



TC07985

VAT – Consideration for provision of services or advance by way of loan, whether returns in complete per Section 73(1) VATA, Payments were loans, Appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/00840

BETWEEN

GLS Limited

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE HEATHER GETHING

The hearing took place on 11 December 2020. With the consent of the parties, the form of the hearing was Vvideo all of the parties attended remotely and the remote platform was CVC with Miss Marshall and Mr Stevenosn attending by telephone. A face to face hearing was not held because of the Covid restrictions.

I directed that the hearing should be in private on the basis that it was not in the public interest during the pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely which by necessity meant it must be in private.

**Mr Campbell of Deans Chartered Accountants represented the Appellant
Mr Hume a presenting officer of HMRC represented the Respondent**

DECISION

1. Headnote

The issues in this case are whether payments received by GLS Ltd (GLS), a property development company, during 2016 from Midside Finances Services Limited (“Midside Finances”), a finance company, were consideration for taxable supplies or advances by way of loan and exempt from VAT. An assessment was issued under section 73(1) Value Added Tax Act 1994 by HMRC on the basis that the VAT returns were incomplete as they did not include the payments received from Midside Finances. Whether a payment is consideration for a supply or the provision of a loan is a question of law, which is dependent on the facts. The burden of proof is on the Appellant to show on a balance of probabilities, what the payments were for.

Held- The Tribunal found that the payments were advances by way of loan and not consideration for taxable supplies. GLS had discharged the burden of proof, that on a balance of probabilities, the evidence available to the Tribunal had been available to the investigating officer before the issue of the assessments. The VAT returns were not incomplete to the extent of the loans, the requirements of section 73(1) were not satisfied, and the assessments may be set aside or reduced. The appeal is allowed.

2. The issues before the Tribunal

The issues before the Tribunal had been narrowed from those in the notice of appeal and statement of case and skeletons. The issues outstanding at the hearing:

- 2.1 Were seven payments totalling £282,000 received in 2016 by GLS from Midside Finances advances by way of loan and exempt from VAT or consideration for taxable supplies of goods or services?
- 2.2 Were the assessments made on 28 February 2018 valid assessments under section 73(1) Value Added Tax Act 1994 (“VAT Act”) and whether they may be reduced or set aside?

HMRC contend that:

- i. The VAT returns were incomplete as they did not include the seven payments totalling £282,000 received from Midside Finances per section 73(1) VATA.
- ii. The assessments raised on 28 February 2018 to cover the deficiency were best judgement assessments because HMRC had not received any satisfactory evidence at that date that the sums received were loans.
- iii. Accordingly, the best judgment assessments and may not be set aside because they were not frivolous, vexatious or capricious.

3. The burden of proof

The burden of proof lies with the Appellant to show that the assessments were incorrect, and the standard is the civil standard.

4. The evidence

- 4.1 In addition to the bank statements, correspondence, notes of meetings and other documents in the trial bundle which comprised 291 pages, I have reviewed the

witness statements provided by Mr Stevenson a director and the major shareholder in GLS, Miss Marshall the company secretary of GLS and secretary to Mr Stevenson, Mr Hamish Deans a director and major shareholder of Midside Finances and Mr Symon the investigating officer of HMRC.

- a. I received oral evidence from each of Mr Stevenson, Miss Marshall and Mr Symon. Mr Hamish Deans was unable to attend the hearing due to his frail health and lack of technological expertise. The Tribunal has not put significant weight on the content of his statement.
- b. In his witness statement at [13] Mr Symon recalls that Miss Marshall (who was the company secretary and secretary to Mr Stevenson at the time) was present at the offices of GLS at the date of the site visit on 27 September 2017 (“**the site visit**”) had informed him during the course of the site visit that the payments in question were advances by way of loan.
- c. Miss Marshall produced the following documents to the Tribunal that she said she had shown to Mr Symon during the site visit but which Mr Symon had said were not sufficient evidence of the nature of the payments:
- d. A letter from GLS to Midside Finance dated 13 January 2016 referring to a conversation between Mr Hamish Deans and Mr Stevenson and GLS’s agreement to borrow a further £10,000. The letter is signed by Mr Stevenson as director of GLS, (**Document 1**).
- e. A letter from GLS to Midside Finances dated 29 April 2016 referring to a conversation between Mr Deans and Mr Stevenson and the agreement for GLS to borrow a further £12,000. The letter was signed by Mr Stevenson as director of GLS, (**Document 2**).
- f. A loan agreement dated 27 May 2016 signed by Mr Stevenson as director of GLS and witnessed by Miss Marshall but not executed by Midside Finances recording the agreement of Midside Finances to lend to GLS the sum of £225,000, (**Document 3**).
- g. An Appendix to a loan agreement dated 6 June 2016, which is signed by Mr Stevenson as director of GLS, dated 5 August 2016 and records a further loan of £25,000 (for the purpose of paying taxes to HMRC), (**Document 4**).
- h. A further Appendix to the loan agreement dated 6 June 2016, signed by Mr Stevenson as director of GLS, dated 23 September 2016 and records a further borrowing of £10,000. The Appendix has at the foot of the page a table of payments to GLS as follows:

| | |
|-------------------|----------------|
| <i>“10/1/2016</i> | <i>£10,000</i> |
| <i>03/05/2016</i> | <i>£12,000</i> |
| <i>02/06/2016</i> | <i>£90,000</i> |
| <i>03/06/2016</i> | <i>£90,000</i> |
| <i>06/06/2016</i> | <i>£45,000</i> |

05/08/2016 £25,000

23/09/2016 £10,000

taking GLS borrowing to £282,000.”

(Document 5)

- i. The Tribunal was provided with the meta data contained in each of the 5 documents. The meta data shows the dates on which the documents were created and in each case the document was created shortly before the loan to which it refers was paid into the bank account of GLS.
- j. In evidence Mr Symon said he had no recollection of being shown these documents.

5. The Facts

I found the following facts:

5.1 GLS is a property developer. In 2016 it was providing construction services in connection with the development of a new Aldi store.

5.2 Mr Stevenson is a director of and the major shareholder of GLS. He also owns a number of other companies. GLS historically has purchased goods and services on behalf of those associated companies and provided loan finance to them.

5.3 Midsize Finance is a provider of finance to companies that are unable to borrow from banks. Its latest accounts filed at Companies House show it has a loan book of more than £1m. There are no fees for a loan made by Midside Finances but the interest rate is 1% per month for each month during which a loan is outstanding, rising to 2% if there is a default which is not remedied within 5 days.

5.4 Mr Hamish Deans is a director of GLS. Mr Hamish Deans is also a director and shareholder of Midside Finances. Mr Stevenson and Mr Deans have been friends and business associates for over 20 years.

5.5 GLS had a history of borrowing from Midside Finances. In 2016 GLS needed to borrow because Mr Stevenson was unable to access bank finance owing to his personal circumstances and impending significant divorce settlement.

5.6 Mr Stevenson explained that some of the 2016 advances were to cover general running expenses and others were used to enable GLS to make loans to some of the associated companies.

5.7 The bank statements of GLS show that the GLS received the following payments from Midside Finances in 2016:

| | |
|-------------------|---------|
| 14 January 2016 | £10,000 |
| 2 May 2016 | £12,000 |
| 2 June 2016 | £90,000 |
| 3 June 2016 | £90,000 |
| 6 June 2016 | £45,000 |
| 10 August 2016 | £25,000 |
| 23 September 2016 | £10,000 |

Total £282,000

5.8 None of the payments received in 2016 had been repaid to Midside Finances at the date of the hearing.

5.9 GLS had been unable to repay the loans because part of the fee for the work on the Aldi building was contingent on the availability of planning permission on a small site. That permission has now been granted and the payment is expected in the next couple of months. The loans will be paid promptly owing to the very high interest rates.

5.10 The accounting records of GLS had been poor in the period under consideration. The loans had not all been reflected in the accounts of GLS. There had been confusion as to what was a personal loan to Mr Stevenson and what was a loan to GLS secured by a personal guarantee. The accounting records have now been brought up to date by Deans Chartered Accountants and the latest accounts reflect the indebtedness of GLS to Midside Finances.

5.11 Miss Marshall had sent Documents 1 to 5, to Midside Finances in 2016 for execution by Mr Hamish Deans. GLS did not have a copy of the executed versions.

5.12 Mr Hamish Deans is 89 years old, is not computer literate and was unable to scan the executed version of the documents and return a copy to GLS.

5.13 Mr Symon has no recollection of Miss Marshall showing him the folder of Documents during the site visit on 27 September 2017. Mr Symon followed up his visit with a request for documents. The Documents were not sent to HMRC during the investigation. Miss Marshall explained that she had not sent them to Mr Symon in subsequent correspondence because he had said they were insufficient during the site visit.

5.16 Mr Symon considered that he had not received any satisfactory evidence of the payments being loans in advance of making his best judgment assessment on 28 February 2018.

5.17 Between the date of the site visit (29 September 2017) and date of the assessment on 28 February 2018 Mr Symon sought explanations of various points covering periods as early as 2013 as well as asking for SAGE returns, historic and current bank statements, evidence of the loans and explanations of the purpose of the loans.

5.18 Miss Marshall had indicated on two separate occasions that she had sought and was waiting for copies of the executed loan agreements from Midside Finances. A letter dated 16 January 2017 from Mr Symon was only received by GLS on 29 January and at that date Mr Stevenson was absent due to illness. Miss Marshall had passed it to GLSs accounting advisers Deans to assist in the reply. They replied to HMRC on 9 April confirming the sums were ordinary commercial loans. Mr Symon had by then raised assessments for VAT on the basis the sums received from Midside Finances were payments for taxable supplies.

5.19 Mr Symon wrote to Deans on 19 April 2018 indicating that GLS and the company secretary had already informed him that the payments were loans but that he needed proof and in the absence of any proof his decision would remain unchanged.

5.20 On 1 May 2016 Mr Symon received an email from Deans informing him that GLS was in touch with Midside Finances and wished to clarify exactly what HMRC required as the information could be scanned from Midside Finances. Mr Symon

replied by email on 1 May 2018 indicating he required the following evidence for each loan:

- i. An agreement between the parties setting out the terms
- ii A narrative description setting out the reason for /purpose of the loan
- iii. Schedules showing the loan amounts and how the interest is calculated
- iv Evidence supporting that these loans had been used within the business
- v. Any other information felt relevant.

5.21 Deans Chartered Accountants replied on 4 May 2018 and enclosed:

5.21.1 A loan agreement dated 23 September 2016 signed by Mr Stevenson of GLS and Mr Deans of Midside Finance. The loan agreement was for £10,000 but records in clause 1 that the £10,000 loan is in addition to the other loans made in January, May June and August 2016 totalling £282,000.

5.21.2 A breakdown of the loans showing the information set out in the table above. This document had been signed by Mr Deans on behalf of Midside and by Mr Stevenson on behalf of GLS and was also dated 23 September 2016.

5.21.3 A schedule of interest payments due.

5.22 Mr Symon replied on 29 May 2018 to the effect that this was not all of the information he had asked for and that his original decision would remain unchanged although GLS could seek a review. Mr Symon's view was upheld by the Review Officer.

5.23 GLS had not supplied any construction services to Midside Finances in 2016.

5.24 I find that that the document dated 23 September 2016 executed by both GLS and Midside Finances recording the making of a further £10,000 loan to GLS on that date and recording the six earlier loans is sufficient evidence that the seven payments totalling £282,000 shown in the bank statements of GLS had had been received by GLS by way of loan.

5.25 In relation to the documents produced by Miss Marshall to the Tribunal listed in 4.1 above I find:

5.25.1 The letters dated 13 January 2016 and 29 April 2016 (Documents 1 and 2) are sufficient evidence of loans of £10,000 and £12,000 were made by Midside Finance to GLS in January and May 2016 to enable them to be enforced against GLS. The absence of any document signed by Midside Finances would not prevent the recovery of the loans from GLS by Midside Finances.

5.25.2 The loan agreement dated 27 May 2016 (Document 3) signed by Mr Stevenson on behalf of GLS is evidence of the agreement by Midside Finances to lend £225,000 to GLS. The loan date was expressed to be 31 May 2016. In the event the bank statements show that the loan was paid in three instalments of £90,000, £90,000 and £45,000 in the first week of June. The agreement would enable Midside Finances to enforce the loans notwithstanding that it was not signed by them.

5.25.3 The Appendices dated 5 August 2016 and 23 September 2016 signed by Mr Stevenson on behalf of GLS (Documents 4 and 5) record the agreement of Midside Finances to lend £25,000 and £10,000 to GLS. As the bank statements of GLS show payments of £25,000 and £10,000 were received by GLS from Midside Finances, the appendices would be sufficient evidence of the loans to enable Midside Finances to enforce the loans notwithstanding that Midside Finances had not signed them.

6. Best judgment assessments – the Respondents position

6.1 Section 73(1) VATA enables the commissioners of Her Majesty's Revenue & Customs to issue assessments where a person is required to file VAT returns and:

“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 judgement and to notify it to him.”

6.2 The Respondents state that where a best judgment assessment has been issued that assessment may only be set aside if the assessment was frivolous, vexatious or capricious.

6.3 The Respondents state that the burden of proof lies on the Appellant to prove its case to the civil standard. That burden was not discharged by the Appellant before the assessments were issued in February 2018.

6.4 The Respondents rely on *Grunwick Processing Laboratories Ltd v Commissioners of Customs & Excise CoA*, [1987] STC 357. That case concerned purchases of silver waste from the processing of photographs undertaken by the Appellant. The Appellant had not produced any evidence to displace any single purchase order in the possession of the purchaser although it had produced some expert evidence that it could not have supplied all the silver waste purchased given the volumes of business conducted by the appellant and the opening and closing stock values. The Tribunal did not accept that the Appellant had discharged the burden of proof. Specific purchase orders had to be challenged. To do so the purchase manager would have had to have been called to confirm the Appellant's evidence. That was not done.

6.5 The Respondents state that GLS' VAT returns were incomplete because they did not include for the relevant periods the £282,000 received from Midside Finances in 2016 which in the absence of evidence to the contrary must be consideration for taxable supplies.

The Appellant's position

6.6 The Appellant says that there is evidence that the £282,000 received by GLS in 2016 and shown in its bank accounts represent seven commercial loans made by Midside Finances to GLS in 2016.

6.7 Evidence of loans totalling £282,000 had been shown to Mr Symon by Miss Marshall during the site visit in September 2017 but that evidence was dismissed by him at the time as being insufficient.

6.8 A further agreement dated 23 September 2016 executed by GLS and Midside Finances for a loan of £10,000 which recorded that the loan is in addition to other

loans totalling £282,000 had been provided to HMRC by Deans in May 2018. (“Document 6”). That document was also dismissed by Mr Symon as insufficient evidence of a loan.

6.9 As the £282,000 of payments received by GLS were loans and not consideration for the provision of services the returns were not incomplete and the assessments should be dismissed and the appeal allowed.

7. Discussion

7.1 For the VAT returns to be incomplete because of the non-inclusion of payments of £282,000, the payments must have been consideration for taxable supplies. If the payments were in fact advances by way of loan the returns were not incomplete and so the requirements of section 73(1) would not be satisfied.

7.2 The issue is therefore whether the Documents produced by Miss Marshall and by Deans are sufficient evidence of loans of £282,000 having been made by Midside Finances to GLS

7.3 Six documents were provided to the Tribunal relating to the alleged loans. Mr Symon has no recollection of being shown Documents 1 to 5 but he did receive Document 6 which, except for the values, is identical to Document 3.

7.4 Documents 3 and 6 are expressed to be governed by Scottish law. No evidence of Scottish law was produced by the parties and so it is presumed to be the same as English law. In ordinary cases such as this, the law does not require a contract to be made in any particular form. A contract can be validly made orally or in writing or partly orally and partly in writing.

7.5 Contracts partly in writing (and not by deed) do not differ in principle from oral contracts. Their meaning is a question of construction and therefore of law to be ascertained in the light of the language used in the context of all the relevant surrounding circumstances. (See *Halsbury’s Laws of England*, Fifth Edition, published by Lexis Nexis, Volum 22 entitled “*Contract*” at para 84 et seq)

7.6 Documents 3 and 6 are clear. The context is set out in the first recital in each case, namely that GLS wishes to borrow the specified sum (£225,000 in the case of Document 3 and £10,000 in the case of Document 6) from Midside Finances.

7.7 Document 3, clause 2 states that Midside Finances has agreed, subject to GLS providing security, to lend to GLS the aggregate sum of £225,000 subject to the terms and conditions specified in the document. The terms include an obligation to repay after 12 months (clause 4), interest at one per cent per month (clause 3) which increases to two per cent if there is a default, which would include a failure to repay after 12 months. Document 3 is signed only by Mr Stevenson on behalf of GLS. But not by Midside Finances. Bank statements show that the aggregate sum of £225,000 was paid in three instalments of £90,000, £90,000 and £45,000 in June 2016. This indicates that Midside Finances performed the contract whether or not the loan agreement was signed on behalf of Midside Finances. In consequence Midside Finances can enforce repayment and recover the unpaid interest against GLS.

7.8 Document 6 also has a recital which records GLS’ wish to borrow £10,000 from Midside Finances and records the loan is in addition to the previous loans listed in a document annexed to the loan and headed “Breakdown of Loans”. The annex records the loan brings the total loans to £282,000. Both the loan document and the annex to it

is dated 23 September 2016 and both are signed by Mr Stevenson for GLS and Mr George Deans director of Midside Finances. Clause 2 of the loan agreement provides that the Lender agrees, subject to taking security, to lend a further £10,000 to GLS. Clause 4 provides that the loan is repayable at the end of 12 months. Clause 3 provides that interest is to accrue at one per cent per month. That rises to two per cent in the event of a default which would include failure to repay after 12 months.

7.9 I am satisfied that as a matter of law Document 3 is a contract for the provision of loan finance from Midside Finances to GLS for £225,000 and that document 6 is a contract for the provision of loan finance for £10,000.

7.10 The Bank statements show that £225,000 was paid in three tranches in June 2016 and £10,000 was received in September 2016 demonstrating that the parties performed the obligations to provide security and to provide finance respectively.

7.11 Document 6 also confirms that the parties accepted the details of the following additional loans bringing the total to £282,000:

| | |
|-----------|---------|
| 14/1/2016 | £10,000 |
| 2/5/2016 | £12,000 |
| 2/6/2016 | £90,000 |
| 3/6/2016 | £90,000 |
| 6/6/2016 | £45,000 |
| 5/8/2016 | £25,000 |

7.12 Mr Symon did not accept Document 6, produced by Deans in June 2018, as sufficient evidence of any loan having been made to GLS by Midside Finances. This was an incorrect judgment. It is beyond doubt that document 6 is an enforceable contract in relation to the £10,000 loan made on 23 September 2016. Further the annex to Document 6 is also an admission against interest by GLS that it had received £282,000 loans from Midside Finances and is liable to repay £282,000 to Midside Finances. By the beginning of June 2018 Mr Symon had all of the relevant bank statements to be able to verify whether the sums had been advanced. This would have been sufficient evidence to demonstrate the relationship of lender and borrower between Midside Finances and GLS. The same error had been made by the Reviewing Officer.

7.13 Given Mr Symon's rejection of document 6 (which is executed by both parties) as evidence of the £10,000 being a loan by Midside Finances to GLS, I accept Miss Marshall's evidence that during the site visit in 2017 Mr Symon had considered Documents 1 to 5 (which are signed only by GLS) as not being sufficient evidence of the relationship of lender and borrower between Midside Finances and GLS. As a matter of law, a lender who makes payments into a borrower's bank account and has a memorandum signed and dated by the borrower has an enforceable contract with the borrower. Mr Symon had incorrectly concluded that Documents 1 to 5 were insufficient evidence that the payments were by way of loan.

7.14 I consider Miss Marshall's version of events to be more than likely to have occurred because the meta data of the Documents shows they were created in 2016 just before the making of the payments and Miss Marshall had said during the site visit that they were loans.

7.15 I consider therefore that GLS has discharged the burden of proving that the £282,000 payments were by way of loan and not consideration for taxable supplies. As the provision of loan finance is an exempt supply for VAT, GLS was not obliged to include the £282,000 payments in its VAT returns. The VAT returns were not incomplete therefore. Accordingly the requirements of section 73(1) VATA were not satisfied. The assessments should be reduced by £47,000 accordingly.

7.16 I do not therefore need to consider whether HMRC acted frivolously, vexatiously or capriciously.

Decision

8. I allow the appeal and reduce the assessments by £47,000.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

2. 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.

JUDGE GETHING
TRIBUNAL JUDGE

RELEASE DATE: 31 DECEMBER 2020