Neutral Citation: [2023] UKFTT 701 (TC)

Case Number: TC 08893

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/00460

VAT – Travel Operators Margin Scheme – use of direct effect by appellant – whether error within the meaning of Regulation 35 – no – whether State imposition of direct effect in rejecting error claim – no – whether breach of fiscal neutrality – no – appeal dismissed

Heard on: 10 February 2023
Judgment date: 3 August 2023

Before

TRIBUNAL JUDGE ANNE FAIRPO
SONIA GABLE

Between

GOLF HOLIDAYS WORLDWIDE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Edwards of MHA Macintyre Hudson LLP

For the Respondents: Ms McArdle, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Introduction

1. 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.

Background

2. The appellant (Golf) appeals against a rejection by HMRC of a claim for overpaid output tax. Golf filed an error correction notice (ECN) for the periods 03/17 to 03/21, together with a claim for under-claimed input tax. Golf had accounted for its supplies within the Tour Operators Margin Scheme (TOMS); the ECN was filed to reverse that position. HMRC rejected the ECN on the basis that there had been no error made by Golf in its VAT returns.

3. In its 03/17 to 03/21 returns, Golf had treated its wholesale supplies as being within TOMS. The ECN was filed on the basis that this was an error within Regulation 35 of the Value Added Tax Regulations 1995 and the wholesale supplies should be within the normal VAT rules.

4. The question for this Tribunal was only whether there had been a relevant error which could be corrected by way of the ECN, or whether Golf's original position had been a lawful option which could not be reversed by way of the ECN.

Relevant law

5. Regulation 35 of the VAT Regulation 1995 states that where a taxable person has made an error in accounting for VAT or in any return then that person shall correct the error either in accordance with regulation 34 or in such manner and within such time as HMRC may require.

TOMS changes

6. The appeal arises from changes in the treatment of supplies under TOMS. TOMS is a special VAT scheme established by the EU (Article 306 of Council Directive 2006/112/EC, the Principal VAT Directive) allowing (in brief) supplies by tour operators to be treated as a single supply of services, with a value for VAT purposes based on the margin earned by the tour operator.

7. The ECJ decided, in *EC Commission v Kingdom of Spain* (Case C-189/11), that wholesale supplies were within the scope of TOMS. HMRC issued updated guidance with regard to this in Revenue & Customs Brief 05 (2014) ("Brief 05/14"). This Brief stated that there would be no changes to the operation of TOMS in UK domestic law but that UK businesses could choose to apply the direct effect of EU law and treat wholesale supplies as within TOMS in accordance with this ECJ decision.

8. HMRC contended that as UK domestic law used the same terms as those in EU law, the UK was not in breach of the Principal VAT Directive in respect of the use of TOMS for wholesale supplies and that there had been an administrative error in the position taken in Brief 05/14. As such, it contended that there had been no error made by Golf when it accounted for VAT in accordance with TOMS on the relevant supplies, as the use of TOMS for wholesale supplies was consistent with UK domestic law read in conformity with EU law (per *MarLeasing SA* Case C-106/89).

9. HMRC argued that this meant that there was, effectively, a concession that allowed wholesale supplies to be treated as outside TOMS by UK businesses if they chose to do so. The

wording of Brief 05/14 (to the extent that it states the contrary) was an administrative error and did not have the force of law in this context.

10. Golf argued that *MarLeasing* did not enable the Tribunal to effectively rewrite UK domestic legislation and that to follow HMRC's submissions would go beyond the interpretation permitted or required by *MarLeasing* and would effectively mean that the Tribunal was rewriting UK domestic legislation. Golf contended that HMRC specifically intended to depart from the ECJ decision in Kingdom of Spain and could not rely on *MarLeasing* to solve any difficulties that arose. It was therefore UK law, and not a concession, that wholesale supplies were outside TOMS.

11. Neither party's submissions on the state of the law were particularly well developed or convincing either for or against the proposition.

12. If HMRC are correct then Golf cannot have made a relevant error as their case is founded on their choice of VAT treatment not being compatible with UK domestic law.

13. Given that we have found, as set out below, that Golf's use of TOMS was not in any case an error within the context of Regulation 35 even if UK domestic law was not consistent with EU law, there is no need for us to reach a conclusion as to the extent to which UK domestic law complies with EU law in this area and so we have not done so.

Submissions and discussion

14. Mr Anderson, Golf's director, provided a witness statement and gave oral evidence in the hearing. His evidence was principally as to the background to the making of the claim and was not substantially disputed. As such, we have not directly reproduced that evidence here.

Whether there has been a relevant error

15. Golf submitted that the correct legal position is that described in Brief 05/14, that UK law excludes wholesale supplies from TOMS and requires a taxable person to apply the normal VAT rules. Therefore, under UK domestic law, and HMRC published policy, TOMS was not applicable to Golf's wholesale supplies to non-UK customers. Golf contended that it had therefore made an error in its VAT returns when it accounted for VAT using TOMS in respect of those supplies. That error was corrected by the ECN, as those supplies should have been accounted for as being outside the scope of UK VAT.

16. Golf contended that the company had not made an active choice to apply TOMS, as the company personnel had followed their accountant's advice and were unaware that TOMS did not (apparently) apply to wholesale supplies. It submitted that the use of TOMS in this context was an error leading to the company accounting for more VAT than if it had simply applied UK domestic law. The company was entitled to correct that error.

17. HMRC submitted that Golf had applied a VAT position which was lawfully open to them (whether by way of UK domestic law or by direct effect), to account for the relevant supplies under TOMS, and that there had been no relevant error which could be corrected by way of an ECN. The position was, it was submitted, similar to that in the decision in *Victoria and Albert Museum Trustees* [1996] STC 1016 (*V&A Trustees*), where the High Court held that choosing an acceptable accounting method which was later found to be less advantageous than another acceptable accounting method did not amount to an error.

18. Golf contended that this decision was not comparable, as it did not concern a question of competing law.

19. Considering the parties' submissions, we agree with the High Court decision in *V&A Trustees* that the term 'error' in Regulation 35 does not cover all possible mistakes that can be made by a taxpayer. The High Court concluded that an incorrect assessment of the most

advantageous position, within the law, is not an error of fact or law which can be corrected through the use of an ECN. This is clearly the position in which Golf find themselves: they have used a lawful option in accounting for VAT which they now realise was less advantageous than an alternative lawful option. That does not mean that they have made an error within the context of Regulation 35 such that they are entitled to use an ECN to reverse the effect of their original action. Although the *V&A Trustees* case did not involve a question of alternative versions of the law, it similarly involved a choice made by the taxpayer between two lawful options.

Whether HMRC imposing direct effect

20. Golf also contended that HMRC could not rely on the principle of direct effect in this case. Although Brief 05/14 includes a reference to a taxable person being able to rely on the direct effect of EU law (during the relevant periods), Golf submitted that *Ursula Becker v Finanzamt Munster-Innenstadt* (Case C-8/81), which established the EU legal principle of direct effect, is also authority for the proposition that direct effect cannot be relied on by the State against individuals.

21. Accordingly, Golf contended that HMRC could not refuse to allow the error correction on the grounds that the VAT declared was in accordance with the Directive. To do so would amount to the unauthorised imposition of direct effect.

22. HMRC contended that it had not enforced or imposed direct effect upon Golf; even if the company had not fully understood the legal and policy position when it treated the supplies as being within TOMS, it was nevertheless Golf that had applied the EU rules. HMRC did not require Golf to use direct effect when they submitted their returns. HMRC have simply acknowledged that Golf made a lawful choice and refused to process the ECN accordingly.

23. Golf's submissions are not, we consider, sustainable. It was Golf, not HMRC, which applied direct effect. HMRC is not relying on direct effect to impose a VAT charge; it is declining to allow Golf to reverse its application of direct effect (if the treatment is not consistent with UK domestic law). It makes no difference that this was not a considered choice by the company. Refusal of the error correction by HMRC does not impose direct effect by the State; it instead maintains the direct effect originally applied by the company. We consider that the reality is that Golf is required to live with the consequences of its actions, not that HMRC are forcing the company to act in a particular way.

24. Golf was not, it contended, obliged to apply EU VAT rules where they differed from UK domestic legislation. Golf contended that where a taxable person had a choice between the application of UK law and a different outcome under direct effect, the original choice was not binding. Retrospective claims were permissible, as indicated by the Supreme Court in its introductory comments in *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2017] STC 985 (*ITC*) because the taxpayers had suffered detriment. Golf submitted that this was simply the reverse of their case and that, as the company had applied EU law to their detriment, they were now entitled to make claim under UK law.

25. HMRC submitted that that *ITC* is not authority for the proposition that a taxable person can retrospectively reverse a lawful option chosen by that person. The case involved tax paid which was not due as a matter of law, a very different set of circumstances.

26. We note that in *ITC*, the taxable person, their supplier and HMRC all originally believed the supply to be taxable although it later transpired that the UK had not implemented the directive correctly: we agree with HMRC that is a very different position to that here. *ITC* was not a situation where the taxpayer had a choice of two lawful options, either of which would be accepted by HMRC, but instead involved VAT which had been found not to be due in law.

The retrospective claim in *ITC* was to apply direct effect in circumstances where UK law was found to be incompatible with EU law - not to resile from a choice to apply direct effect.

27. Golf's situation is not a mirror-image position as submitted: in *ITC* there had been an error of law which enabled the taxpayers to apply direct effect to follow EU law instead. In this case, Golf did not make an error of law, it used a lawful option which it now regrets.

Breach of fiscal neutrality

28. Golf also contended that the rejection of the ECN was a breach of the principle of fiscal neutrality. Brief 05/14 allows identical supplies to be treated differently for VAT purposes, which Golf contended would be a breach of fiscal neutrality if it did not arise from the principle of direct effect. Golf further contended that if direct effect is imposed, rather than an option, then the different treatment would be discriminatory.

29. Golf submitted that HMRC's rejection of the ECN imposes direct effect upon Golf and so the company suffers discrimination in comparison to its competitors as their supplies were subject to a different VAT treatment. Golf was aware that other businesses had been allowed to make claims for overpaid VAT in identical circumstances. Golf submitted that the principle of fiscal neutrality is part of the UK VAT system, being inherent to the common system of VAT, such that the UK departure from the European Union does not affect their reliance on this principle.

30. HMRC submitted that fiscal neutrality can no longer be relied upon as a cause of action, following the UK departure from the European Union (paragraph 3, Schedule 1, European Union (Withdrawal) Act 2018).

31. HMRC further submitted that there was no fiscal neutrality breach in any case. All taxpayers making wholesale supplies are treated equally as they have the same choice as to whether or not to apply TOMS.

32. We consider it is clear that there is no breach of fiscal neutrality, as there is a choice of methods available to taxpayers with regard to these supplies. The fact that Golf now regrets its choice does not mean that its supplies have been treated less favourably in comparison to those of other taxpayers. In the circumstances, we do not consider that it is necessary to decide whether or not the principle of fiscal neutrality survives in UK law in any relevant form.

33. With regard to Golf's contention that other taxpayers have been able to claim overpaid VAT in the same circumstances and so it has been discriminated against, we consider that this is not an argument that there has been a breach of fiscal neutrality but, instead, an argument that HMRC have behaved unfairly in their administration. It is well-established that this Tribunal does not have a general supervisory jurisdiction over HMRC and so has no jurisdiction to consider a complaint of this nature.

Conclusion

34. For the reasons set out above, we conclude that Golf has not made an error which is capable of being corrected under Regulation 35, The rejection of their ECN does not mean that HMRC are enforcing direct effect, nor has there been any breach of fiscal neutrality.

35. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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 FAIRPO
TRIBUNAL JUDGE

Release date: 3 August 2023