[2020] UKFTT 0061 (TC)

TC07557

VAT – VAT registration - supply of medical care or supply of staff – direction and control – supply of medical care – exempt – no requirement for registration – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/04765

BETWEEN

ARCHUS TRADING LIMITED **Appellants**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on Monday 10 June 2019

Philip Simpson, QC, instructed by Gemmell McGee, VAT Solutions Limited, for the Appellant

Graham Maciver, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Written submissions were lodged on 29 November and 5 December 2019

DECISION

INTRODUCTION

1. The decision under appeal is the review conclusion letter dated 21 June 2018 from HMRC to the Appellant upholding the decision to compulsorily register the Appellant for VAT.

2. The matter in dispute is whether the supplies by the Appellant to Ayrshire and Arran Health Board ("the Board") constitute "the provision of medical care" and are thus exempt from VAT in terms of Item 1 Group 7 Schedule 9 Value Added Tax Act 1994 ("VATA") or whether the Appellant supplies staff to the Board which would be a supply liable to VAT and thus requiring registration.

3. I heard evidence from Dr Henderson who was formerly one of the shareholders and directors of the Appellant. He was also one of the general medical practitioners ("GPs") who provided medical care at HMP Kilmarnock. I also heard evidence from Ms C Ruth McMurdo who, since May 2016, has been the Senior Manager Justice Healthcare Services at HMP Kilmarnock. Both were wholly credible witnesses.

The Procedural Background

4. On 25 November 2014, in response to an enquiry from HMRC as to the nature of the contract held by the Appellant, the Appellant's agent wrote to HMRC confirming that the Appellant was a "contractor" as defined in the Health Board Primary Medical Services Contracts (Scotland) Directions 2011 ("the Contracts Direction").

5. On 16 August 2016, HMRC wrote to the Appellant informing it that it was required to be registered for VAT as supplies of staff are liable to VAT at the standard rate. The Appellant had been trading above the VAT registration threshold but had not registered for VAT in the belief that its supplies were exempt from VAT.

6. Correspondence ensued.

7. On 5 June 2018, HMRC advised the Appellant's representative that having reviewed the information provided, it had not changed its opinion that the service which the Appellant provided to the Board is the provision of staff rather than of medical services and as such should be standard rated for VAT. The reasoning was that the contract stated that it was the responsibility of the Board to provide the medical care and not the Appellant.

8. The review conclusion letter dated 21 June 2018 upheld that view on the basis that:

   (a) The obligation is on the Board to provide healthcare to the inmates of HMP Kilmarnock and the contract between the Board and the Appellant outlines how this will be delivered, ie by NHS staff and by the Appellant; and

   (b) The contract provides that the Appellant is engaged in "providing staff to the NHS so that the NHS can meet their obligations in relation to the healthcare of inmates of HMP Kilmarnock".

9. The Appellant duly appealed to the Tribunal and the hearing was on 10 June 2019. The Tribunal issued Directions on 4 November 2019 seeking further information regarding the statutory framework underlying the contract. Those submissions were duly lodged together with a supplementary joint Bundle of documents.

Matters not in dispute

10. The supply of staff is subject to VAT at the standard rate and the supply of medical care is exempt from VAT.

11. The facts that the Appellant is a company[1] and that the Board is the recipient[2] do not mean that the exemption cannot apply.

12. The contractual structure is not determinative.

13. The principal issue is the question of direction and control of the doctors.

The Law

14. Section 31(1) VATA states that a supply will be exempt from VAT "…if it is of a description for the time being specified in Schedule 9…". Item1 in Group 7 Schedule 9 VATA reads:

> "1. The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following-
>
> (a) The register of medical practitioners or the register of medical practitioners with limited registration….".

15. It is not disputed that the domestic legislation implements Article 132(1)(c) of the Principal VAT Directive, albeit HMRC relied on the Sixth Directive.

HMRC's arguments

16. HMRC's view, as articulated in the review conclusion letter dated 21 June 2018, can be summarised as

(a) The obligation rests with the Board to provide health care to HMP Kilmarnock,

(b) The contract outlines how that is delivered ie by NHS staff and by the Appellant, and

(c) The Appellant provides staff, being the GPs, so that the Board can honour its obligations.

17. In their Skeleton Argument HMRC quote from and rely on their own guidance at paragraph 6.3 in VAT Notice 701/57 but they did not include the final paragraph. I annex at Appendix 1 the full text of 6.3 and also the text of 6.4 to which I was referred in the hearing.

18. They also quote from and rely on their own guidance in VAT Notice 700/34 at paragraph 2.1 and I annex the full text of that at Appendix 2.

19. Although HMRC are clear that the contract confirmed the establishment and operation of a medical practice at HMP Kilmarnock, they contend that under that contract the Appellant supplies staff to the Board and that that is the question for the Tribunal to decide.

20. However, HMRC argue that the contractual arrangements between the parties is not determinative of the position for VAT and rely on *HMRC v Reed Personnel Services*[3]. They state that the Tribunal must take a realistic view of the arrangements which are in place and in that regard rely on *University of Glasgow v HMRC*[4].

Overview of the Appellant's arguments

21. The Appellant is the provider of the medical services and the contractual arrangements reflect that. Many of the provisions in the contract relate to the provision of medical services as opposed to a supply of staff. The contract is the means by which the Board secures the provision of primary medical services.

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[1] Paragraph 31 of Ambulanter Pflegedienst Kűgler GmbH v Finanzamt Fűr Kőrpershaften I ("Kugler") in Berlin Case C-141/00

[2] Gambro Hospal Ltd v HMRC [2004] UK BVC 2191 ("Gambro")

[3] 1995 BVC 222

[4] 2005 BVC 2583

22. If the contract were for the supply of staff then it should have specified that control of those individuals would pass to the Board and there would be no requirement for professional indemnity insurance.

23. The doctors do not work under the direction of the Board's staff and the Board's staff have no management control over them.

24. The Appellant is clear that the contract, as drafted, specifies the provision of medical services as opposed to the provision of staff.

25. The purpose of the exemption is to reduce the cost of medical care[5].

The Statutory framework for the contract

26. In the documentation there are various references to legislation but there was no detail in the Bundles. I therefore issued Directions seeking clarification. Mr Maciver is correct in stating that my wish was to set out the background to the appeal as fully and accurately as possible. I am obliged to both Mr Maciver and Mr Simpson for their submissions.

27. The statutory framework is decidedly convoluted and lacks clarity. It became clear that the references in the contract to the types of contract identified in the various parts of legislation bore little or no resemblance to the contract between the parties. I have therefore decided that it would serve no purpose to set out the statutory framework.

28. It suffices to say that Section 2C of the National Health Service (Scotland) Act 1978 as amended ("the Act") placed a duty on NHS Health Boards "… to provide or secure the provision of primary medical services as respects their area".

29. With effect from 1 November 2011 the provision of healthcare services to prisoners was transferred from the Scottish Prison Service to Health Boards.

30. Responsibility for the provision of healthcare at HMP Kilmarnock was borne by the Board as HMP Kilmarnock is within its geographical area.

31. In terms of the Health Board Provision of Healthcare in Prisons (Scotland) Directions 2011, Scottish Ministers gave Directions in exercise of the powers conferred by Sections 2(5) and 105(7) of the Act "…and of all other powers enabling them to do so"[6].

32. Direction 2(5) reads:

> "These Directions apply to the provision by Health Boards of healthcare to prisoners in prisons. Every Health Board which provides, or secures the provision of, healthcare to prisoners in prisons must comply with these Directions, and must ensure that every person with whom the Health Board enters into arrangements to provide healthcare to prisoners in prisons is obliged to comply with PART 1 of these Directions so far as relevant to the services provided by such persons."

That makes it explicit that the Board can provide health care either directly or through a third party provider.

33. It is not disputed by the parties that Directions 11 and 12 of the Directions empower the Board to engage services provided by a third party in order to meet its obligations.

The Contractual Framework

The Board

34. HMP Kilmarnock was operated by Serco Limited on behalf of Scottish Prison Service under contract with Scottish Ministers. From November 2011 onwards, prisoner healthcare

[5] Paragraph 29 of *Kugler*
[6] Preamble to those Directions

within the prison has been provided by the Board in terms of an amendment to the said contract between Serco Limited and Scottish Ministers.

The Invitation to Tender

35. By an invitation to tender dated 23 December 2011, the Board invited tenders from GPs in relation to HMP Kilmarnock.

36. The introduction to that tender stated:

> "The Health Board will establish HMP Kilmarnock Medical Practice in accordance with Section 2C of the NHS (Scotland) Act 1978.
>
> The objective of the Health Board in establishing the practice is to provide services to patients of a high quality comparable to that in the wider community in an efficient and cost effective manner….
>
> The Health Board proposes to enter into a contract of service agreement with appropriately qualified and experienced general medical practitioners to provide the GP medical services to the prison in hours and out of hours."

37. At Section 3 the invitation to tender specifies the medical services in considerable detail including requirements for:

(a) An assessment of prisoners on admission by a doctor (clause 3.2),

(b) Assessment by the GP of any need for prescribed medication (clause 3.3),

(c) GP consultations (clause 4.1),

(d) A total of 10 GP clinics each week (clauses 4.2 and 4.3),

(e) Preparation of liberation and transfer summaries (clauses 4.4 and 4.5),

(f) "In addition to the services specified…the practice will provide Essential Services and Additional Services as defined in the NHS (General Medical Services Contract) (Scotland) Regulations 2004. GPs providing these services will need to demonstrate an understanding of and experience of the range of medical issues specific to a prison population such as addiction, mental health problems, learning disability problems, blood-borne virus and long term conditions" (clause 4.6),

(g) Out of hours medical care on an on-call basis (clause 5.1),

(h) Professional indemnity cover arranged with a recognised provider that specifically covers their clinical activities within HMP Kilmarnock (clause 12.1.), and

(i) The clinical governance committee of the Board delegated oversight of clinical standards ultimately to the prison clinical governance group and the successful tenderer will be represented on the Group by a GP providing services within the prison (clause 13.1).

38. It also stipulated at numerous points what the "the provider of GP primary medical services" or "the GP medical services provider" would be required to do.

39. It made it explicit that although the provider "…would need to work closely with Health Board staff as part of a multi-disciplinary team in the delivery of services to patients…" but the "...overall management of the service rests with the Health Board".

The Contract

40. Having won the tender, the Appellant was incorporated on 22 May 2012 and at the relevant dates the five shareholders and directors were Dr Robert Church, Dr Paul Dunlop, Dr Bruce Henderson, Dr Awfa Paulina and Dr Abha Paulina. The nature of the company's business is described as "general medical practice activities".

41. On 31 May 2012, the Appellant entered into a contract with the Board whereby the Board undertook (a) to establish a medical practice for the provision of services to patients from 1 June 2012 and (b) to procure the necessary facilities, equipment, consumables, administrative staff and nursing care.

42. The contract runs to 73 pages. Clause 4 and Part 1 of the Schedule specify the Services (defined as General Medical Services) which the Appellant contracted to provide. Clause 4.1 specifies that those shall be provided "…with all reasonable skill and care".

43. In summary, and the list is not exhaustive, the Appellant is required to assess all new prisoners within 72 hours of arrival, provide GP clinics in the Health Centre facility, liberation summaries in addition to clear ongoing communication with community based GPs to ensure continuity of care, transfer summaries where prisoners are transferred to another prison and, in addition, they are required to provide Essential Services and Additional Services as defined in the NHS (General Medical Services Contract) (Scotland) Regulations 2004. The Appellant must provide an out-of-hours service providing advice, remote prescribing and GP attendance as required and as agreed with the NHS nurse. The GPs are required to actively participate in multi-disciplinary teamwork. In that context they are responsible for clinical supervision and leadership and have responsibility for medical referrals to visiting clinicians.

44. Clause 4.5 provides that if the Board requires Additional or Enhanced Services (as defined in the National Health Service (Primary Medical Services Section 17C Agreement) (Scotland) Regulations 2004), the parties will co-operate and the payment may be either increased or decreased depending upon the savings made or the increase in costs.

45. Clause 5.1 specifies that the Appellant shall "…liaise and co-operate" with the Board in order to further the aims and objectives of the Board in relation to the provision of medical services.

46. There are a number of clauses setting out obligations in regard to training, prescribing, providing information etc.

47. Clause 22.1 provides that the Appellant is responsible for monitoring the performance of the doctors.

48. Clause 23.1 specifies that the Appellant shall "...at all times hold adequate insurance against liability arising from negligent performance of clinical services…".

49. Clause 23.2 prohibits the Appellant from sub-contracting its obligations to provide clinical services unless it is satisfied that any sub-contractor holds adequate professional negligence insurance.

50. The payment profile is a fixed annual sum for both in hours and out of hours work. There is no reference to VAT.

51. Part 1 of the Schedule also includes requirements for professional indemnity cover clinical activities, contingency planning for business continuity, clinical governance and quality standards specification.

52. Part 10 of the Schedule deals with quality control pointing out that the "Provision of healthcare to prisoners will be delivered by a section 2C contract with a doctor…". It then sets out the clinical standards that the Appellant is required to implement and that includes annual appraisal for the doctors.

The Board's perspective

53. There was in the Bundle a letter from the Assistant Director of Finance dated 25 April 2018 which set out the Board's views on how the Appellant operated, namely:

(a) The Appellant does not operate as a GP practice which would be entitled to payment under different legislation. It operates, and is paid, under a service contract.

(b) GP practices have to operate core hours within their contracts. The Appellant provides GPs at the times that they deem to be the most efficient and effective.

(c) The contract contains no terms dealing with attendance, discipline, line managers, working under direction or specified duties.

(d) The Appellant has control over whether or not they see patients.

(e) The Appellant is not supervised directly and beyond the requirements set out in the contract, they provide medical services as they deem fit.

(f) They provide additional services that are not part of the contract, such as joint injections, without any request from the Board but because they wish to do so.

(g) They are responsible for, and arrange at their own expense including the cost of locum cover, their training and development for those additional services. The Board has no input in that regard.

(h) There is no administrative support from the Board to assist with typing and sending of referral letters.

(i) The Appellant created and implemented new procedures without input from the Board, although, of course, the Appellant shared such matters with the Board.

(j) Where drugs are not available the Appellant places the order with the NHS.

(k) When the Appellant arranges locum cover, it is responsible for all background checks and for payment of the locums. The Board has never been asked to provide cover.

(l) All insurances are held by the Appellant or by the GPs personally.

54. None of these statements have been challenged and, indeed, many were vouched by the evidence of the two witnesses. Points (b), (d) and (e) were also covered in the Determination by Sheriff Principal Duncan Murray in 2018 in relation to a Fatal Accident and Sudden Deaths Inquiry ("the FAI"). Indeed, one of the issues in the FAI was the flexibility enjoyed by the Appellant in relation to when GPs were, or were not, required to be in the prison. I therefore find these matters as fact.

Additional findings in fact based on the witnesses' evidence

55. As I indicated at the outset I found both witnesses to be wholly credible.

56. The Appellant has undertaken ongoing service development work in relation to clinical matters over the period of the contract. The doctors have attended training courses at their own expense and written protocols for patient management that are followed by both the doctors and the NHS staff. Those were viewed by the Board's pharmacist responsible for the prison who provided comment and collaborated in some areas but they were not ratified by the Board.

57. Although the contract provided for ten sessions per week including one on a Friday evening or Saturday morning to cover new admissions to the prison, the Appellant had total autonomy in terms of deciding when and how to deliver patient care. In practice although the GP covering the session assumes responsibility at 8.00am, the GP does not routinely attend until much later since they are unable to see patients until after 9.00am and the prison is locked

down. The prison is again locked down between 11.30am and 1.30pm. Dr Henderson's evidence to the FAI was that he would routinely work from home after 11.30am.

58. Although the NHS would investigate any complaints from prisoners, the Appellant is responsible for any disciplinary action in relation to the GPs. There was one such incident where the clinical lead was demoted by the Appellant.

Discussion

59. I agree with Judge Short in *City Fresh Services Ltd v HMRC*[7] at paragraph 42 where she states that:

> "The difference between making a supply of services and making a supply of staff that provide those services can be a fine distinction for VAT purposes. On the basis of the authorities, a supply will be a supply of staff if the recipient, by controlling the person supplied, can control their activities and in doing so change the nature of the supply made … There will be a supply of staff if there has been a change of control from the supplier to the recipient over the activities of the individuals concerned."

60. Undoubtedly, the Board is under a statutory obligation in relation to the healthcare provision in prisons but Section 2(C) of the Act makes it clear that that obligation is to "… provide or secure …" that provision. Therefore, the Board can fulfil its obligation by providing the primary medical service itself, for example, through employees or it can arrange for someone else to provide medical care.[8]

61. The Supreme Court has held that the contract is the starting point in determining the nature of a supply and the legal rights and obligations between the parties. This is because the contractual position normally reflects the economic and commercial reality of the transactions.

62. Thus, in *HMRC v Secret Hotels2 Ltd*[9] ("Secret Hotels2"), Lord Neuberger stated at [31]-[32]:

> "31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J. said in A1 Lofts Ltd v Revenue and Customs Commissioners [2010] STC 214, para 40, in a passage cited by Morgan J:
>
> > 'The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy* Centres (UK) Ltd v Lanwall Services Ltd [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.'"

[7] 2015 UKFTT 0364 (TC)
[8] Paragraph 30 Gambro
[9] [2013] STC 784

63. I have also had regard to Lord Neuberger in *Arnold v Britton and others*[10] at paragraph 15 which reads:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30."

64. There was in the Bundle the 2018 Determination by Sheriff Murray in 2018 in relation in the FAI. At paragraph 114 he states in relation to that Schedule in the contract that the "…Schedule is not well expressed and is open to interpretation" and that "…I note the Health Board considered that the contract should be viewed flexibly and in a permissive way". He found it surprising that Ms McMurdo "appeared uninformed about the operation of the contract, given she accepted it had been her responsibility to manage the contract over the period when it was twice renewed." He also observed that he had heard evidence from her that "…the contract was not as 'efficient as it could be'" and that led him to recommend that the Board "…should give careful consideration to specification of the required services in the successor to the existing contract".

65. I entirely agree with those observations.

66. Dr Henderson was clear that the contract was written as a best guess based on experience of community practices but the reality was that it did not work because of the unique requirements of the prison. They had inherited a system that was not for purpose. The Appellant undertook a significant element of service design which departed from the contractual framework. This was achieved on their own initiative and without input from the Board other than to ensure that the changes did not adversely affect the Board.

67. Ms McMurdo the Senior Manager appointed by the Board has operational management responsibility for the full range of prison based healthcare services delivered in HMP Kilmarnock. She was very clear that she had no line management responsibility for the GPs. She stated equally clearly that the doctors were autonomous in all that they did. The only prescribed matter was security training which was imposed by the prison on everyone.

68. Although she did investigate complaints it is exclusively the Appellant which deals with disciplinary issues about doctors.

69. She was unable to comment on the contract, explaining that it was not her *forte*.

70. In my view, at best, the contract is simply indicative of the Board's aspirations at the outset and it has rarely, if ever, been taken into consideration. It is clear that when the Appellant implemented service design changes causing significant deviation from the contract the contract was never amended.

71. HMRC argue that one expects members of the medical profession to exercise their functions with considerable personal autonomy. That is undoubtedly the case in respect of exercise of clinical judgement. However, as can be seen in this instance, the Appellant exercised far more autonomy than that. The Appellant was able to choose and vet locums,

[10] [2015] 2 WLR 1593

permit the GPs to work at home rather than in the prison, and choose when the GPs worked. As could be seen the Appellant arranged for and chose what the Appellant considered to be appropriate training other than in relation to security, standards for which are specified by HMP Kilmarnock. They were free to change working practices.

72. The reality is that the Appellant has had a free hand to decide what the GPs do, how they do it and when, and that is very clearly borne out by the Determination in the FAI and by the witness evidence.

73. If the Appellant supplied staff only, then as Mr Simpson graphically put it, the Appellant's responsibility would stop at the prison gate. It most certainly did not.

74. I am clear that in the words of paragraph 29 of *Gambro* the "predominant characteristic" of the supply made by the Appellant is the provision of medical care.

75. I find that the Board exercised no control in relation to how the Appellant delivered medical care in the prison. It appears that the contract was, as the Sheriff observed, largely ignored by the Board's management.

76. I do not accept Mr Maciver's argument that, to the extent that there was autonomy, it was the individual GPs who were autonomous and not the Appellant. Whilst I accept that all clinicians exercise a degree of autonomy in their clinical work nevertheless, as is evidenced by the example given by Dr Henderson of disciplinary action taken in relation to one of the GPS who was demoted, it is the Appellant that directs and controls the GPs.

77. It was the Appellant that decided on ways of working, training requirements, the provision of locums and all disciplinary matters. If there was a major change in working practices service managers in the Board were consulted but only, as Dr Henderson said, to ensure that "…there were no downstream adverse effects that we were not aware of…".

78. I accept that the Appellant worked on a collaborative basis with the Board but I find that the direction and control of the GPs, and the locums, rested at all material times with the Appellant and not with the Board.

79. Since I make that finding the HMRC Guidance is not relevant.

Decision

80. The supplies made by the Appellant consist of the provision of medical care by suitably qualified medical practitioners. Therefore, those supplies fall within the exemption from VAT and the Appellant has no requirement to register for VAT.

81. The appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

82. 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.

ANNE SCOTT

TRIBUNAL JUDGE

RELEASE DATE: 31 JANUARY 2020

Appendix 1

Paragraphs 6.3 and 6.4 VAT Notice 701/57

6.3 Supplies of registered health professionals (other than nurses) by employment businesses acting as a principal

The Employment Agencies Act 1973 defines an "employment business" as a "business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity".

Staff supplied by an employment business may be either employees of that business, or self-employed and engaged by that business. In both cases the workers' services are provided to the employment business, which in turn makes a supply of that worker to the client. If the worker comes under the direction and control of the client, this is a supply of staff. The employment business in these circumstances is acting as the "principal".

When an employment business supplies registered health professionals (other than staff subject to the nursing agencies' concession referred to in paragraph 6.5) as a principal to a third party, it's making a taxable supply of staff to that third party – not an exempt supply of healthcare. It's the third party which is responsible for providing healthcare to the final patient, rather than the business supplying the staff which has no such responsibility.

A taxable supply of staff is made even where the employment business is responsible for ensuring that the workers it provides are properly trained and qualified when they work under the control of the third party.

However, if the employment business maintains the direction and control of its health professional staff to make a supply of medical care directly to a final consumer, then the employment business is providing medical services rather than merely a supply of staff. In these circumstances, the business is making an exempt supply of health services (provided, of course, the services meet the conditions for exemption under paragraph 2.3).

6.4 Supplies of self-employed locum GPs

When self-employed locum GPs supply their services to an employment business which makes an onward supply to a third party who is legally responsible for providing health care to the final patient, both the supplies to and from the employment business are taxable. The fact that the locum GPs may be supplied to a prison or other institution where they may not be supervised by any medical staff does not mean that the employment business supplying the locum doctor to the third party is legally responsible for providing healthcare to the final patient.

Appendix 2

Paragraph 2.1 VAT Notice 700/34

2.1 Supply of staff

You make a supply of staff for VAT purposes if, for a consideration, you provide another person with the use of an individual who is:

- contractually employed or otherwise engaged by you
- Is a director of your company

For more information about consideration see paragraph 2.3

There is a supply whether the terms of the individual's employment or engagement with you are set out:

- in a formal contract or letter of appointment
- on a less formal basis

What is important is that the staff are not contractually employed by the recipient of the supply, but come under the direction of that person.

If your business supplies services, such as construction services, to another person but your staff continue to operate under your direction, this is not a supply of staff. It's a supply of those construction or other services. This difference is important where the services may be zero-rated or exempt, or when determining whether or not the supply is made in the UK.