[2021] UKFTT 0191 (TC)

TC08141

VAT: whether vehicle hire and insurance single standard rated supply or the supply of standard rated vehicle hire and the exempt supply of insurance. Held: supply of vehicle hire and separate supply of insurance. C-349/96 Card Protection Plan Limited v HM Customs and Excise [1999] STC 270, C-41/04 Levob Verzekeringen and OV Bank v Staatssecretaris van Financien [2006] STC 766, In *C-224/11 BGZ Leasing sp z oo v Dyrektor Izby Skarbowej w Warszawie [2013] STC 2162, HMRC v Wheels Private Hire Ltd [2017] UKUT 0051 (TCC) considered and applied.*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00997

BETWEEN

BLACK CABS SERVICES LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE MALEK
DEREK ROBERTSON

The hearing took place on 15-17 March 2021. The form of the hearing was V (video) via the Tribunal video platform and all parties, witnesses and representatives attended remotely. A face-to-face hearing was not held because it was just, proportionate and in the interest of justice for the hearing to be conducted by video. The documents to which we were referred are the hearing bundle, various legal authorities and the skeleton arguments of the parties.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr. Kemal, an accountant, for the Appellant

Mr. Hume, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against the Respondents decision of 28 June 2018 to refuse the Appellant's VAT error correction claim of £43,245 for the 12/2013 – 03/2016 periods. The VAT 652 (notification of errors in VAT Returns) form is dated 20 April 2017 and sets out that the Appellant is a taxi hire business which has paid output VAT on all of its taxable supplies, including supplies relating to insurance. It now considered that the supply of insurance was a separate and exempt supply and accordingly it had overpaid VAT. By letter dated 28 June 2018 the Respondents rejected the Appellant's error correction claim concluding that it would be artificial to split the supply of the taxi and the supply of insurance and that the insurance supplied with the hire of the taxi was for the customers to better enjoy the service being provided. Accordingly, the Respondents concluded that the Appellant supplied taxi services only.

2. The key issue before this Tribunal is, therefore, whether the Appellant makes a standard rated supply of taxi vehicle hire or the exempt supply of insurance together with the standard rated supply of taxi vehicle hire.

THE LAW

Legislative framework

3. Article 135(1)(a) of Directive 2006/112/EC (the 'Principal VAT directive') exempts "insurance and reinsurance transactions". It is implemented in this jurisdiction by virtue of section 31 and Group 2 of Schedule to the VAT Act 1994.

Caselaw on the scope of the insurance exemption

4. The CJEU first considered the scope of the insurance exemption in the matter of *C-349/96 Card Protection Plan Limited v HM Customs and Excise [1999] STC 270 ("CPP")* where it held at paragraph 30 & 31 of the judgment that:

> "30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (C & E Commrs v Madgett (t/a Howden Court Hotel) (Joined Cases C-308/96 and C-94/97) [1998] BVC 458, para. 24).
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> 31. In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances such as those described in para. 7 to 10 above indicated that the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event."

5. In considering the same issue again the CJEU provided an alternative formulation to the test in the matter of *C-41/04 Levob Verzekeringen and OV Bank v Staatssecretaris van Financien [2006] STC 766 ("Levob")* holding at paragraph 22 that there is a single supply:

> "…where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split"

6. In *C-224/11 BGZ Leasing sp z oo v Dyrektor Izby Skarbowej w Warszawie [2013] STC 2162 ("BGZ")* the CJEU considered whether there was the single supply of leasing insured goods or separate supplies of leasing and insurance. The CJEU held at paragraph 39 that:

> "... as a general rule, a leasing service and the supply of insurance for the leased item cannot be regarded as being so closely linked that they form a single transaction. The fact of assessing such supplies separately cannot constitute in itself an artificial splitting of a single financial transaction, capable of distorting the functioning of the VAT system."

7. Applying this general rule to the specifics in the case before it the CJEU went on to find at paragraph 42 that:

> ….although it is true that as a result of the insurance for the leased item, the risks faced by the lessee are normally reduced as compared with those incurred in a situation in which such insurance is lacking, it remains the case that that derives from the very nature of the insurance. That, in itself, does not mean that such insurance must be regarded as being ancillary to the leasing service of which it forms part. Although such insurance supplied to the lessee through the lessor facilitates the enjoyment of the leasing service, in the manner described above, it must be held that [it] constitutes essentially an end in itself for the lessee and not only the means to enjoy that service under the best conditions."

8. The CJEU's decision in BGZ was analysed by the Upper Tribunal in the matter of *HMRC v Wheels Private Hire Ltd [2017] UKUT 0051 (TCC) ("Wheels")* when the Tribunal made the following observations:

> "22. At [43], the CJEU referred to the fact that the lessee does not have to take the insurance offered by BGZ but can insure with the insurance company of its choice. The CJEU stated that this showed that the requirement that the goods are insured does not, in itself, mean that a supply of insurance by the lessor is indivisible or ancillary to the supply of the leasing services. We consider that this indicates that the ability of the customer to choose whether or not to be supplied with a particular element of a transaction is an important factor in determining whether there is a single composite supply or several independent supplies, although it is not decisive. At [44], the CJEU stated that separate invoicing and pricing of services supported the view that the services are independent, without being decisive. The CJEU then referred, at [45], to the separate pricing and invoicing reflecting the interests of the parties in BGZ. The CJEU also stated that the lessee's decision to obtain insurance from the lessor was made independently of the decision to lease the goods.
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> 23. The CJEU in BGZ rejected the idea that the leasing and insurance cannot be separate services simply because the lease provided that BGZ may terminate the lease if the lessee does not pay the re-invoiced cost of the insurance. The CJEU stated that while such a provision may indicate that there

> is a single supply in other circumstances, it does not do so where the transactions cannot be objectively regarded as constituting a single service.
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> 24. Finally, at [48], the CJEU addressed the Levob test and held that "the insurance and leasing services at issue in the main proceedings cannot be regarded as being so closely linked that, objectively, they form a single indivisible economic supply which it would be artificial to split."

Burden and standard of proof

9. It is for the Appellant to make out its appeal and prove, on the balance of probabilities, that the Respondent's decision to refuse its claim was wrong.

EVIDENCE: DOCUMENTS, WITNESSES AND FINDINGS OF FACT

Documents

10. The documents that we were invited to consider were contained in a bundle produced for the purposes of this hearing. References to numbers in square brackets in this decision are references to the page numbers within the bundle.

11. In addition, both parties submitted skeleton arguments and authorities for us to consider.

Witnesses

12. Mr. Farley Freeman, a director of the Appellant company, gave evidence before us. He provided the relevant affirmation. He confirmed that the signature on his witness statement was his and confirmed that the contents of his statement were true. The Respondents had an opportunity to cross-examine the Mr. Freeman and we had an opportunity to ask questions.

Findings of fact

13. Whilst we considered all the documents, the witness statement and oral testimony before us we only deal here with the findings of fact that we must necessarily make in order for us to reach our decision.

14. There was no real dispute as to the facts and these can be briefly stated. We make the following finds of fact on the balance of probabilities:

(1) The Appellant was incorporated on 9 January 2003. It is essentially a specialist car leasing company. It carries on the exclusive business of renting or leasing London Hackney cabs (or "London Black Cabs") to self-employed drivers.

(2) London Black Cabs are not like ordinary taxis and are not linked to any radio controller. Drivers pick up their fares by plying for hire on the streets, waiting at cab ranks or by using various taxi apps.

(3) Typically, drivers come to the Appellant because they do not want the hassle of maintaining, financing and insuring the vehicle themselves.

(4) The cabs are insured under a "motor fleet policy". This means that the contract of insurance is between the insurer and the Appellant and all cabs owned by the Appellant are covered. There is usually no requirement for the details of the drivers to be sent to the insurer.

(5) When a driver first comes to the Appellant wanting to hire a cab Mr. Freeman will carry out some basic checks. He may decide to turn the driver away. The main reason for this is if the driver is "accident prone". However, Mr. Freeman will also take into account age and whether or not the driver has a clean license.

(6) The drivers always have the option of using their own insurance. This might be because the driver has owned their own taxi and had insurance for a long time with a large "no claims" discount. However, even then Mr. Freeman would need to make sure that the cover was equivalent. In 99 times out of 100 the Appellant's insurance is better and cheaper. In fact Mr. Freeman has never experienced any of his drivers using their own insurance policy.

(7) The hire agreement between the Appellant and the driver provides that the hire sum includes a £30 insurance contribution [54]. Only one sum is payable by the driver, but the cost of insurance is listed separately and the driver is aware that this is a separate cost and how much is being paid.

(8) No invoices are issued to the drivers. Just receipts for payments received. However, the cost of insurance is separately set out on the receipt that Mr. Freeman makes out to drivers.

(9) The drivers do have to pay an excess of up to £500. The exact figure will vary depending on the insurance policy, but it is less than £500.

(10) Insurance forms a small part of the overall cost of running a vehicle. The majority of the cost comprises finance and maintenance.

DISCUSSION

15. We begin by observing that the facts in ***Wheels*** are very similar to the facts that are before us today. We, therefore, think it would be helpful to set out the pertinent facts in that decision. In ***Wheels*** the respondent company ran a taxi business in the course of which it leased cars with a radio support service to drivers who did not own their own vehicles. It offered these drivers the option of arranging their own insurance cover or purchasing such cover from it for an additional £45 per week. The insurance was at a competitive rate and the respondent company did not derive any significant profit from it. The receipt of this additional sum was accounted for separately. The respondent company was the insured and cover notes were issued in respect of individual vehicles. The respondent company determined who may drive a particular vehicle and the insurers require details of the drivers annually. Not all of its drivers used the insurance provided by the respondent company; with some preferring to use their own insurance.

16. Like the Upper Tribunal did in ***Wheels***, we start with the CJEU's observation in ***BGZ*** that, as a general rule, a leasing service and the supply of insurance for the leased item cannot be regarded as being so closely linked that they form a single transaction. There must be something more than the obvious link between the insurance and the item insured which makes them a single transaction.

17. In ***Wheels*** the Upper Tribunal found that the ability of drivers to choose whether to pay the hirer for insurance or arrange their own cover was a significant (but not decisive) indicator. In the present case the Respondents, firstly, submit that the drivers do not have any real choice in or option of using their own insurance cover. The vehicle hire agreement [53] is pre-populated with the words "n/a" where details are sought of the hirer's own insurance company and, in fact, the Appellant acknowledges that drivers will invariably use the insurance policy provided by the Appellant. In our view the evidence does not support the Respondents submission in this regard. The vehicle hire agreement asks for the driver to "tick here" if they want to use the insurance provided by the Appellant. In short, the drivers must "opt in" to use the Appellant's insurance. It gives the option of own insurance, but then appears to pre-suppose

that the driver will use the Appellant's insurance by prepopulating "n/a" where details of the drivers' own insurance are to go in the event that own insurance is to be used. This does not, in our view, preclude the drivers from using their own insurance.

18. During the course of giving evidence Mr. Freeman explained that it was always optional for drivers as to whether or not they used the insurance offered by the Appellant. However, he freely accepted that he could not recall any driver ever having exercised the option to use his (all of the drivers being male) own insurance. He explained that this was because the Appellant's insurance offering was invariably cheaper and invariably offered better cover. This was largely because the Appellant bought a "block" policy which was almost bound to work out cheaper pro rata. In our view it is hardly surprising that drivers opt for the cheapest and most convenient insurance quote and, therefore, not surprising that in reality none of the drivers choose to exercise the own insurance option. Does this, however, mean that these drivers did not have the option of using their own policy? In our view the answer is "no". Mr. Freeman's evidence was clear and uncontroverted. He always gave drivers the option of using their own insurance; but the economic realities of the purchase of "block policy" insurance meant that this option was never exercised. Given the explanations provided by Mr. Freeman we see no contradiction in holding that drivers in the present case had the option to use their own insurance, notwithstanding the fact that none have done so. The possibility or option remained open.

19. Secondly, the Respondents submit that the drivers only make payment of one amount which covers both the hire and insurance and that it would be artificial to split the two. It is submitted that this view is supported by the terms and conditions of the hire agreement which provide for an insurance contribution and the fact that an excess is payable by the hirer in the event of an accident. The difficulty with this argument is that it deals only with the payment sum. It omits to take into account the evidence that the receipt given to the driver differentiates between the cost of hire and the cost of insurance. It further omits to take into account the fact that the cost of insurance to each driver is separately set out in the vehicle hire agreement.

20. Thirdly, the Respondents submit that the evidence suggests that in the view of the "typical consumer" the Appellant is supplying a single supply of an insured taxi. This submission is grounded in the fact that the vehicle hire agreement simply includes the sum of £30 for insurance and is pre-populated with "N/A" where the driver is able to enter details of his own insurance. This to be contrasted with Mr. Freeman's evidence when he said that drivers were aware of the added cost of insurance because not only was it set out in the agreement, but the receipt separately set out the hire amount and the insurance amount. Doing the best with the evidence that we have we come to the conclusion that the average driver was likely to differentiate between the taxi hire and the insurance cover purchased. Accordingly, the "typical consumer" was likely to conclude that s/he was receiving two supplies at the same time.

21. Lastly, the Respondents submit that there are differences between the facts of this case and those in ***Wheels*** such that the insurance supplied in the current case is for the customer to better enjoy the service being provided. This submission, in our view, is unsupported by the facts (or the facts as we have found them). In our view, firstly, it is for us to apply the principles derived from the case of ***Wheels*** and others and not merely to look for factual similarities. Secondly, the only relevant factual difference that we can discern in the present case from that of ***Wheels*** is that in the latter at least some drivers used their own insurance. This is a point that we have already dealt with.

22. For the avoidance of doubt the Respondents did not seek to argue before us that the amount of the sum apportioned to insurance (£30) by the Appellant ought to be lower on the basis that it did not represent a fair apportionment.

23. Taking into account all the relevant facts and after considering the law and all the submissions we come to the conclusion that the Appellant does in fact make a separate exempt supply of insurance services in addition to the standard supply of vehicle hire.

CONCLUSION

24. For the reasons set out above we allow the Appellant's appeal in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

25. 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.

ASIF MALEK
TRIBUNAL JUDGE

RELEASE DATE: 26 MAY 2021