[2017] UKFTT 093 (TC)

TC05611

Appeal number: TC/2015/07102

VAT – supply of goods through Amazon sales portal – net revenues from sale paid by Amazon to the appellant's bank account – was the appellant the supplier of the goods? – held, on the particular facts of the case, no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AVALAYA.COM PARTNERSHIP **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS ("HMRC") **Respondents**

TRIBUNAL: JUDGE ZACHARY CITRON
MR NIGEL COLLARD

Sitting in public at Fox Court, London on 13 September 2016

Mr Alex Starostin, partner in the Appellant, for the Appellant

Ms Esther Hickey, Presenting Officer, for the Respondents

DECISION

1. The issue in this case was whether the appellant – or another person - had made taxable supplies of goods (fashion jewellery) through the Amazon sales channel where, in unusual circumstances, Amazon had paid the proceeds of the sales of the goods (net of its commission) to the appellant's bank account.

The appeal

2. By letters dated 24 December 2014 and 17 February 2015, HMRC notified the appellant of assessment of VAT due under s73 Value Added Tax Act 1994 (the "Act"), as follows:

VAT quarterly period	VAT due
12/10	£18,452
03/11	£9,550
6/11	£10,075
9/11	£10,019
12/11	£59,866
3/12	£18,726
6/12	£8,124
9/12	£5,014

3. HMRC sent the appellant a "penalty explanation" letter dated 20 March 2015, in respect of a related penalty of £22,789.62. The penalty percentage was 18%. A notice of penalty assessment in this amount was sent to the appellant by HMRC on 20 April 2015.

4. The appellant requested a statutory review of HMRC's decision; by letter dated 5 August 2015, HMRC upheld their original decision. The appellant appealed by notice of appeal dated 30 November 2015

5. At the hearing, the appellant withdrew its appeal with respect to the assessments for the 6/12 and 9/12 periods.

Evidence

6. We had a document bundle containing copies of correspondence between the parties and other documents related to the appeal, including:

(1) A five-page "Investment and Development Agreement" dated 8 January 2009 between Mr Alex Starostin and Ms Nina Stepanets, the partners in the appellant (described as the "investor"), and Ms Alla Kisil, trading as Jewellery 4 All (described as the "investee"). The core of the agreement (clauses 2 and 3) was a 12 month "investment" of the appellant in Jewellery 4 All, in the form of a $60,000 interest-free loan to be repaid in Pounds Sterling. There were also clauses dealing with the background to the appellant's and Jewellery 4 All's businesses (clause 1), specific business arrangements (clause 4) and cooperation and no competition (clause 5). The copy of the agreement in the bundle was signed by Mr Starostin, Ms Stepanets and Ms Kisil.

(2) A one-page schedule prepared by the appellant headed "Investment repay - Repayment calculations - Total invested USD 60,000". It recorded, on 15 dates between 7 May 2009 and 18 November 2009, amounts received by the appellant in Sterling, translated into US Dollars, and decreasing "amounts owed" in Dollars, culminating in a negative amount with the note "this needs to be paid back to Alla". This schedule in effect shows how the $60,000 loan to Jewellery 4 All was repaid to the appellant.

(3) Two schedules prepared by the appellant headed "Exchange transfers 2010" (3 pages) and "Exchange transfers 2011" (4 pages) respectively. These showed:

(a) Dates in 2010, 2011 and the first quarter of 2012 with amounts of "payments received" in Sterling on those dates; and translation of such amounts into Dollars. Mr Starostin said that these were amounts paid by Amazon into the appellant's UK bank account with Barclays.

(b) Dates and amounts transferred, in Dollars, by "Alex" and "Nina". Mr Starostin said that these were amounts paid by himself and Ms Stepanets from their personal bank accounts in the Ukraine, to a personal account of Ms Kisil in the Ukraine.

(c) Notes on the above, including to explain where payments by Mr Starostin and Ms Stepanets were "overpayments for the future" or "to be paid later" or "contribution towards the balance". Certain payments were noted as "lending extra money", "lent extra money as agreed with Alex, Nina & Alla", "owing so far to be repaid". One or two were to the effect that "Alex's father lent" and "Nina's sister lent" (referring to how the payments by Mr Starostin and Ms Stepanets were funded).

(d) Each schedule totted up the following totals:

(i) "Total investment into [the appellant]" in Sterling

(ii) "Total paid by [Mr Starostin]"

(iii) "Total paid by [Ms Stepanets]"

(iv) "[Mr Starostin's] investment in %"

(v) "[Ms Stepanets'] investment in %"

(e) The 2010 schedule showed an amount owed by the appellant after the period end. The 2011 schedule indicated that a "final payment" was made on 20 April 2012.

(4) Bank statements of Mr Starostin's personal account at a Ukrainian bank, Prominvestbank, from October 2011 to February 2012 (12 pages), showing transfers in Dollars of large round amounts (typically $10,000) to an account number 127688274002 (at Prominvestbank Kiev). The dates and amounts appeared to correspond to payments by Mr Starostin to Ms Kisil as set out in the 2011 schedule referred to in sub-paragraph (3) above. The bank statements did not state a name against account number 127688274002. The text of these bank statements was in Ukrainian so we had to rely on Mr Starostin's translation. Mr Starostin said he was only able to get statements on this account from October 2011. No copies of Ms Stepanets' personal bank statements were produced.

(5) "VIES" printouts and "SCAC 2010 requests" (supplies of information in accordance with article 15 of Council Regulation (EU) 904/2010 (VAT Administrative Co-operation Regulation)) between HMRC and the Luxembourg tax authorities indicating that Amazon Services Europe Sarl had charged commission fees to the appellant for services rendered of certain monthly amounts during 2010-2012. HMRC's analysis showed that the amounts of sales to the appellant recorded by Amazon in these reports corresponded (after commission taken by Amazon) to payments that had been made by Amazon to the appellant's Sterling bank account. The amounts assessed by HMRC in the assessment under appeal were based on these figures.

(6) An analysis by HMRC of the appellant's VAT returns between 2007 and 2012 which indicated that its inputs exceeded its outputs over that period by £553,581.

7. We also heard oral evidence from Mr Starostin and from Mr Andrew Nicholas, a higher executive officer of HMRC who had conducted the enquiry into the VAT affairs of the appellant. We found both to be credible witnesses. Mr Nicholas provided a witness statement dated 10 June 2016, setting out the steps he had taken during the enquiry, and much of Mr Starostin's evidence was contained in a document signed by him entitled "appellant's notes to the respondent's statement of case" and dated 15 July 2016.

HMRC's submissions on the evidence

8. Ms Hickey made the following submissions on the evidence, all of which she said supported a finding that the appellant's business, and that of Ms Kisil (known as Jewellery 4 All), were the same:

(1) that the "Investment and Development Agreement" could be read as saying that the appellant would develop websites for both itself and Jewellery 4 All (clause 1.1); and that the provisions in clause 3 for the proceeds of Jewellery 4 All's sales via the Amazon portal to be paid to a bank account of the appellant and used to repay the loan, indicated that the appellant and Jewellery 4 All were really one business. It was highly irregular for one business to pay all of its sales over to another business, even for seven months. The agreement did not create any separation between the appellant and Jewellery 4 All as businesses; revenues from the Amazon sales portal were paid to the appellant's bank account because those moneys belonged to the appellant;

(2) that there was no evidence that Jewellery 4 All traded in its own right;

(3) that it was hard to believe that, after repayment of the 2009 loan, a business (Jewellery 4 All) would have its revenues (from the Amazon portal) paid into another business' (the appellant's) bank account. Equally, it was hard to believe the partners in the appellant would transfer their personal money to a third party, Ms Kisil, for Ms Kisil to make purchases and incur expenses, and then pay all the revenue from her business' sales on the Amazon portal to the appellant; and

(4) that the appellant was making an unsustainable net loss. The appellant's VAT returns – with its inputs in 2007-2012 exceeding its outputs by over £500,000 – looked more credible if one adds the sales via the Amazon portal to its outputs.

9. Ms Hickey also submitted that there was no evidence to corroborate Mr Starostin's statement that payments from his personal Ukrainian account to account number 127688274002 at Prominvestbank Kiev, were to Ms Kisil.

Findings of fact

10. We make the following findings of fact relating to the period relevant to this appeal (October 2010 to March 2012 inclusive).

(1) The appellant was a partnership of Mr Starostin and Ms Stepanets carrying on a business of selling jewellery online through a website. It was registered for VAT in 2007 under registration number 897 4765 46.

(2) Ms Alla Kisil was a personal friend of the partners in the appellant and, like them, was of Ukrainian origin. Also like them, she had a jewellery-related business, but her business, unlike the appellant's', sold through the Amazon sales portal and traded under the name "Jewellery 4 All". We thus find that Ms Kisil had a separate business to the appellant's. Our reasons for not accepting Ms Hickey's submissions at paragraph 8 above are (in summary) as follows:

(a) As regards the submission at sub-paragraph 8(1), we find that the "Investment and Development Agreement" does provides evidence that the appellant and Ms Kisil had separate businesses – they are consistently presented in it as distinct parties with distinct businesses; this is consistent with the statement in clause 8.4 of the agreement that the parties are

independent contractors and the agreement does not create an agency, partnership or joint venture between them; and we find (see sub-paragraph (5) below) that the arrangement for payment of the proceeds of Ms Kisil's business to the appellant's bank account, whilst unusual, was included not because the two businesses were one, but rather to ensure repayment of the loan to the appellant.

(b) As regards the submission at sub-paragraph 8(2), the evidence for Jewellery 4 All trading in its own right is Mr Starostin's oral evidence, which in our view is corroborated by the "Investment and Development Agreement" and the schedules referred to at sub-paragraphs 6(2) and (3) above.

(c) As regards the submission at paragraph 8(3) above, we agree with Ms Hickey that the payment of monies by Amazon into the appellant's bank account is evidence from which one would normally infer that the appellant was the business supplying the jewellery to Amazon's customers; and, absent contrary evidence, would be decisive of this question of fact. However, in this case, there is contrary evidence – Mr Starostin's oral evidence and the schedules and bank statements referred to at sub-paragraphs 6(3) and (4) above. We found Mr Starostin's explanation of the circumstances to be credible; the schedules to be detailed and consistent with Mr Starostin's oral evidence; and the bank statements also to be consistent with the schedules and oral evidence. We note the only apparent discrepancy between the bank statements (for the period of time we have them) and the schedule for 2011 are two payments of $10,000 in December 2011 which are not shown in the bank statements – but the schedule explains this in the notes against both payments, where it says "Alex's father lent". We find this evidence strong enough, on the balance of probabilities, to overturn the natural presumption that the identity of the supplying business can be inferred from the bank account into which the customer's money was paid. Hence our findings, at sub-paragraphs (7) to (10) below, as to the terms of and reasons for the unusual arrangements upon which Ms Hickey was commenting.

(d) Our response to the submission at sub-paragraph 8(4) can be seen at sub-paragraph (10) below, where we find that the partners in the appellant were prepared to fund the appellant's losses at this relatively early stage of its development.

(3) The way the Amazon sales portal worked was that Amazon users would purchase goods (in this case, jewellery) and pay Amazon; Amazon would then remit the sale proceeds, less their commission, back to the supplier of the goods (or, in this case, at their direction – see sub-paragraph (5) below).

(4) Due to their personal relationships and the similarity of their businesses, there was considerable business cooperation and interaction between the appellant and Ms Kisil.

(5) An instance of such interaction, prior to the period relevant to this appeal, was the interest-free $60,000 loan made by the appellant to Miss Kisil trading as

Jewellery 4 All in January 2009 (and documented in the "Investment and Development Agreement"). This agreement provided that revenues paid by Amazon to Jewellery 4 All (net of Amazon's commission) would be paid into a Sterling bank account of the appellant – out of which loan repayments would be made to the appellant. This was a security mechanism to ensure that the appellant had primary access to the funds that would repay its loan. We infer from the evidence that Ms Kisil

(a) directed Amazon to make payments to the appellant's bank account (to comply with this term of her agreement with the appellant); and

(b) in response to enquiries from Amazon (relevant to whether Amazon would need to charge VAT on its commissions), gave them the appellant's VAT number, to which she had access.

(6) The "Investment and Development Agreement" provided for cooperation between the appellant and Jewellery 4 All; and it gave the appellant a degree of control over important financial decisions of Ms Kisil's business and expenditures by Ms Kisil's business of over £1,000 (we regard these as a form of further security for repayment of the loan). The agreement stated that it was to be regarded as terminated if the loan was repaid before the end of 12 months (clause 3.11). As the loan had been fully repaid by 18 November 2009, the agreement had already terminated prior to the period relevant to this appeal.

(7) Following the repayment of the loan, and during the period relevant to this appeal, the appellant and Ms Kisil continued to have the revenues from Ms Kisil's business (net of Amazon's commission) paid to the appellant's Sterling bank account – in other words, we infer that following termination of the loan, Ms Kisil did not instruct Amazon to pay such moneys to a different account (of hers). During this period, the partners in the appellant paid equivalent amounts, in Dollars, from their personal bank accounts in Ukraine, to account number 127688274002 at Prominvestbank Kiev, which we find (based on Mr Starostin's oral evidence, corroborated by the schedules referred to at sub-paragraph 6(3) above) to be Ms Kisil's bank account. The amounts transferred by the partners were not exactly equal to the sums received in the appellant's Sterling bank account – they transferred in rounded amounts, and kept track of over- and under-payments in the schedules referred to at paragraph 6(3) above.

(8) The reasons for this arrangement were as follows:

(a) Ms Kisil's business received revenues in Sterling but needed to pay its suppliers (who were largely in the Far East) in Dollars – hence, Ms Kisil's business had Sterling but needed Dollars.

(b) The appellant needed Sterling to pay its suppliers, who were largely in the UK. Its partners, who were funding the appellant, had personal funds in Dollars. Hence, the appellant's partners had Dollars but needed Sterling to fund the appellant (which at this stage was loss-making – see sub-paragraph (10) below).

(c) Hence, the arrangement suited the parties' objectives by effectively converting Ms Kisil's business' revenues from Amazon into Dollars, and

at the same time enabling the partners to contribute equity to the appellant in Sterling, in an equal amount – and doing this without incurring currency conversion fees for either party.

(9) This arrangement resulted in around £208,000 being invested into the appellant by its partners in 2010 and around £494,000 in 2011 and the first three months of 2012 (these being the sum of amounts paid to the appellant's Sterling bank account by Amazon).

(10) The arrangement resulted in the monies paid to the appellant's bank account by Amazon being treated as equity invested in the appellant by its partners. The appellant therefore used such moneys for ordinary business needs, such as to purchase stock. Much of the money the appellant received, either as investment from its partners or from sales, was spent on buying stock (fashion jewellery). Having an extensive collection of fashion jewellery available for immediate despatch to customers was part of the appellant's business strategy – and it helped the appellant to get preferential rates from suppliers. The partners accepted that the appellant would operate at a loss in this relatively early phase of its development and were prepared to fund that loss.

(11) The appellant acquired the Amazon selling channel from Ms Kisil in April 2012 (when Ms Kisil moved back to the Ukraine for personal reasons).

The law

11. Section 1 of the Act provides:

> (1) Value added tax shall be charged, in accordance with the provisions of this Act—
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply),
>
> (b) ….
>
> (c) …
>
> and references in this Act to VAT are references to value added tax.
>
> (2) VAT on any supply of goods or services is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply.
>
> ….

12. Section 4 of the Act provides:

> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

13. Section 5 of the Act provides:

> (1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.
>
> (2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—
>
> > (a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
> >
> > (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

14. Section 47 of the Act provides:

> (1) …
>
> (2A) Where, in the case of any supply of goods to which subsection (1) above does not apply, goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and as a supply by the agent.
>
> ….

15. Section 73 of the Act provides:

> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> ….

Arguments of the parties

16. Mr Starostin submitted that the jewellery supplied through the Amazon sales channel was supplied by Ms Kisil trading as Jewellery 4 All, and not by the appellant.

17. Ms Hickey submitted that the appellant was liable to pay output tax on the supplies through the Amazon sales channel because the appellant made those supplies as principal. Amazon billed the appellant for commission, because the appellant was Amazon's customer. The monies received from Amazon were for goods sold by the appellant; and as the appellant was a registered person for VAT purposes, VAT is required to be paid on the receipts from Amazon under s4 of the Act.

Discussion

18. This is a case which is essentially decided on the facts. On the facts as we have found them, the appellant was not the person who made the supplies of jewellery sold

via the Amazon sales portal in the period relevant to this appeal. Rather, in the unusual circumstances of this case, the supplier was a different person – Ms Kisil trading as Jewellery 4 All – who entered into a financial arrangement with the appellant, described and explained in sub-paragraphs 10(7) and (8) above, in order to minimise currency conversion fees for both parties. That arrangement, of which Amazon was unaware, arose from an unusually close working relationship between the two businesses, explicable by reference to the personal relationships involved. However, we do not find that this cooperation rose to the level of partnership – we do not find that they shared profits or that they were in business together. Nor do we find that the appellant was an agent acting in its own name in relation to these jewellery sales – its involvement was the financial arrangement described in the sub-paragraphs referred to above. Hence the appellant was not itself the person who made the supplies of goods in question here.

19. We acknowledge that this outcome, viewed from the broader perspective which HMRC understandably take, may seem an unsatisfactory one, in that it leaves unanswered the question of whether VAT was accounted for on these sales of jewellery in the period relevant to this appeal. However, the question in this appeal is whether that VAT was a liability of the appellant and, on the facts as we have found them, our decision is that it was not.

Conclusion

20. The appeal is allowed; the assessments and penalty assessments raised by HMRC in respect of the VAT quarterly periods from 12/10 to 3/12 inclusive, are discharged.

21. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 19 JANUARY 2017