it (on a first-come first-served basis). Payment was made to the firm by the customer and the firm accounted to the driver for all that was received, the driver bearing any bad debts. The FTT held that firm acted as no more than an intermediary between the customer and the driver and did not supply services for consideration as principal.

48. In so holding the FTT noted that the payment mechanism for accounting account work paralleled that where customers paid by credit card - the firm "simply acting as a collector" in both cases- and that bad debts were the loss of the driver, not of the firm.

49. In Mr Williams' case payment was not transmitted in whole to the driver and bad debts were shared. The analysis in *Lafferty* is in our view best understood as of an arrangement under which, once a driver had been allocated for a job the driver formed a separate contract with the customer at the time the customer was picked up, with the terms of that contract requiring payment to the firm for the benefit of the driver. In Mr Williams' case there was no prospect of the driver forming a contract with the local authority.

50. In *Mahmood*, Mr Mahmood carried on the business of a taxi firm. He took over an account business with various local authorities. The FTT found that the contracts with the local authorities were made with Mr Mahmood as agent, (which had the result that the taxable supplies to the local authorities were made by the drivers).

51. The FTT noted that HMRC accepted that in relation to cash customers Mr Mahmood acted as agent for the drivers. It held that the evidential burden was on HMRC to show how the account business differed from the cash business. HMRC offered only three features - the negotiation of the contract by the appellant and the receipt, and the invoicing and payment by the appellant. The tribunal found that these features were perfectly compatible with the appellant acting as agent. At [43] the tribunal accepted that a firm acting as agent would relay bookings for a fee, possibly provide other services such as radios, and collect fees on the driver's behalf.

52. At [46] the FTT accepted that if a firm ran the risk of bad debts that was an indication that it was a principal but [at 47] in the circumstances of that case that factor was heavily outweighed "by the fact that all material features of the account business points to it being an agency business, in particular the 100% correlation of fares and payments made to the drivers ... and the fact that the same rental is paid irrespective of the nature of the driver's work in the week concerned".

53. There is no discussion in that case of how the negotiation with the authority was undertaken. In Mr Williams' case the evidence indicated that the formation of a

contract with the driver could not have taken place at the time Mr Williams made the agreement with the local authority. It could have been the case in *Mahmood* that the agreement was made on behalf of an identified driver.

54. The facts of *Mahmood* also differ in relation to the payment. The tribunal was impressed by the fact that all the payment went to the driver and that the driver was charged a rental fee which was the same irrespective of the work done; in Mr Williams' case, Mr Williams did not account for the whole fee to the driver; he retained his share. The absence of a connection between the driver and the local authority meant that Mr Williams could not have received payment from the local authority as fiduciary for the driver but received beneficially. That receipt was taxable consideration for the supply made of procuring the taxi services for the authority.

55. We conclude that Mr Williams (as principal) made supplies to the local authorities in return for the gross amounts received from them.

Conclusion

56. We therefore dismiss the appeal against registration.

Rights of Appeal

57. 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.

**CHARLES HELLIER
TRIBUNAL JUDGE**

RELEASE DATE: 06 FEBRUARY 2019