Neutral Citation: [2023] UKFTT 737 (TC)

Case Number: TC08920

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2018/04799

VAT – Whether supply of academic work made by Appellant – agency – commercial and economic reality – Whether updated contract terms changes application of Upper Tribunal decision – no – appeal dismissed

Heard on: 4 July 2022
Judgment date: 23 August 2023

Before

TRIBUNAL JUDGE KIM SUKUL
JAMES ROBERTSON

Between

ALL ANSWERS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown, counsel, instructed by Constable VAT Consultancy LLP

For the Respondents: Joanna Vicary, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. All Answers Limited ('All Answers') appeals to the First-tier Tribunal ('FTT') against VAT assessments issued by the Respondents ('HMRC') for the period 12/16 in the amount of £31,422, for the periods 12/17 to 06/19 in the amount of £286,541 and for the periods 09/19 to 03/20 in the amount of £101,596.

2. The hearing lasted 1 day. With the consent of the parties, the form of the hearing was video using the Tribunal's Video Hearing Service platform. 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.

3. The documents to which we were referred were contained within the 658-page hearing bundle. We were also provided with an authorities bundle (320 pages) and skeleton arguments from both parties.

4. We have carefully considered all the submissions made by the parties. Our conclusions regarding the key arguments are set out below.

BACKGROUND

5. Previous appeals made by All Answers against other VAT assessments made on the same basis were considered and dismissed by the FTT in All Answers Limited v HMRC [2018] UKFTT 701 (TC) and the Upper Tribunal ('UT') in All Answers Limited v HMRC [2020] UKUT 236 (TCC) ('the UT decision').

6. The opening of the UT decision, released on 30 July 2020, sets out the background to the appeal as follows:

> "1. The Appellant operates a largely internet-based business. Customers accessing its website (who we will refer to as "Customers") can, in return for payment which is made to the Appellant, order academic work such as essays, dissertations or pieces of coursework which are then written by third parties ("Writers"). The Writers tend to be teachers, lecturers and PhD students who are not employed by the Appellant. The Appellant does not disclose the Writers' identities to the Customers and vice versa.
>
> 2. The Appellant and a Writer of a particular piece of work share the fee paid by the purchasing Customer between them. The Appellant generally retains around two thirds of that fee with the Writer obtaining the remaining one third. Therefore, if a Customer pays £240 for a piece of work, and ignoring VAT for the time being, the Appellant will typically retain £160 of that and will pay £80 to the Writer.
>
> 3. These proceedings concern the VAT treatment of the above transactions. HMRC contend that the Appellant makes a single standard-rated supply of the academic work to a Customer and should, in the above example, account

> to HMRC for VAT on the full £240 paid by the Customer. The logic of HMRC's case is that, when the Appellant pays the Writer £80, it is paying the Writer consideration for a separate supply made by the Writer to the Appellant. However, since Writers tend not be registered for VAT purposes, the Appellant is not entitled to credit for any input tax incurred in respect of this separate supply.
>
> 4. The Appellant argues that it is acting as a Writer's agent in relation to the supply of the academic work. Therefore, it argues that the supply of the academic work is made by the Writer to the Customer and the Appellant is not obliged to account for VAT in respect of that supply. The Appellant acknowledges that it makes a supply (of agency services) for a consideration of £160 in the above example and accepts that it is obliged to account for VAT in relation to that supply.
>
> 5. Therefore, the difference between the parties is whether, using the above illustrative figures, the Appellant is obliged to account to HMRC for VAT on £240, or just for VAT on £160. In a decision released on 3 December 2018 (the "Decision"), the First-tier Tribunal (the "FTT") determined the above issue in HMRC's favour."

7. Having considered the meaning and effect of relevant contractual terms and whether the contractual terms reflect commercial and economic reality, the UT determined that All Answers, and not the Writers, made a supply of the academic work so as to become subject to an obligation to account for VAT.

8. With regard to the effect of the contractual terms, the UT decision states at [62]:

> "Our conclusions on the effect of the Writer Contract and the Customer Contract are as follows:
>
> (1) By the Writer Contract, a Writer gave the Appellant authority to enter into contracts as agent on behalf of the Writer.
>
> (2) However, in the Customer Contract, the "core" obligations, to deliver the academic work, to the requisite standard and by the applicable deadline, were obligations that were binding on the Appellant only.
>
> (3) The "no plagiarism guarantee" was an exception. By Clause 7 of the Customer Contract, the Appellant agreed, as agent for the Writer, that if plagiarism was detected in the work provided, the Writer would pay the Customer £5,000. That obligation was binding on the Writer and not on the Appellant.
>
> (4) Pursuant to the Writer Contract, a Writer transferred the entire copyright in the relevant academic work to the Appellant. Having divested itself of that copyright, a Writer would be incapable of providing any licence to use that work to a Student, or indeed to anyone else.
>
> (5) Pursuant to the Customer Contract, the Appellant provided the Customer with only a limited right to use the work. That was different from the interest

> the Appellant obtained under the Writer Contract, namely the whole copyright in the work."

9. In September 2020, All Answers provided HMRC with the revised contracts which they considered to be consistent with the agency relationship they understood they held with the Writer and the Customer. HMRC did not accept this altered the position that All Answers was a principal and VAT should be accounted for in accordance with the UT decision. All Answers contend that the UT decision was based on the contracts in place prior to October 2016, and that the application of that decision is incorrect in respect of VAT periods ending after the changes were made, namely from 12/16 onwards.

The Facts

10. We were presented with the witness statements of 3 All Answers employees. We accept their unchallenged evidence, which set out the reasoning behind the contractual changes, the process of making the changes and the dates the changes were processed.

11. However, we find the relevant facts to be unchanged from that summarised in the UT decision as follows:

> "6. Most relevant facts were not in dispute. We would summarise the undisputed facts as follows, with references to numbers in square brackets being to paragraphs of the Decision.
>
> 7. The Appellant's business is largely internet-based. Customers wishing to order academic work, such as essays or dissertations, or who wish to obtain feedback on their own written work are able to access the Appellant's website to make an order. The Appellant trades under various names with Customers; one such name is "UK Essays.com" ([6]).
>
> 8. The Appellant's website generates a price for most "standard" orders by reference to information that the Customer provides as to, for example, the nature of the work (for example an undergraduate essay), the standard required (for example 2:1) and its length (for example 1000 words). A small minority of orders (1% to 2%) require bespoke pricing ([7], [8] and [29]).
>
> 9. Before an order can be submitted over the website, a Customer must tick a box confirming acceptance of standard terms and conditions ([9]). We will consider these terms, and their effect, later in this decision. In addition, at the same time as placing an order, a Customer must pay a deposit of at least 50% of the price due, or if the work is required for urgent delivery, full payment in advance. The Customer pays this by card, over the Appellant's website, at the time the order is placed.
>
> 10. The Appellant has available to it a "pool" of Writers who are not its employees, but are generally third-party lecturers, teachers and PhD students ([30]). Before the Appellant will put a Writer on its books, it requires the Writer to go through an application process that involves the Writer, providing details of his or her academic qualifications, signing up to terms

and conditions (which we will consider later in this decision) and providing samples of written work.

11. Once the Appellant has received an order from a Customer, the Appellant posts details of that order on a portal to which only its pool of Writers have access. Those Writers are invited to indicate whether they are prepared to take on the assignment for the price quoted being the Writer's share of the total fee. Thus, as part of the process of offering work to its Writers, the Appellant does not tell Writers the total fee that the Customer will pay, just the share of the fee that will be payable to the Writer who produces the work. However, Writers could work out the gross fee since, in most cases, it will be three times what the Writer is offered. In any event, a Writer could always go to the Appellant's website and key in details of the work in question to see what price the Appellant would be quoting the Customer for that work ([42]). If multiple Writers indicate that they are prepared to do the work, the Appellant chooses one.

12. The Appellant is concerned to ensure that, except in wholly exceptional circumstances, a Customer is not aware of the identity of the Writer who produced work that was ordered, and a Writer is not aware of the identity of the Customer for whom work is being produced. That concern for confidentiality is demonstrated in some of the contractual provisions we will consider in the next section: for example, Writers are contractually obliged not to identify themselves in the written work that they produce. The FTT concluded that the concern for confidentiality was driven by at least two factors: Writers would not want their employers to know that they were "moonlighting" ([25]) and the Appellant would not want Customers to be able to cut the Appellant "out of the loop" by obtaining further work direct from a Writer.

13. Once the Writer has prepared the work, he or she uploads it to the Appellant's portal. In periods material to this appeal, the contract between Writer and Appellant provided that the act of uploading the work operated to transfer copyright in the work to the Appellant ([27]). At this stage, the work is not yet available to the Customer and, before releasing it, the Appellant performs some quality control measures ([43]) and obtains payment of the balance, if any due on the order.

14. The FTT made some findings at [47(7)] as to the form of invoices that were issued, observing that the Writer issued no invoice to the Customer. In view of some of the submissions that were made to us on invoices, we will provide a slightly fuller summary of the various invoices that are issued:

(1) The Appellant would issue a "sales receipt" to the Customer. We were shown an example of such a receipt for a job that involved marking and proof-reading a 2,500 word essay. That receipt showed the total paid for the work (£75). The "researcher fee", being the amount payable to the Writer, was shown as £261. To that is added the "agency fee" of £40.83

> and VAT on that agency fee of £8.17 thus reconciling with the total fee of £75.
>
> (2) The Appellant would issue what was described as an "invoice" to a Writer. Describing those documents as "invoices" was something of a misnomer because they set out amounts due from the Appellant to the Writer. It appears that these "invoices" were issued on a monthly basis capturing work done by that Writer in the 30 days or so ending around the middle of the month in question. The invoices disclosed the fees payable to the Writer for work done in this period but did not mention the total fees paid by the Customer for all work undertaken by that Writer."

Updated Contracts

12. Standard form contracts are provided by All Answers to its student Customers ('the Customer Contract') and its Writers ('the Academic Writer Contract'). There is no written contract between Writer and Customer.

13. HMRC presented to us 3 tables setting out a detailed comparison of the "core" terms contained within the original and updated Customer Contracts, an illustration of the amended terms contained within the updated Customer Contract and an illustration of the amended terms contained within the updated Academic Writer Contract. They argue that there have not been any material changes to the business model from that which was operated throughout the periods considered in the UT decision and that the "core" obligations within the updated contracts remain binding upon All Answers alone. Therefore, in accordance with the reasoning of the UT decision, All Answers is the principal to the contracts. HMRC further contend that there is no contractual, commercial or economic connection, and no supply for VAT purposes, between parties the Writer and the Customer and the entirety of the supply is rendered by All Answers to its Customers.

14. All Answers submits that the changes to the contracts included updates that impact on the "core" obligations, the main impact being the obligation to provide the work to the Customer. They contend that the most fundamental of the various changes made to the contracts were:

- Changes to intellectual property clauses in the Academic Writer Contract and Customer Terms and Conditions. It was made clear that "The copyright to the work produced under the contract between the Principal and the Customer remains with the Principal". To be clear, copyright remained with the creator of the academic work.
- An explicit contractual term between Writer and Customer was also introduced at that time: "You agree that when you do bid for a project and we allocate it to you, this is a binding contract for services between yourself and the Customer".

LEGAL FRAMEWORK

15. The relevant principles of VAT law were set out in the UT decision as follows:

“19. By Article 2(1)(c) of Council Directive 2006/112/EC on the common system of value added tax (the “Principal VAT Directive”), the “supply of services for consideration within the territory of a Member State by a taxable person acting as such” is subject to VAT.

20. In *Adecco (UK) Limited and others v HMRC* [2018] EWCA Civ 1794, Newey LJ, with whom both other members of the court agreed, set out the following propositions on the scope of Article 2(1)(c) of the Principal VAT Directive:

> 38. The following propositions can, I think, be derived from the case law:
>
> i) The concept of a "supply" is "an autonomous concept of the EU wide VAT system" (the *Airtours* case, at paragraph 20, per Lord Neuberger);
>
> ii) A supply of goods or services "for consideration", within the meaning of article 2(1) of the Principal VAT Directive, "presupposes the existence of a direct link between the goods or services provided and the consideration received" (Joined Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd and Baxi Group Ltd v Revenue and Customs Commissioners* [2010] STC 2651, at paragraph 51 of the judgment of the Court of Justice of the European Union ("CJEU"); see also Case 102/86 *Apple and Pear Development Council v Customs and Excise Commissioners* [1988] STC 221, at paragraph 12 of the judgment); iii) A supply of services "is effected 'for consideration', within the meaning of art 2(1) of [the Principal VAT 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" (Case C-653/11 Revenue and Customs Commissioners v Newey [2013] STC 2432, at paragraph 40 of the CJEU's judgment; see also Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, at paragraph 14 of the judgment);

21. The essence of the dispute between the parties revolves around the concept of “reciprocal performance” described in *Tolsma*. The Appellant says that, in relation to the provision of the academic work, the legal relationship is between, and only between, the Writer and the Customer. Therefore, although in our hypothetical example, the Customer pays the full £240 to the Appellant it is said that this is not consideration for a taxable supply made by the Appellant.

22. That therefore leads to the secondary question of how to determine relevant aspects of the legal relationships between the parties in order to determine whether the £240 is consideration for a taxable supply made by the Appellant. The CJEU determined this question in *HMRC v Paul Newey* (Case C-653/11) [2013] STC 2432 where one of the questions referred was:

In circumstances such as those in the present case, what weight should a national court give to contracts in determining the question of which person made a supply of services for the purposes of VAT? In particular, is the contractual position decisive in determining the VAT supply position?

23. The answer to that question was given in paragraphs 42 to 44 of the CJEU's judgment as follows:

> 42 As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group [*2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).
>
> 43 Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified. 44 It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45 That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.

24. In the light of that guidance, we will adopt the following approach:

(1) First, we will ascertain the meaning and effect of relevant contractual terms so as to determine whether those terms impose an obligation on the Appellant or the Writer (or both) to provide the academic work to the Customer in return for the payment that the Customer makes to the Appellant.

(2) Second, we will consider whether the contractual terms reflect commercial and economic reality.

(3) In the light of our answers to questions (1) and (2), we will determine whether the Appellant made a supply of the academic work so as to become subject to an obligation to account for VAT."

16. We adopt the same approach as that taken in the UT decision.

THE MEANING AND EFFECT OF RELEVANT CONTRACTUAL TERMS

17. The updated contracts include terms to the effect that the copyright remains with the Writer. The original Academic Writer Contract states:

> "14. Intellectual Property

> 14.1 You agree that the intellectual property rights to the work submitted transfers to All Answers Ltd upon submission.
>
> 14.2 You agree to never publish, resell, or otherwise redistribute any completed project that has been submitted and/or sold through us.
>
> 14.3 We reserve all rights of ownership including the right to reproduce, distribute, store, alter and resell the completed projects in any way or form.
>
> 14.4 However, we undertake never to pass or sell the copyright in the completed project to the Client or to anyone who we know or suspect will use the completed project for academic or other dishonesty."

18. The Updated Academic Writer Contract states:

> "15. Intellectual Property
>
> 1. The copyright to the work produced under the contract between the Principal and the Customer remains with the Principal.
>
> 2. The Customer acquires an exclusive licence, by assignment by the Principal, to own a copy of the work for academic purposes to use as an example/model answer. The Customer does not acquire the copyright or the rights to submit the work, in whole or in part, as their own.
>
> 3. The Principal agrees to never publish, resell, share or otherwise redistribute any completed project that has been submitted and/or sold through us."

19. The copyright terms of the Updated Customer Contracts also states that the copyright remains with the Principal. The effect of the updated terms is that the copyright remains with the Writer. Although the UT did consider the transfer of copyright to All Answers to support their conclusion regarding the "core" obligations, we are not satisfied the contractual updates regarding the copyright achieves the effect, as argued by All Answers, that the "core" obligations, to deliver the academic work, to the requisite standard and by the applicable deadline, were no longer binding on them only.

20. The analysis in the UT decision of Clause 3 of the Writer Contract, which deals with the allocation of a Writer to a Customer's order and Clause 4 headed "Co-operation" is that:

> 48. These two clauses therefore indicate that the Appellant is accepting a personal obligation to use reasonable care and skill in delivery of the work. That is emphasised by the fact that the Appellant is to be judged by the standard of a "competent research agency". The clause does not suggest, for example, that the Writer has the sole obligation to deliver the work, or that the Writer's conduct is to be assessed by reference to the standard of a competent academic. It does not even suggest that there is to be any claim against a Writer for a failure to deliver work to an acceptable standard. The only liability mentioned in Clause 4.2, and the only liability limited in Clause 4.3, is that of the Appellant.

21. With regard to the obligations to deliver the academic work to the requisite standard and by the applicable deadline, the UT decision states:

> 49. Clause 6 deals with the time of delivery of work and contains the "completion on time guarantee" referred to in Clause 4.3 as follows:
>
> > 6 Delivery – "Completion on Time Guarantee"
> >
> > 1 The Agency agrees to facilitate delivery of all Work before midnight on the due date …
> >
> > 2 The Agency undertakes that all Work will be completed by the Expert on time or they will refund the Customer's money in full and deliver the work for free….
> >
> > 7. The Agency is not liable under this guarantee where any delay is caused by death or illness of the Expert or immediate family.
>
> 50. Like Clauses 4.2 and 4.3, this clause suggests that only the Agency is to be liable if work is not delivered on time. If the clause was intended to provide that the Writer was to be liable if work was delivered late, Clause 6.1 would have stated that the Writer would "deliver" work on time. The statement that the Appellant is to "facilitate delivery" indicates that it has responsibility for timely delivery, not the Writer. Similarly, if the Writer was to be liable under the "completion on time guarantee", the Writer would scarcely need to exclude liability for his or her own death (see Clause 4.7). The fact that death of the Writer operated to exclude liability under the "completion on time guarantee" emphasises that this was a promise given by the Appellant.
>
> 51. The conclusion that the Appellant, and not the Writer, was to be liable to the Customer for late delivery of the work is reinforced by other provisions of Clause 6. Clause 4.8 required a Customer who had not received work by the due date to contact the Appellant the next working day and clause 4.9 operated to limit the liability of the Appellant (with no reference to a liability of the Expert) if the Customer waited longer than this. Moreover, Clause 1.6 of the Customer Contract precluded the Customer from contacting the Writer and so a Customer's only port of call if the work was delivered late was the Appellant.

22. We do not consider the updated contract terms, whereby the copyright remains with the Writer, provides a sufficient basis to depart from the conclusion reached in the UT decision that the "core" obligations to deliver the academic work to the requisite standard and by the applicable deadline was binding on All Answers only.

23. Further, clause 9.4 of the original Academic Writer Contract states: "You agree that when you do bid for a project and we allocate it to you, this is a binding contract for services." The Updated Academic Writer Contract clause 4 states: "You agree that when you do bid for a project and we allocate it to you, this is a binding contract for services between yourself and the Customer."

24. The UT found on the basis of the original Academic Writer Contract that "no separate contract, consisting entirely of implied terms, came, into existence between a Writer (through the agency of the Appellant) and a Customer not least because it was not explained to us the offer and acceptance that could lead to such a contract or indeed what the terms of such a contract would be" (see the UT decision at [69]). We also find that the addition of the words "between yourself and the Customer" is insufficient to bring into existence a separate contract between a Writer and a Customer, as it does not explain to us the offer and acceptance that could lead to such a contract or indeed what the terms of such a contract would be.

25. We therefore accept HMRC's submission that the contractual changes do not alter the finding that the "core" obligations to deliver a product, in the appropriate timescale, to the requisite standard, remain imposed upon All Answers alone and, as such, the reasoning of the UT decision continues to apply to the updated contracts in force during the relevant periods under appeal.

COMMERCIAL AND ECONOMIC REALITY

26. There are no significant changes to any of the relevant facts as referred to in the UT decision.

27. Having considered those relevant facts, the UT decision states at [74] that "in our judgment, the conclusion that the contracts imposed the "core" obligations on the Appellant, and not on a Writer, was entirely consistent with commercial and economic reality". It follows that the UT considered, and we therefore accept, that the commercial and economic reality was that All Answers delivered the academic work, and not the Writer.

28. All Answers refers to the comment at [79] of the UT decision that "If either the terms of the contracts, or considerations of commercial reality had been different we might have reached a different conclusion". They submit that, taking into account the revised contractual relationships between the parties, in particular the fact that they no longer had any right to use or supply the works, the economic and commercial reality is that they were an agent and not a principal to the transactions.

29. We disagree. The circumstances of the transactions and overall business operations are the same before and after the updates to the contracts. The reality is that All Answers pays consideration to the Writer for the supply of the service of preparing academic work. All Answers assumes liability for the obligation to provide the Customer a limited right to use academic work, of suitable quality, within the stipulated timescale, and are paid in return. We consider the terms of the updated contracts impose those "core" obligations on All Answers, and not on the Writer, and are therefore consistent with commercial and economic reality that All Answers delivered the academic work.

30. If we are wrong on this and the terms of the updated contracts impose the "core" obligations on the Writer then, whilst we accept that the contractual position normally does reflect economic and commercial reality (see *HMRC v Paul Newey* (Case C-653/11) [2013]

STC 2432 at [43]), we would find this to be inconsistent with commercial and economic reality, considering the facts and all the circumstances of this case.

Conclusion

31. We agree with HMRC's submission that the same conclusion reached in the UT decision applies in this case, namely that there is a legal relationship between All Answers and a Customer under which All Answers, and only All Answers, assumes liability for the obligation to provide a limited right to use academic work of suitable quality, within the stipulated timescale, and that in return for All Answers assuming such liability, a Customer pays them a sum of money.

32. We also find that the terms of that legal relationship are consistent with commercial and economic reality and, in our judgment, applying the principle set out in *Tolsma*, the supply of the academic work is made by All Answers to a Customer. It therefore follows that, when All Answers pays over the Writer's share of that fee, they are paying consideration to the Writer for a separate supply made by the Writer to All Answers, consisting of the service of preparing that academic work (See UT decision at [76]).

33. For the reasons set out above, we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

KIM SUKUL
TRIBUNAL JUDGE

Release date: 23rd AUGUST 2023