TC04155

Appeal number: TC/2012/08420

VAT – whether appealable decision – letter referred appellant to public notice – refusal to make decision is not to be treated as a deemed decision - appeal struck out – Tribunal has no power to direct HMRC to make a decision - appellant failed to demonstrate sufficient interest in appeal in any event

FIRST-TIER TRIBUNAL
TAX CHAMBER

ADAM MATHER **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 28 October 2014

Mr E Brown, Counsel, instructed by, and Dr A Sinyor of, Berwin Leighton Paisner LLP for the Appellant

Mr G Peretz, Counsel and Mr B McGurk, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Mather lodged an appeal with the Tribunal on 22 August 2012 against what it described as a decision of HMRC dated 6 August 2012 ("the Letter"). The Letter was in response to a letter Mr Mather had written to HMRC on 26 July 2012. In his letter, Mr Mather asked HMRC for a decision confirming his view that a 57 minute phone call made by him on 8 June 2012 to Canada, which cost him £1.28 and on which (both parties agreed) VAT (21p) had been calculated on the full price of the call should in law have only had VAT calculated on 50% of the full price (10p) on the basis the use and enjoyment of the phone call was 50/50 in the UK and Canada. In the appellant's view, the Letter ruled that use and enjoyment of this telecommunication service took place entirely in the UK.

2. I am not asked to consider the merits of the appellant's views on the VAT liability of this phone call; HMRC did not suggest that the appeal should be struck out on the basis that the case had no reasonable prospect of success. But on 8 May 2013 HMRC did apply for an order striking out Mr Mather's appeal on the grounds that the Tribunal did not have jurisdiction to hear the appeal because:

(a) There was no 'decision' by HMRC;

(b) The appellant did not have a sufficient interest in the matter under appeal (in Latin short hand, the appellant lacked 'locus standi').

3. All parties were agreed that while s 83(1)(b) Value Added Tax Act 1984 ("VATA") provided that an appeal to this tribunal shall lie with respect to:

> "the VAT chargeable on the supply of any goods or services"

it was necessarily implied into s 83(1)(b) that there could be no appeal unless HMRC had first made a decision on the VAT chargeable on the supply of any goods or services. I was referred to binding Upper Tribunal authority of *Earlsferry Thistle Golf Club* [2014] UKUT 250 where at [20] the Judge decided there was no basis for an appeal under s 83(1)(b) because HMRC had not made a decision whether the supplies in question were subject to VAT. By binding authority and by application of logic, therefore, I agree that there is no appeal to this Tribunal under s 83(1)(b) unless it is against a decision made by HMRC on the VAT chargeable on the supply of any particular goods or services.

Was HMRC's letter of 6 August 2012 a decision?

4. The appellant's position is that the Letter was such a decision.

5. Both parties were agreed, and I agree with them, that the issue of whether the Letter was a decision letter is a matter to be determined objectively. They were also agreed, as I am, that the Letter had to be seen in its context, and its context included the letter to which it was a reply.

The letters

6. I find, and there was no dispute on this, that the appellant's letter of 26 July 2013 clearly asked HMRC for a decision on the correct VAT treatment of the phone call in question:

> "I am writing to ask you for a decision as to whether or not the VAT charged on a supply to me of a telecommunications service was calculated on the correct basis…."

7. That, therefore, was the context in which an HMRC officer, Ms Cullender, wrote the Letter of 6 August 2012. The Letter said:

> "please note that it is the responsibility of the VAT registered supplier to establish the correct liability of any given supply. HMRC do not normally supply a VAT ruling to a supplier's customer unless they disagree with the supplier's original decision and the relevant public notice does not cover the matter of concern.
>
> Although I cannot provide you with a definitive response I can give you the following advice….

There followed a brief outline of what the officer understood the facts of the case to be and the letter continued in paragraphs 5 & 6 as follows:

> Initially, please be aware that all HMRC published guidance is our interpretation of current VAT legislation and should be viewed as such. In order to obtain HMRC's view of the VAT treatment of a specific business transaction, you must follow the procedures of our Clearance service.
>
> With regard to the issue in question, in addition to detailed information at section 16 of public notice 741A (2010) I can confirm that the use and enjoyment rules apply to telecommunications services….

There followed several paragraphs of general statements by HMRC of its view of the use and enjoyment rules. The letter (ignoring the last, irrelevant, paragraph) concluded:

> It is not clear if your supplier is aware of all related published guidance referred to and if this is the case you might want to pass this on to them for their information. They can contact us direct if they have identified an area of uncertainty and need further clarification that would assist them in their decision.
>
> Finally, all the facts of the case make this a third party dispute and it is HMRC's policy not to get involved in such matters." (my emphasis)

Was the letter objectively a decision?

8. I find that objectively the Letter was not a decision. Firstly, while the letter did not state in terms that it did not amount to a decision, it did indicate at least three times (see the underlined sections) that HMRC was not providing an answer to the question asked by Mr Mather. Secondly, and more significantly, the Letter simply did

not contain any decision on the liability of the phone call in issue at all. There was no statement about the VAT liability of the phone call.

9. The closest the Letter got to the question of VAT liability of the phone call was to state principles in general terms, as the Letter did in paragraphs 5 & 6 and subsequent paragraphs. The appellant's position was that this must be read as a decision that the liability of the phone call to Canada was VAT on 100% of the net price.

10. The Letter certainly does not state that in terms. Nevertheless, the appellant's case is that the reference to section 16 of the public notice has to be read as a decision against the appellant's position. Section 16 of the public Notice 741A is rather long and both parties were agreed that the relevant part of it was section 16.7 which reads:

> **16.7 what does effective use and enjoyment of telecommunications services and radio and television broadcasting services mean?**
>
> Effective use and enjoyment takes place where the customer actually consumes telecommunications services …. (in practice this will be where the services are physically used) irrespective of contract, payment or beneficial interest.

11. By itself, this gives no clear statement even of what HMRC's views would be about the phone call to Canada: for instance what did it mean by 'where the services are physically used' in the context of a phone call between one person in the UK and one in Canada? However, section 16.7.1 went on to give four examples of different scenarios, each with a statement of HMRC's view of whether there was a UK VAT liability. None of the scenarios dealt with a UK based customer of a telecoms supplier placing a phone call to a person located outside the EU. The last two examples do, however, deal with very similar situations. The most similar is example 3 which states HMRC's view that, where a UK based person accepts a reverse charge call from outside the EU, the place of supply will be entirely within the UK as the effective use and enjoyment (in HMRC's view) is within the EU. HMRC did not take the view in example 3 that half of the use and enjoyment took place outside the EU where the other person to the phone call was present.

12. The appellant's view is, that taking what HMRC say in 16.7 including the examples given, and applying it by analogy to the particular circumstances of the appellant's case, HMRC were by their Letter in effect ruling that the place of supply of the appellant's phone call was 100% in the UK.

13. I do not agree. While I consider that section 16.7 gives a strong indication of what a ruling by HMRC on the supply at issue in this appeal would be, it does not amount to a ruling because section 16.7 is simply a general statement of principle which was not made in response to the particular circumstances of the supply in question.

Lack of effective remedy?

14. The appellant's case, as I understood it, was that I should be very broad in what I see as comprising a decision, because, if I was not, the appellant would be denied an effective remedy. Either the Letter should be seen as a decision against the appellant because the general statement of principles should be applied to the particulars of the case, or the refusal to give a clear ruling should itself be seen as a decision ruling against the appellant. Without such a broad interpretation, the appellant would be unable to bring its case in this tribunal.

15. The appellant drew my attention to the case of *Colaingrove Limited* VATTD 16981 (2000) in which HMRC had been asked to make a repayment but (so far) had failed to make it, saying by letter merely that the claim would be unpaid 'until the underlying query has been resolved'. I find the judgement short and a little difficult to follow. At [12] the chairman said that this letter did not constitute an appealable decision but then at [21] he dismissed HMRC's strike out application and at [22] directed a statement of case to be served, both of which latter actions would only make sense if his decision at [12] had been that the letter did constitute an appealable decision.

16. It is also difficult to see why HMRC should have been found to have made a decision when it appears (even if ineptly worded) they had not reached a concluded decision because there were outstanding queries about the claim to resolve. In the High Court decision in *Touchwood Services Ltd* [2007] EWHC 105 (Ch) HMRC replied to a claim letter saying that they needed to carry out verification before they made the repayment. The taxpayer lodged an appeal immediately on receipt of this letter. The High Court upheld the Tribunal's decision on the facts (by the same chairman as in *Colaingrove)* that such a letter did <u>not</u> amount to an appealable decision.

17. Whatever the decision actually reached in the *Colaingrove* case on its facts, at [10] the chairman stated that:

> "...total silence in response to a repayment claim must constitute a refusal. Equally, repeated refusals to give a straight answer will amount to a refusal. It would be surprising if a trader's only remedy was to obtain an order from the High Court directing a formal decision. In my view such a refusal would amount to an appealable decision."

18. The appellant takes from this that the tribunal ought not to take a restrictive view of what constitutes an appealable decision in order to avoid the position that the appellant is forced to take judicial review proceedings against HMRC just in order to obtain a decision that it can appeal to the Tribunal.

19. Here I am not faced with 'total silence' by HMRC. They did reply to the appellant's letter. But they did refuse to give a ruling. Therefore, HMRC's position in this case seems to be comparable to that envisaged by the chairman in [10] of *Colaingrove* of a refusal by HMRC to give a decision at all. Should a refusal to give a decision be interpreted by this Tribunal as a decision? In the situation envisaged in [10] of *Colaingrove* a refusal to reply to a claim for repayment could easily be

interpreted as a decision to refuse it; here, a refusal to reply to the appellant's letter of 26 July could be interpreted as a rejection of the appellant's case and a decision in favour of the tax treatment actually applied by Talk Talk to the supply.

20. This sort of argument was considered in the High Court in *Touchwood.* The Judge there recognised that European Law, as explained in *Garage Molenheide BVBA* (C-286/94) requires that there must be 'effective' recourse for a taxpayer to a judicial body. He said that where a decision was made, the recourse was to the VAT Tribunal under s 83 VATA; but where HMRC did not make a decision, the recourse was to the High Court by an action for judicial review:

> "[12] ….Excessive, unexplained or unnecessary delay by a public body in making a decision which is required of it is a classic and familiar area for judicial review…"

21. The implication of the decision in *Touchwood*, although I cannot find a clear statement to that effect, is that Lindsay J was satisfied that the combination of s 83 where HMRC make a decision and judicial review if they delay making a decision, is a comprehensive remedy which complied with European Law requirement that taxpayers have an effective judicial remedy.

22. The High Court decision in *Touchwood* is a clear indication that it is not appropriate to treat HMRC's refusal to give a decision as a decision against the taxpayer; doing so by-passes HMRC's discretion when making a decision, effectively making their decision for them; it also treats them as making a decision when they may have a discretion not to make a decision (I return to this below).

The rights of a customer to an effective remedy

23. Both *Touchwood* and *Colaingrove* were cases were HMRC had refused to give a decision to taxpayers pending outstanding enquiries. This appeal is different. HMRC are simply refusing to give a customer a decision at all.

24. Where HMRC refuse to reach a decision, a taxpayer has an effective remedy because it can pursue judicial review action: but is the same true for the taxpayer's customers?

25. HMRC's position is that, while they do have a duty to reach decisions, when provided with the requested information, on repayment claims made by taxpayers (such as in *Touchwood* and *Colaingrove),* they have no duty to make a decision on application for a liability ruling by the *recipient* of a supply, as in this case. Moreover, referring to [12] from *Touchwood*, HMRC would regard this case as one where there is no available judicial review remedy because the decision Mr Mather requested was not a 'decision required of' HMRC. HMRC were not, says Mr Peretz, under any duty to give Mr Mather a decision because he was not the taxpayer in respect of the supply in issue nor a customer requesting a refund. The appellant does not agree.

26. Assuming without deciding that HMRC are right to say that Mr Mather cannot compel them to make a decision in his case, where customers are concerned, should I give 'decision' a broad interpretation so that a refusal or failure to make a decision is treated as a decision against the position adopted by the customer requesting the ruling, because otherwise Mr Mather would be left without access to judicial determination?

Civil courts provide an effective remedy?

27. It seems to me, on the contrary, the customers are not without access to judicial determination and that there is binding authority that I cannot treat a refusal to give a decision as a decision. In *Earlsferry Thistle Golf Club* (above) the recipient of the supply in issue made a claim to HMRC for repayment of overpaid VAT. HMRC refused to rule whether or not the VAT was repayable but told the customer to apply to its supplier for a refund.

28. Lord Tyre, sitting as a judge of the Upper Tribunal, ruled that HMRC's letter did not amount to a ruling on VAT liability because HMRC declined to deal with the customer's claim and he concluded:

> "[20]…As the letter does not bear to convey any decision by HMRC as to whether VAT was properly chargeable on supplies of services by [supplier] to [customer], there is in my opinion no basis in law for an appeal under s 83(1)(b)."

29. I note for completeness that the Judge did treat the letter as containing a decision that HMRC would not repay the VAT to the customer, on the grounds that the customer ought to make its claim against the supplier (see [21]), and therefore the Judge considered that potentially it was a decision on which the Tribunal had jurisdiction under s 83(1)(t). That issue does not arise here as Mr Mather did not apply for a refund.

30. Lord Tyre then dealt with the EU law requirement for customers to have an effective remedy for overpaid VAT:

> "[22] …The rulings of the ECJ in *Reemtsma* and *Danfoss* make clear that member states must provide a means by which the recipient of a supply can recover VAT wrongly paid to the supplier. If member states provide for recovery of such tax by civil proceedings against the supplier to whom it was erroneously paid, it must provide a means of seeking repayment directly from the state only in so far as recovery from the supplier is impossible or excessively difficult. The method by which this result is achieved is, however, a matter for the member state to determine. As one might expect, there is nothing in the judgments of the Court to suggest that the result must be achieved by means of an appeal to a tax tribunal. The principle of effectiveness is satisfied if the claimant can bring an ordinary action for payment against HMRC…

The Judge went on to consider that *Investment Trust Companies* litigation ([2012] EWHC 458 (Ch)) indicates that a customer does have a right of action against HMRC

in the civil courts in any case in 'which it cannot recover from the supplier without excessive difficulty'. Of course, it went without saying that a customer would have a right of action against its *supplier* in the civil courts.

31. In other words, if the customer has an effective right to claim in the civil courts against its supplier, and in default of its supplier, against HMRC, there is binding Upper Tribunal authority that I should not give an unnaturally wide definition of 'decision' in order to allow the customer to bring a case in this Tribunal. The customer has an effective remedy in the civil courts.

32. In this case, Mr Mather has not (yet) sought to recover from Talk Talk any amount overpaid. Such an action would necessarily have to be brought in the County Court and would be an action for restitution (monies paid under mistake). The binding authority of *Earlsferry* is that that the civil courts are a sufficient remedy to satisfy European law. This also follows from what the CJEU said in *Reemtsma* C35/05*:*

> [39] In the light of the caselaw cited in the two preceding paragraphs, it must be conceded that, in principle, a system such as the one at issue in the main proceedings in which, first, the supplier who has paid the VAT to the tax authorities in error may seek to be reimbursed and, second, the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due observes the principles of neutrality and effectiveness. Such a system enables the recipient who bore the tax invoiced in error to obtain reimbursement of the sums unduly paid.

33. The advisors to Mr Mather made the point that it was undesirable for HMRC to refuse to issue Mr Mather a decision, thus forcing him to sue his supplier in the County Court rather than contest the decision in this Tribunal, which is the specialist Tribunal established by Parliament for resolution of tax matters. I would agree that the County Court has no specialist tax knowledge and is unlikely ever to be confronted with questions about the VAT liability of cross border supplies. In *Investment Trust Companies* [2012] EWHC 458 (Ch) there was (presumably) no concern over lack of specialist tax knowledge as the claim was for a sum which meant the litigation was commenced in the Chancery division of the High Court, whose judges sit in the Upper Tribunal Tax and Chancery Chamber.

34. But I do not think it makes any difference. There is no requirement under European law that tax disputes are resolved in specialist tax courts.

Does Mr Mather have a civil cause of action against TalkTalk?

35. In summary, a person pursuing repayment of overpaid VAT must be given an effective remedy. If that person is the taxpayer, it has an effective remedy as it can take action against HMRC in this Tribunal if it disagrees with a decision issued by HMRC; and if HMRC refuses to issue a decision it can compel it to do so in an action for judicial review. If that person is the customer of the taxpayer, while it could take action against HMRC in this Tribunal if it had received and wished to challenge a

decision issued by HMRC, this Tribunal cannot compel HMRC to make a decision (see §§55-60 below) and it may or may not be able to take judicial review action against HMRC (see §25 above); nevertheless it has an effective remedy if it can take action against its supplier in the civil courts.

36. But it seems to me that the customer will not be able to take action against its supplier in the civil courts for overpayment of VAT unless it can claim breach of contract or (more relevantly) restitution of monies paid by mistake.

37. In this case, Mr Mather was in receipt of an invoice for the disputed supply which stated the price was "total amount payable, including VAT". It did not state how much VAT was charged and was not a VAT invoice. There is nothing odd in that: Mr Mather is a private individual and not entitled to a proper VAT invoice nor was TalkTalk liable to provide one. Mr Mather's contract with TalkTalk, a rather long document, was quite clear on the question of VAT:

> "Unless we expressly agree otherwise, any and all charges are inclusive of VAT"

HMRC accepted that TalkTalk had charged VAT on the full price of the phone call in issue because Mr Mather had made enquiries with TalkTalk and that was their response. But, as it was not suggested there was a contrary agreement, I find the contract was VAT inclusive. Even if Mr Mather is right and TalkTalk accounted for too much VAT to HMRC on this phone call, Mr Mather is not entitled to a refund of what he paid to TalkTalk.

38. So while his advisers at the hearing appeared to be of the opinion that Mr Mather could take an action in the County Court against TalkTalk, and addressed me on why it would be undesirable for him to bring a tax dispute in the County Court, I consider that, as his contract was VAT inclusive, he has no right of action against TalkTalk which could put in issue the VAT treatment of the supply in issue. This is because he would be unable to succeed in a claim for restitution (money paid by mistake) because he paid the amount that was contractually due, which was the same whatever the VAT treatment of the supply. Therefore, Mr Mather has no ability to pursue this tax matter against TalkTalk in the County Court. He has no alternative remedy.

39. That distinguishes Mr Mather's case from those in *Touchwood* and *Earlsferry*. He is not the supplier; neither is he a customer with a civil action for recovery of overpaid VAT against his supplier. Does that mean that, contrary to what I say at §31, I should give 'decision' a wide meaning to avoid Mr Mather being left unable to challenge the VAT treatment of his supply? Does it mean that Mr Mather is denied an effective remedy to which he is entitled under European law?

Who is entitled to an effective remedy?

40. Taking the second point first, European law demands that a customer must have a right of action for 'recovery of sums unduly paid' ([25] of *Danfoss* C-94/10) and [36] of *Reemtsma*). As the contract was VAT inclusive, even if Mr Mather is right

about the VAT treatment of overseas phone calls, he has not 'unduly paid' sums of money. He owed TalkTalk the same either way.

41. Nevertheless, looking at what was said in *Danfoss*, it seems that it may be enough to engage the right to an effective remedy under European law if the VAT was passed on to the final consumer, even if the contract was VAT inclusive:

> [27] It follows that a Member State may, in principle, oppose a claim for the reimbursement of a duty unduly paid made by the final consumer to whom that duty has been passed on, on the ground that it is not that consumer who has paid the duty to the tax authorities, provided that the consumer – who, in the final analysis, bears the burden of that duty – is able, on the basis of national law, to bring a civil action against the taxable person for recovery of the sums unduly paid.

42. The appellant's position appeared to be that even if the contract was VAT inclusive, their position was that the (alleged overpaid) VAT was nevertheless passed on to Mr Mather in the form of charges that were higher than they would otherwise would be but for the (alleged) VAT overcharge.

43. However, I was presented with no evidence to that effect. The appellant's position appeared to be that the mere possibility that the VAT was passed on in whole or in part to Mr Mather ought to give him a right of action. It seems to me, on the contrary, that this is something that would have to be proved. The right to an effective remedy is limited to those final consumers to whom the VAT has actually been passed on (whether the CJEU meant this in the wider or narrower sense, which I do not have to decide).

44. So even if the CJEU meant 'passing on' in the wider sense of higher charges than otherwise and irrespective of whether there was a contractual charge made representing VAT, Mr Mather has not shown that the VAT on this supply was passed on to him. He is therefore not a person entitled to an effective remedy as he has not shown that he has a right to be repaid the VAT allegedly overpaid by TalkTalk.

45. So far as the first point is concerned, it seems the only way Mr Mather can litigate the issue he wishes to litigate is to receive a decision from HMRC. HMRC have refused to issue one. Judicial review proceedings to require HMRC to issue a decision may, or may not, be successful; if they succeed, Mr Mather will not be without a remedy; if they do not succeed, it will be because HMRC have no duty in these circumstances to issue a decision. In such a case, I do not think it right for this Tribunal to effectively by-pass the public law issue of whether HMRC ought to issue a decision to Mr Mather, by deeming HMRC's refusal to issue a decision to be a decision. I do not follow [10] of *Colaingrove.*

Conclusion

46. For these reasons, I give 'decision' its normal meaning and not the broad meaning put forward by the appellant. So a refusal to issue a decision is not a decision

rejecting the legal position considered to be correct by the appellant; it is not a decision on the VAT status of the supply at all.

47. And I find, for the reasons given at §§8 & 13 above, HMRC have refused in this case to issue a decision on the VAT liability of the supply in issue. HMRC did make general statements about their view of the law but this amounted to no more than advice as it was not a statement about the VAT liability of the particular supply in issue. I am therefore satisfied that this Tribunal does not have jurisdiction to entertain the proceedings. I must therefore strike out the proceedings under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and I do so. That is therefore the end of these proceedings.

Can I direct HMRC to issue Mr Mather with a decision?

48. The appellant's next position was that if I struck out the appeal on the basis that the Letter was not a decision, I should direct HMRC to make a decision against which he could lodge an appeal. Mr Mather relied on the decision in *Morfee* TC 3766 (2014) which was a decision of this Tribunal from which there does not appear to have been an appeal by HMRC. Mr Brown's position was that, because it had not been appealed, HMRC had accepted it was rightly decided.

49. With respect to the Tribunal that decided *Morfee*, I do not consider that it correctly applied the law, and I decline to follow it. I explain my reasons.

50. The issue in that case appears to be very similar to that in this case. Mr Morfee was a customer who believed his supplier had applied the wrong VAT treatment to the supply to him and applied to HMRC for a ruling. HMRC declined to give a ruling in a letter not dissimilar to the Letter in this case, referring Mr Morfee to HMRC's published guidance.

51. HMRC applied to strike out the proceedings which Mr Morfee brought in this Tribunal on receipt of this letter. The Tribunal, however, at [19] declined to rule on whether the letter was a 'decision' or not. I consider this wrong in law as a Tribunal must rule on applications which are made to it and must not accept jurisdiction in a case in which it has no jurisdiction (Rule 8(2)(a)).

52. Nevertheless, despite refusing to rule on the question of jurisdiction, the Tribunal did proceed to strike out proceedings [22], although the legal grounds on which it did so are not made clear.

53. Having struck out the appeal, it then purported to issue directions to the taxpayer to provide HMRC with information on which HMRC could issue an informed decision, and then purported to direct HMRC, on receipt of the information, to issue a decision to Mr Morfee on the VAT liability of the supply.

54. Relying on this, the appellant's position is that, if I am not satisfied that the Letter amounted to a decision, then I must direct HMRC to issue a decision letter, as the Tribunal did in *Morfee*.

55. I do not consider that I have the power to do anything of the kind. It is clear that this Tribunal has no inherent jurisdiction (see, for instance, [27] of *Noor* [2013] UKUT 71 (TCC)) and cannot issue a writ of mandamus.

56. While the Tribunal does have power to 'give a direction in relation to the conduct or disposal of proceedings' (Rule 5(2)), a 'direction' to HMRC to issue an appealable decision is not a direction in relation to the conduct or disposal of proceedings. On the contrary, it is nothing to do with progressing any proceedings extant in the Tribunal but rather a direction that HMRC exercise a public law duty or discretion to make a decision entirely outside the actual proceeding in front of the Tribunal, albeit that ultimately the directed decision could give rise to new proceedings in this Tribunal. (I note, as I said at §25, that the parties are not agreed on whether HMRC does have a duty, or merely a discretion, to issue a decision to a customer, but I do not need to resolve that question of public law for the purpose of these proceedings).

57. I reject Mr Brown's suggestion that a wide interpretation should be given to Rule 5(2) and/or that the Tribunal's power to issue directions under Rule 6(1) was not constrained by Rule 5(2). It is obvious to me that neither Rule 5(2) or 6(1) were intended to be so widely construed as to amount to a power to judicially review HMRC or generally to compel parties to proceedings to do more than simply take steps to progress to a fair conclusion live proceedings in this Tribunal. This follows because Parliament chose not to expressly extend to the First-tier Tribunal even the limited judicial review conferred on the Upper Tribunal and therefore the Lord Chancellor cannot be supposed to have intended to do it impliedly by secondary legislation; moreover the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 are clearly intended merely to govern procedure in the Tribunal, not to confer a jurisdiction on the Tribunal which is not there in primary legislation; moreover the list of the sorts of directions which the Tribunal is expected to make (Rule 5(3)) is, while not comprehensive, clearly limited to progressing extant appeals to a fair conclusion.

58. And even if the Rules had been intended (which they were not) to confer a power on the Tribunal to issue directions to parties to proceedings beyond those merely intended to progress to a fair conclusion existing live proceedings, the Rules would be ultra vires the primary statute and could not be relied on in this Tribunal (see *Dong* [2014] UKFTT 369 (TC)). They would be ultra vires the statute under which they were made because the Tribunals Courts and Enforcement Act 2007 provides at section 22:

> "(1) There are to be rules, to be called "Tribunal Procedure Rules", governing—
>
> (a) the practice and procedure to be followed in the First-tier Tribunal, and
>
> (b) the practice and procedure to be followed in the Upper Tribunal.
>
> (2)…

(3) In Schedule 5—

> Part 1 makes further provision about the content of Tribunal Procedure Rules,
>
> ….

(4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing—

> (a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
>
> (b) that the tribunal system is accessible and fair,
>
> (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
>
> (d) that the rules are both simple and simply expressed, and
>
> (e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.
>
> (5) In subsection (4)(b) "the tribunal system" means the system for deciding matters within the jurisdiction of the First-tier Tribunal or the Upper Tribunal.

59. It is clear from this and from Schedule 5 that the Rules are intended, as I have said, to ensure the fair resolution of proceedings which the Tribunal has jurisdiction to hear. The Tribunal was not given a wider dispute resolution jurisdiction. It cannot *create* proceedings by forcing one party to make an appealable decision

60. Rule 5(2) and 6(1) give the Tribunal no more than a power to issue directions to parties to proceedings which require (or permit) those parties to do things which progress the extant proceedings to a fair conclusion. The proceedings in front of me concern HMRC's Letter. If that Letter was not a decision, this Tribunal has no jurisdiction over the proceedings and the legally correct and therefore fair outcome of the proceedings is that they should be struck out.

61. The appellant sees its dispute with HMRC in more general terms: it does not see it as a dispute over whether the Letter was a decision but whether the supply to it by Talk Talk was subject to VAT on 100% of the price. It thinks it 'unfair' if the Tribunal will not rule on that dispute. But the Tribunal applies the law. The law is that it only has jurisdiction if there is a decision. If there is no decision, it has no legal power either to consider VAT liability of the supply or to compel HMRC to make a decision about it.

62. The appellant says that the outcome in *Morfee* was 'fair' in the sense that the practical effect of both parties abiding by the Tribunal's 'directions' was that their dispute over VAT liability would be determined in the tax tribunal. I consider it likely that that HMRC have indeed chosen to abide by, rather than challenge, the 'directions': indeed it is clear from the case summary that HMRC had always

maintained (unlike this case) that they would issue a decision if the appellant would provide more information. But that does make the 'directions' given in that case right in law nor 'fair' in the wider meaning that courts and tribunals should not exceed their legal powers.

63. I decline to make a direction that HMRC issue a decision to the appellant in this dispute. I have no power to make such a direction.

Does the appellant have locus standi?

64. As I have struck out the proceedings, there is no need for me to consider the second ground raised by HMRC for strike out, which was that the appellant, in their view, had no standing to bring an appeal against a decision by HMRC on the VAT status of the supply to him by Talk Talk.

65. HMRC accepted that generally customers can have sufficient interest in the VAT status of a supply ('standing' or 'locus standi') to bring an appeal over the matter. This follows from cases such as *Williams & Glyn's Bank Limited* [1974] VATTR 262, *Cresta Holidays Ltd* [2001] EWCA Civ 215 and *Canterbury Hockey* Club [2005] UKVAT V19086 (25 May 2005). Nevertheless, they did not consider Mr Mather to be in an analogous position to the appellants in those cases.

Burden of proof

66. The first issue between the parties was which of them bore the burden of proof on this issue: was it for the appellant to prove it had locus standi or for HMRC to show that the appellant did not?

67. The appellant thought that the answer was clearly that HMRC had to prove that it did not have sufficient interest because it was HMRC's application to strike out.

68. HMRC did not agree. Their view was that it was the person asserting that the Tribunal had jurisdiction who had to prove it; further that the burden of proof must be on the appellant because otherwise HMRC were required not only to prove a negative but to prove it without possession of the relevant information, as the appellant's locus standi would depend upon the appellant's contractual position with its supplier.

69. I accept that the normal rule for determining the burden of proof is that the person who asserts a matter must prove it. I accept also that, generally, the applicant for a strike out would have the burden of proving it was justified.

70. Nevertheless, it seems to me that, as a Tribunal can only hear cases which it has jurisdiction to hear, it must in all cases be for the person who maintains that the Tribunal has jurisdiction to prove it. So even though it is HMRC's application to strike out the appellant on the grounds Mr Mather does not have sufficient interest in the outcome of the appeal, I consider that it would be for Mr Mather to prove that this Tribunal does have jurisdiction, which requires him to prove he does indeed have locus standi.

71. I am reinforced in that view by the consideration that any other decision by me would require HMRC to prove a negative in the absence of possession of the relevant information.

What amounts to sufficient standing?

72. HMRC consider that a person only has sufficient standing if he would be financially affected by the decision reached by HMRC. They consider that even if this point was not expressly made in decided cases, it was implicit in them.

73. In this case they do not consider Mr Mather has shown that he has any financial interest because they say it has not been demonstrated that if he was right about the VAT liability of the supply (that VAT should only have been charged on half of the cost of the call) he would be entitled to be repaid the relevant VAT by Talk Talk.

74. In other words, HMRC's position is that Mr Mather must demonstrate that his contract with Talk Talk was exclusive of VAT. And I have found that the contract was VAT inclusive (see §37).

75. The appellant does not agree. He considered it was obvious that the appellant was not in fact concerned with the 10p at issue in this appeal but with the point of principle of where the use and enjoyment of phone calls made to persons outside the EU was. It did not really matter to Mr Mather whether the contract was inclusive or exclusive of VAT. In his view, the supplier (Talk Talk) was really nothing more than a tax collector; the burden of the tax fell on the customer. The appellant relied on what was said in the *University of Sussex* case [2001] STC 1495 that:

> '…in the field of VAT the function of the taxpayer…at least where it is not the final consumer of a good or service, is to act effectively as a tax collector for [HMRC]…')

VAT was intended to be a tax on consumption and effectively borne by the consumer. The appellant's position was that the consumer ought to have sufficient standing to challenge the VAT treatment of a supply made to them.

76. I do not agree that it is right to see the supplier as a 'mere' tax collector; its interest in the VAT liability of its supplies is much greater than the interest of a 'mere' tax collector. While the supplier does collect the VAT, it liable to pay the right amount of tax and therefore has a financial interest in ensuring that the VAT treatment of their supplies is correct. I agree with Henderson J in *Investment Trust Companies* that:

> '[50] In my judgment this passage makes good the contention, at a fairly high level of generality, that for the purposes of VAT the final consumer is properly to be regarded as the taxpayer, and that the role of the intermediate taxable persons in the chain of supply is to collect the tax and account for it to the tax authorities. On the other hand, I am satisfied that there are dangers in pressing this point too far, because the final consumer is not in any ordinary sense a taxpayer vis-à-vis HMRC. It is the supply of goods or services to the final consumer

> which triggers the liability to pay and account for VAT on the supply, and the supplier is liable accordingly, whether or not he passes on the tax charge to his customer. Conversely, the customer is under no liability to HMRC for the VAT, even if the supplier fails to pay it, and the customer's obligation to pay the VAT to the supplier rests only in contract. If, for whatever reason, the supplier fails to charge VAT to the customer, he will have no remedy against the customer unless the customer is contractually bound to pay it. Essentially for these reasons, I am not happy with the claimants' conduit metaphor, which suggests that the tax flows from the final consumer to HMRC, and that the supplier is in some sense acting as the customer's agent in paying it to HMRC. It needs to be clearly understood that the liability of the supplier to pay and account for output tax is a primary one, and in legal terms the taxable person is the supplier, not the customer. Nor is there any relationship of agency, or anything resembling agency, between them.'

77. In conclusion, the customer is not the taxpayer. Nevertheless, where a customer has a financial interest in the VAT liability of a supply made to it, the customer will have the standing to lodge an appeal against a decision of HMRC.

Sufficient legal interest?

78. I consider that it is apparent from the cases cited at §65 above where customers were found to have locus standi that those appellants did have a financial interest in the outcome. In *Canterbury Hockey*, the club clearly had £480 at stake. In *Cresta*, the appellant also appeared to have a financial interest in the outcome. In *Williams & Glyn* there appears to have been assumption that the contract was VAT exclusive; further at [13] it stated that the tax was held in trust for the customer, which, while this appears to be wrong in law, shows that the Tribunal clearly proceeded on the assumption that the customer had a direct financial interest in the outcome of the Tribunal case.

79. A much earlier VAT Tribunal case, *Beckley* (1974) (unrep), stated that an appellant would not have to show a financial interest in the outcome of a case in order to demonstrate locus standi. The basis of this view was not clearly explained and in any event in that case it seems the appellant was found to have a financial interest. Moreover, a would-be litigant has to have some interest in a case, and Mr Mather did not suggest that he had any interest in the VAT liability of the phone call other than a financial interest. It is certainly difficult to envisage a person having a legitimate interest in a tax case that was not financial.

80. I note in passing that the appellant appeared to think that it only had to demonstrate that it had an arguable case that it had a financial interest in the outcome of its purported appeal, and that the matter could be left for determination at any substantive hearing. This is not right. A Tribunal must determine questions of jurisdiction before it proceeds to hear the case. So the appellant must demonstrate that actually does have locus standi; so it needed to demonstrate to me that it does have a financial interest in the outcome of the appeal.

Am I satisfied that Mr Mather has a financial interest in the appeal?

81. The contract was VAT inclusive. The agreement was to pay a set price, irrespective of the amount of VAT due. It followed that if the VAT due on the supply was in law more or less than what the supplier accounted for, the customer could not be held liable to pay any VAT underpaid to HMRC nor the supplier to return to the customer any VAT the supplier had overpaid to HMRC.

82. Had Mr Mather been a taxable person himself, even with a VAT inclusive contract he might still have a financial interest in the outcome of the appeal because he might have the right to deduct (in whole or part) any VAT actually due on the supply. However, Mr Mather was not a taxable person and did not receive and was not entitled to a VAT invoice.

83. The appellant's case is that it was irrelevant whether the contract was inclusive or exclusive of VAT because it must be the case that the price a telephone user paid was influenced by the supplier's view of how much VAT it was liable to account for to HMRC on that supply. If Mr Mather was able to bring this appeal, and was successful in his representations on the law on use and enjoyment, that would result in a decrease in Talk Talk's liability to pay VAT and might lead in the future to a decrease in charges for foreign phone calls, even if he could not claim a refund from Talk Talk for VAT which (on Mr Mather's case) was overpaid by Talk Talk in the past.

84. It might also lead to a decrease in the size of telephone bills for all other private consumers of telecommunications services who make calls outside the EU. Mr Mather's maintains that there is a general public interest in a determination by a judicial body of the VAT liability of the phone calls placed within the UK to persons outside the EU.

85. Dealing with the last point first, I do not consider that there is any rule of national or EU law which would permit a hypothetical question of law to be determined. The courts and tribunals are for resolutions of actual disputes by persons affected the outcome.

86. And so far as the first point is concerned, Mr Mather adduced no evidence at all, apart from the invoice and contract. Certainly I could not be satisfied that he has any financial interest in the outcome of this dispute merely on the basis of his assertion that the price of foreign phone calls would decrease if he succeeded in this appeal (assuming it is not struck out). I find he has failed to demonstrate that the price of phone calls he makes in the future would be less if he succeeded in this appeal.

Conclusion on locus standi

87. A person must have sufficient legal interest in an appeal to be an appellant. While a legal interest does not have to be financial, Mr Mather has not suggested he had any interest in the appeal other than a financial one, except possibly to the extent he was suggesting that he considered he was concerned with the general public interest in establishing the proper VAT treatment of telephone calls abroad.

88. So far as the latter is concerned, I do not consider that it is enough to establish locus standi simply to say that the public as a whole must be interested in the outcome. There must be many unanswered questions about VAT which might have real impact on actual supplies taking place but only those persons with sufficient interest in the answer can bring a case to this Tribunal.

89. Having established no other legal interest, and having established no financial interest, in the outcome, Mr Mather has no locus standi.

Overall conclusion

90. It is for a person who maintains that this Tribunal has jurisdiction to hear the appeal that must prove this Tribunal actually does have jurisdiction, and that is the case even where the jurisdiction issue is raised in an application for a strike out by the respondent.

91. The appellant has failed to establish that this Tribunal has jurisdiction to hear this appeal. Mr Mather failed to establish that he had a financial or any other legal interest in the outcome of the appeal.

92. In any event, this Tribunal only has jurisdiction to determine the VAT liability of a supply where HMRC have made a decision on the VAT liability of the supply in question. In this case, HMRC refused to make a decision.

93. A refusal to make a decision is not the same as making a decision. If Mr Mather considers HMRC ought to have made a decision that is something for judicial review: it is not immediately obvious to me that HMRC has a duty to issue a ruling to a customer of the taxpayer who has not demonstrated a financial interest in the outcome of the decision, but that is not a matter for this Tribunal to decide. It is clear that this Tribunal cannot compel HMRC to make a decision.

94. As this Tribunal does not have a judicial review function, it is not appropriate to treat a refusal by HMRC to make a decision on an issue as actually making the decision on the issue against the customer. To do so assumes that HMRC ought to make the decision, which is a public law question for judicial review.

95. That leaves Mr Mather unable to have judicial determination of the proper VAT treatment of phone calls abroad. If he brought an action against TalkTalk for restitution in the civil courts, because the contract was VAT inclusive, he would be bound to lose it without the court even considering the question of the VAT liability of the supply. And this Tribunal has no jurisdiction to hear his appeal.

96. Mr Mather thinks that unfair. Yet he has not demonstrated an interest in the outcome of the appeal so it is not obvious to me that that outcome is unfair. It is well established that the courts do not determine hypothetical matters or matters simply of interest to a person. There must be a real legal interest in the matter for the court to have jurisdiction.

97. For the reasons given above, this appeal is struck out.

98. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 28 November 2014