TC04133

Appeal number: TC/2013/04893

Value Added Tax - sales of rights to access genealogical websites – nature and time of supply – whether "face value vouchers" – repayment claim in respect of unredeemed vouchers – VATA 1994, Schedule 10A, para 1 – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRIGHTSOLID ONLINE TECHNOLOGY LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
MR PETER R SHEPPARD, FCIS, FCIB, CTA

Sitting in public at George House, 126 George Street, Edinburgh on 26 May and 10 September 2014

For the Appellant – Philip Simpson, QC, CTA

For the Respondents – Iain Artis, MBA, Advocate, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Introduction

1. The Appellant (now known as DC Thomson Family History Limited) offers access to genealogical websites which it owns or in respect of which it holds licences. Access may be by way of a subscription, which lasts for a certain period, but which is not otherwise limited as to use. Alternatively the sites may be accessed by a Pay As You Go system ("PAYG"): a lump sum is paid, for which a number of units or vouchers giving opportunities to download information, are issued, and which have to be used up within a certain time.

2. This appeal relates to PAYG receipts only, where the units have not been used up before the date of their expiry. The Appellant seeks a repayment of VAT which, it asserts, was accounted for incorrectly on unredeemed vouchers for the periods from September 2008 to 10 May 2012. In essence it is submitted that where units have not been used, there has been no taxable supply and no consequent VAT liability. The repayment claim totals £434,294.10. By Decision of 25 June 2013 the Respondents refused repayment (Docs 14).

3. It should be noted that on 10 May 2012 the law was changed to the effect that VAT would be due on the issue of face-value vouchers at the date of their issue, not redemption. Hence the Appellant's present basis of claim could not be maintained beyond that date.

Evidence

4. Only the Appellant led evidence. Its sole witness was Mrs Pamela Short. She adopted the terms of her Witness Statement and elaborated on it somewhat in her evidence. Mrs Short is presently Financial Manager of the Appellant and has been employed by its company group since September 2009. It may be noted that Mrs Short did not work for the Appellant company in particular throughout the period of time to which this claim relates.

5. The business of the Appellant, Mrs Short explained, was providing on-line access to genealogy and ancestry information. It owns or has licences to access certain datasets. Currently its staff totals 129. It advertises its services which may be obtained by subscription (not relevant to the present appeal) or by PAYG. Then "units" or credits are purchased which are redeemed on purchasing images or transcriptions on the websites. The unitised system assists the Appellant in calculating royalties due to their business partners who provide access to their websites.

6. At the outset customers are advised that units (or credits) expire by a certain date, but may be revived in the event of further credits being purchased within two years.

7. Finally, Mrs Short explained that this repayment claim had been prompted by the change in the taxation of vouchers in May 2012. It had then been discovered that VAT had been incorrectly accounted for on the issue of PAYG vouchers, rather than on their redemption.

8. In cross-examination Mrs Short explained that both subscribers and PAYG customers had equal access to all the data bases. She agreed that PAYG users could have a mixture of differently priced units. Promotional vouchers might be made available for, say, corporate customers. In cases of promotions the user could not work out the cost of units. She agreed that conditions might vary between the various websites available.

9. She explained that vouchers could not be redeemed or transferred to third parties. They could only be used on registered websites.

10. In a brief re-examination Mrs Short indicated that the Appellant's computers would have a record of monies expended in purchasing units. The Appellant's website would show the structure and pricing of vouchers and units.

11. We found Mrs Short a helpful and credible witness. While we appreciate, as Mr Artis reminded us, that she was not employed immediately by the Appellant company throughout the relevant period, we considered that she could speak reliably and knowledgeably to the nature of the business operations involved. The substance of her evidence was not seriously challenged in cross-examination and the foregoing narrative of it may be regarded as factually accurate.

The law

12. Reference was made in particular to the terms of Paragraph 1 of Schedule 10A VATA 1994, viz

> "Meaning of 'face-value voucher' etc
>
> 1(1) In this Schedule 'face-value voucher' means a token, stamp or voucher (whether in physical or electronic form) that represents a right to receive goods or services to the value of an amount stated on it or recorded in it.
>
> Treatment of credit vouchers
>
> 3(2) The consideration for any supply of a credit voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher.
>
> Treatment of retailer vouchers
>
> 4(2) The consideration for the issue of a retailer voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher."

Extensive references were made to the relevant case-law which is set out in the Appendix hereto.

Submissions

13. Mr Simpson and Mr Artis addressed us in turn. Each of them helpfully had submitted written submissions which they adopted and explained and to which reference should be made.

14. Mr Simpson introduced his arguments by reminding us that the appeal related only to PAYG and not to the subscription service. Also, he acknowledged that the change in the law in May 2012 would undermine his argument in relation to purchases of credits thereafter. (Now the supply is considered to be made when credits are purchased: FA2012, Section 201, introducing a further paragraph "7A" into Schedule 10A). He referred us to Schedule 10A VATA, para 1, and the definition of "face value vouchers". The email issued confirming the purchase of credits constituted a face-value voucher in his view and, more particularly a "retail voucher" (para 4), the consideration for which fell to be disregarded. There was no distinction, he suggested, between credits in physical or electronic form. Moreover, determining the nature and substance of the service provided by the Appellant was crucial. That, Mr Simpson, argued was the accessing of particular records by the customer. The credits were in respect of accessing records once identified. The credits were not in respect of the use of search engines. The tax point for VAT purposes, he continued, was when the records were accessed. The supply was made only at that stage. The voucher and its credits were the consideration, made only at that time.

15. On Mr Simpson's analysis the customer purchased a specific number of electronic credits which could be used to pay the varying prices across the five websites available. The Appellant's computer system enabled a customer to calculate how much had been paid for particular credits. The email issued on purchase of credits set out this information. A tariff for viewing and downloading particular information was available.

16. Mr Simpson referred us to the terms and conditions of the Appellant. Their clear implication was that what the customer purchased was not credits but, rather, information on the various websites. Having sight of the information on the documents was what the consumer desired, and that was the supply for tax purposes. Mr Simpson rejected the argument of the Respondents, viz that there was an omnibus supply of not only the accessing of documents but the facility of the search engines to trace the documents. Until the customer views and downloads a document the Appellant could not be aware of the nature of his supply. The Appellant's maintenance of the website and their arrangements with copyright owners of the information available were merely ancillary features to the main service.

17. Mr Simpson (and Mr Artis too) referred extensively to the relevant case-law which we address in our Decision *infra*.

18. By contrast on behalf of HMRC Mr Artis submitted that there was an immediate supply for VAT purposes at the time of payment for the voucher and credits. The charge to VAT applied then, when the right to access was conferred. The supply extended in Mr Artis' view to both the facility to access the documentation as well as the right to view and download these. That, he insisted, was the correct assessment of the rights conferred. By way of a reserve stance in support of VAT being due immediately Mr Artis suggested that even if there was not an immediate supply, there was a *pre-payment* for VAT purposes. In terms of Section 6(4) VATA liability to the tax arose on the earlier of payment or supply.

19. Furthermore, the email issued on purchase of units did not constitute a "face value voucher" for purposes of Schedule 10A, para 1. These did not bear an *ex facie* cash value, with a *monetary* limit. The email was no more than a receipt. It was not a

retailer voucher". It was impossible to know what particular credits were worth in cash terms. They could not be redeemed for money nor were they transferrable.

20. Next, Mr Artis criticised the Appellant's argument (para 40 of Written Submissions) to the effect that there was no taxable supply. The customer had received *rights* to access the websites even if he did not ultimately exercise them. There was a strong presumption against non-taxation in respect of VAT.

21. In relation to the Appellant's argument in support of *pre-payment* (para 43) Mr Artis responded that Section 6(4) VATA imposed a charge on the earliest of payment or issue of a VAT invoice.

22. In conclusion Mr Artis argued that all the information necessary to determine the nature of the supply was known at the time of payment. The essentials of the supply were known from the outset. A package of pre-paid rights was supplied at the time of payment, he maintained.

23. For these reasons Mr Artis urged us to refuse the appeal.

24. In his concluding remarks Mr Simpson submitted that his stance as to the emails representing "face-value vouchers" and, also, as to there being a prepayment for a later supply were competent mutually exclusive arguments. It would be possible to calculate the cost of each credit and the value of the outstanding balance. The cash value is recorded electronically. The money paid at the outset was a prepayment for a later supply: that supply was made only when documents were downloaded. The supply desired by the customer was the actual downloaded document. He invited us to allow the appeal.

Decision

25. While Mr Artis made certain limited criticisms of the evidence of Mrs Short – in particular in relation to her speaking indirectly to matters before her personal involvement – we considered her evidence on all material aspects to be sound and reliable. Mr Artis' cross-examination did not challenge her evidence in material respects but rather expanded its scope. Accordingly our narrative of her evidence set out at paras 4 – 11 supra may for the critical aspects of this appeal be viewed as equivalent to our **Findings-in-Fact.**

26. Primarily and crucially we have to determine the nature of the supply here. We prefer the analysis of Mr Artis. We consider that what the customer acquired was a "package" including the means of access to the records on the websites, the facility to search these, and then to access and, if desired, download particular items. We consider these to be inter-dependent. While the objective in acquiring the package is to obtain information in a particular document or documents, these generally have to be identified and traced. Mr Simpson focussed on the importance of only the ability to view and download a document. That, we consider, is too restrictive: it is the final stage of the process. It may be the ultimate objective, but it does not stand independently of the other facilities acquired.

27. On that analysis the supply for VAT purposes is made at the outset, viz on purchase of the "package", and not later when units are used up.

28. We were addressed at length on the nature of *face-value vouchers* in the context of Schedule 10A VATA. These measures are designed to avoid a double-charge, occurring as at acquisition and then on use. Until 10 May 2012 the charge to VAT arose at the later time ie use. Extensive reference was made to the two decisions in *Leisure Pass Group Limited*. In the first appeal Park J emphasised as two necessary elements, a cash value, which should be stated or recorded on the pass, resembling in effect a book-token. The value should appear *ex facie* of the voucher. That was not satisfied in the circumstances of the first appeal but by the time of the second appeal, the form of the vouchers had been altered to incorporate a stated cash value and that appeal succeeded.

29. We do not consider that the document issued on purchase here qualifies as a *face-value voucher*. We observe that calculation of value by way of a coding or micro-chip in the ticket together with a computer reference may enable a document to so qualify: see Park J in *Leisure Pass Group Limited* para 14, and Judge Nowlan in *Skyview Ballooning Ltd*, para 13. The evidence which we heard was that PAYG vouchers may be obtained by purchase, gift, or in a promotion, and the consideration would be liable to vary in each case. It may not be disclosed to the holder. Unused units in one allocation could be "revived" by subsequent purchases within a specified time period. All this would frustrate any attempt to price the balance of unexpired units.

30. We consider that in these circumstances the document issued on purchase is no more than a simple receipt, and does not constitute a *face-value voucher* in the context of Schedule10A.

31. Finally, we consider the relevance of the "pre-payment" argument and Section 6 VATA which directs (broadly) that supply for VAT purposes takes place at the earlier of payment or supply. This emerged as a reserve argument by the Respondents and, of course, is not relevant if it is correct, as we consider, that the supply took place at the outset. Having regard to the cases cited we consider that the circumstances of the present appeal are distinct from these in *Macdonald Resorts Limited*. There the exact accommodation was not known until its selection, and that after the acquisition of entitlement "points". Here, the nature of the supply is known at the outset. There is a direct link at the time of payment. For somewhat similar reasons the circumstances in *BUPA* are distinguishable: in that case there was a unilateral right to resile without financial penalty, and the list of supplies was variable. In this context reference was made also to *Esporta Limited* and VAT liability on fees paid to a health club after cancellation of membership. (Did these represent consideration for a service or compensation for breach of contract?) Again we did not consider its circumstances comparable to the present case. However, the decision emphasises the need to identify the "economic and commercial reality of the transaction" (para 43 per Arden LJ).

32. In short these authorities in our view do not assist the taxpayer in postponing the tax point in the present appeal to a date after the purchase of the vouchers.

33. We consider that the stance of the Respondents in this appeal is well-founded and we agree that the tax point for VAT purposes was at the outset, on the purchase of the voucher. Accordingly we dismiss the appeal.

34. It occurred to us that in the event of a repayment of VAT to the Appellant being found due, the issue of *unjust enrichment* might arise, affording a possible defence to HMRC. In the event we were not addressed on this by either counsel, and in view of our decision the matter does not arise.

35. 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.

KENNETH MURE, QC
TRIBUNAL JUDGE

RELEASE DATE: 13 November 2014

APPENDIX

IN THE FIRST TIER TRIBUNAL (TAX CHAMBER)

Ref: TC/2013/04893

JOINT BINDER OF AUTHORITIES

in the cause

D C THOMSON FAMILY HISTORY LIMITED, formerly **BRIGHTSOLID ONLINE TECHNOLOGY LIMITED,**

APPELLANTS,

against

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS,

RESPONDENTS

NOTE: REFERENCE WILL BE MADE TO LEXIS NEXIS ORANGE TAX HANDBOOK 2013/14, Volume 1.

1. *Blackpool Pleasure Beach (Holdings) Limited* v. *HMRC* [2005] UKVAT V19014.
2. *Leisure Pass Group Limited* v. *HMRC* [2008] STC 3340.
3. *Leisure Pass Group Limited* v. *HMRC (No. 2)* [2009] UKVAT V20910.
4. *Skyview Ballooning Limited* v. *HMRC* [2014] UKFTT 32 (TC).
5. *Celtic plc* v. *Commissioners of Customs and Exci se* 1997 V.A.T.D.R. 111.
6. *Customs and Excise Commissioners* v. *Richmond Theatre Management Limited* [1995] STC 257.
7. Case C-549/11 *Direktor na Direktsia* v. *Orfey Balgaria OOD* [2013] STC 1239
8. Case C-107/13 *Firin OOD* v. *Direktor na Direktsia* (unreported, 13th March 2014).

9. Case C-419/02 *BUPA Hospitals Limited* v. *Commissioners of Customs and Excise* [2006] STC 967; [2006] ECR I-1685.

10. Case C-520/10 *Lebara Limited* v. *Commissioners of Customs and Excise* [2012] STC 1536.

11. Case C-270/09 *Macdonald Resorts Limited* v. *HMRC* [2011] STC 412; [2010] ECR I-13179.

12. *Revenue and Customs Commissioners* v. *Loyalty Management UK Ltd* [2013] STC 784

13. Case C-174-00 *Kennemer Golf & Country Club* v. *Staatssecretaris Van Financien* [2002] STC 502

14. *Esporta Ltd* v *HMRC* [2014] EWCA Civ 155

15. *RCC* v. *IDT Card Services Ireland Ltd* [2006] STC 1252 (CA)

16. *HMRC* v. *Prince Arachchige* [2009] EWHC 1077 (Ch)

5