



[2019] UKFTT 0356 (TC)

TC07184

VAT – Bad Debt Relief – Fraudulent employee – whether acting within scope of his employment – No. Distinction between monies diverted and monies stolen.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/01357

BETWEEN

TOTAL CATERING EQUIPMENT LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE GERAINT JONES QC.
MRS JANET WILKINS.**

Sitting in public at Taylor House, London on 03 June 2019

No appearance for or on behalf of the Appellant

Miss N. Davies, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. This is an appeal brought by the appellant, Total Catering Equipment Ltd, in respect of a decision of HMRC disallowing Bad Debt Relief against the appellant's VAT account. Prior to the hearing of this appeal the Tribunal had been informed that the appellant did not intend to be represented, seemingly for financial and/or personnel availability reasons. The appellant requested that the appeal should nonetheless proceed to determination.

2. The facts of the case of common ground. They are:

(1) From time to time the appellant made sales to people who sought to purchase goods or services over the telephone and make payment by credit or debit card whilst absent from the point of sale.

(2) Within the appellant's VAT quarter ended 31 July 2016 the appellant claimed Bad Debt Relief, further to section 73 of the Value Added Taxes Act 1994, in respect of goods/services purchased by customers who had supposedly made payment by credit or debit card over the telephone.

(3) There is no dispute that customers had telephoned the appellant to order goods and/or services and had made payment.

(4) However, it is also common ground that the appellant had a dishonest employee, its depot manager, who by some dishonest artifice had arranged matters so that when a customer made a payment over the telephone, by using a credit or debit card, the monies were not paid by the paying bank to the appellant's bank account but, instead, to a bank account operated by this dishonest employee.

(5) The bad debt relief claim relates solely to the payments that were made into the bank account of the dishonest employee.

(6) The appellant supplied the goods/services believing that payment had been made in respect thereof, but upon discovering the fraud perpetrated by its dishonest manager, sought bad debt relief. The police were involved in investigating the dishonest manager but we do not know whether that person was or was not prosecuted and, if so, for what offence or offences.

3. The parties respective positions are straightforward:

(1) HMRC maintains the position, as clearly set out in its undated Review Letter, that when the dishonest employee obtained payment from the customers who he had set out to dupe, the fact that he was, at that time, the appellant's manager is sufficient to lead to the conclusion that he was acting for and on behalf of the company and thus the appellant company was paid for any goods/services when the customer gave his/her credit or debit card details. HMRC maintain this stance notwithstanding that the money was actually paid to the dishonest manager and never reached any bank account maintained by the appellant.

(2) The appellant's case is that that is irrelevant and that the relevant question is whether, as a matter of fact or mixed fact and law, it received payment for the relevant goods/services.

4. Notwithstanding that, as we set out above, the Review Letter fails to identify any facts that might be in issue and notwithstanding that the Reviewing Officer proceeded on the basis that the dishonest employee had "directed" monies that should have been paid into his employer's bank account to be paid into his personal bank account, Miss Davies sought to argue that there was some kind of relevant difference between monies which were "diverted" and monies which were "directed" into the dishonest employee's personal bank account. We quite understand that each case is fact sensitive. If this had been a case where the appellant had been paid and the money had gone into its own bank account or its till, but an employee had subsequently stolen that money, it would not be open to the appellant to allege that it had not been paid. In that circumstance it would simply have been the victim of theft by one of its employees. However, that is not the basis upon which this application for Bad Debt Relief and/or the Review Letter proceeded. Hitherto this case has undoubtedly proceeded on the basis that the dishonest employee did not steal money from his employer's possession, but chose to divert or direct monies that ought to have been paid to the employer to be credited to his personal bank account. We note from an email timed at 16:50 hours on 04 August 16 that the Suffolk Police refer specifically to the money paid by the various customers "being diverted to the bogus account by the suspect."

5. The conclusion in the Review Letter is that "Unfortunately, your former manager, while on duty, has taken payments and directed these to his own personal bank account. For VAT purposes, he was an employee trusted to collect payments and was legitimately representing your company at the time of the payment."

6. The foregoing quotation is sufficient to demonstrate that HMRC addressed the wrong questions.

7. There are two relevant questions that should have been addressed. They are:

(1) Whether, when the dishonest manager obtained customers' credit or debit card details, he was then acting (i) in the course of and (ii) within the scope of his employment or whether he was then on a dishonest frolic of his own.

(2) Whether, as a matter of fact, the appellant company received payment in respect of the relevant goods/services.

8. The rules of attribution as to when the knowledge of a company director, servant or agent can or will be attributed to the company itself are firmly established by the judgement of the Supreme Court in Jetivia v Bilta [2015] UKSC 23. Those rules do not follow precisely the rules for attribution as between a company and third parties, but give the firmest possible steer that where fraud or dishonesty is concerned it will be a rare circumstance where the conduct of a person acting dishonestly, whilst on a frolic of his own, will be attributed to the company.

9. Thus the issue in this appeal is whether, when the dishonest employee procured payment for the various goods/services, he was acting legitimately in the course of his employment or dishonestly on a frolic of his own. The answer, it seems to us, is self-evident because it is not

possible to conclude that an employee acting in that way was acting legitimately within the course of his employment. He was certainly not acting within the scope of his employment.

10. If an employee is dishonestly on a frolic of his own, by dishonestly obtaining money from third parties whilst pretending it is being paid to his employer, it follows that that money has been dishonestly obtained by deception. The deception is that the customer is led to believe, either expressly or impliedly, that the payment is being made to the company from whom goods or services are being purchased, rather than to an employee acting dishonestly outside the scope of his employment.

11. Thus it is our judgement that it is untenable to argue that in respect of these dishonestly diverted funds, the dishonest manager was acting within the scope of his employment, even if he was purporting to act within the course of his employment. Self-evidently he was not; he was on a dishonest frolic of his own.

12. There is no dispute that the appellant company did not receive the funds which the dishonest employee caused to be credited to one of his personal banking facilities. It is untenable to argue, as HMRC seems to argue, that this dishonest manager received those funds as agent for the appellant company. He self-evidently did not; nor did he purport to do so. When he received those monies into his personal bank account he did not have the appellant company's actual authority to receive those monies; he could not possibly be said to have been acting within the scope of any implied or ostensible authority; and the appellant company's evidence, which HMRC very sensibly accepts, is that that employee had no authority whatsoever to engage in such dishonest conduct.

13. Accordingly the appellant company is entitled to the Bad Debt Relief as claimed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**GERAINT JONES QC.
TRIBUNAL JUDGE**

RELEASE DATE: 04 JUNE 2019