TC01598

Appeal number: TC/2010/1692

Value Added Tax – Whether supply business entertainment – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

C I CRUISES INTERNATIONAL SA **Appellant**

- and -

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

TRIBUNAL: DR K KHAN (Judge)
SHEILA CHEESMAN

Sitting in public in London on 13 October 2011

John Shelley, Tax Adviser, for the Appellant

Michael Jones, counsel, for the Respondents

DECISION

Introduction

1. This appeal is made pursuant to section 83(1) (c) of Value Added Tax Act 1994 ("VATA"). It is an appeal against a decision of the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") made on 5 June 2009 and upheld on 4 December 2009 to partially refuse a claim made by the Appellant on 31 October 2008 for a refund of UK VAT pursuant to the 13th Council Directive 86/560/EEC ("the 13th Directive") as implemented into UK law by section 39 VATA. The total amount claimed was £113,035.83 for the period 1 July 2007 to 30 June 2008 inclusive ("the relevant period"). The claimed amount which was refused is £111,126.64 which was incurred on services used for the purposes of business entertainment, which is the sum in dispute.

2. The Appellant says that the services supplied by Opus Create Ltd (t/a Opus Creative Marketing) ("Opus"), a UK business, were not business entertainment and therefore a repayment should have been made in full. The Commissioners maintained their refusal. They say that pursuant to section 84(4) VATA, the Appellant can only succeed in its appeal if they can show that the Commissioners' decision with respect to the amount of input tax that may be credited to the Appellant, can be shown to be unreasonable.

Relevant facts

3. The facts are largely undisputed.

4. The Appellant is a Swiss company registered for Swiss VAT carried on business as a Cruise Liner company.

5. During the relevant period the Appellant incurred costs in respect of the launch of a new cruise ship, the MSC Poesia, on 5 April 2008 at Dover.

6. In the period before the launch, during February and March 2008, Opus made enquiries with the Commissioners regarding the VAT liability of the service they were purporting to provide to the Appellant. The Commissioners stated in an e-mail on 25 February 2008:

> "I do not think you are providing advertising services but an event and thus the place of supply is where the event takes place as they are specifically excluded from the Schedule 5 services as per paragraph 12.3.3 of the above Public Notice (Notice 741)."

7. The Commissioners therefore confirmed that the supply was an event taking place in the UK and therefore there was a liability to standard rate VAT.

8. By way of background, the launch of the ship was attended by over 2,000 people including travel agents, journalists, celebrities, competition winners, royalty and employees. The event was free of charge to guests. It was designed and implemented by Opus, a UK based events management company.

9. During the launch party there was music, dancing and other entertainment for the guests, who also enjoyed free food, drink and accommodation. The "christening" of a ship, which takes place when the ship is first launched, was done by Sophia Loren.

10. Opus invoiced the Appellant in three stages for a total amount of £635,009.39 plus VAT of £111,126.64. When the claim was made on 31 October 2008, the claim form stated that it was for "advertising and various port services". The nature of the services provided by Opus was specified in a schedule to the invoices as "Marketing for Launch".

11. On 21 May 2009, Reeves & Neylan, accountants to the Appellant, provided information to the Commissioners explaining the supplies made by Opus. They stated:

> 1. The launch was attended by 2,336 people.
> 2. It was provided free of charge to all guests
> 3. Opus "designed the event from concept to implementation including booking all artists, dealing with all technical details etc.
> 4. The event was intended to "sell the product" (cruise ship) and those attending, in particular travel agents, would advertise and sell the ship to members of the public.

12. The ship itself was very impressive having some sixteen decks, various bars, duty free, spas, fitness centres, sport centres together with various forms of entertainment and facilities of the highest quality.

13. On 5 June 2009, the claim was refused on the basis that the VAT related to services which were used in the provision of business entertainment. On 9 July 2009 Reeves & Neylan wrote to the Commissioners stating that, in their view, the supplies were not entertainment but advertising and marketing and were supplied outside the EC to Switzerland and therefore should be zero-rated.

14. In a review letter on 9 September, the Commissioners upheld their decision of 5 June 2009.

15. There followed various communications between the parties but the decision was not changed and a Notice of Appeal was lodged at the Tribunal on behalf of the Appellant on 10 February 2010 by their representative Mr John Shelley.

Issue

16. The main issue for determination by the Tribunal is whether the services provided to the Appellant by Opus were used for the purposes of business entertainment. The Tribunal can only allow the Appellant's appeal if it considers that the Commissioners' decision was unreasonable, or would have been unreasonable, if the information brought to the attention of the Tribunal that could not have been brought to the Commissioners, had been available to be taken into account when the determination was made. In other words, the Commissioners made an unreasonable determination.

17. The Tribunal have also been asked to look at the question of the place of supply and whether the services provided by Opus comprised "advertising services" which were treated as supplied in Switzerland and outside the scope of VAT.

18. The second ground is not listed in the Notice of Appeal.

Submissions of the Appellant

19. The grounds of appeal as stated by the Appellant in their Notice of Appeal are as follows:

> "The decision which ought to have been given was that the VAT was properly claimed and should have been repaid by HMRC for the following reasons:
>
> > 1. The Company contends that the Respondents were wrong to treat all or any of the services as 'business entertainment'. The Company contends that the services supplied by Opus were a mixture of marketing and the provision of the infrastructure by which the 'christening' service as advertised and presented to the public generally and the travel agents in particular.
> > 2. Without prejudice to the above, the Company also relies on the fact that the provision of hospitality was undertaken through the ship's own on-board facilities and the guests with [sic] provided inter alia free with drinks, free lunch, various entertainments, overnight accommodation, breakfast and general hospitality. As such these expenses were not invoiced from Opus.
> > 3. In the circumstances the Company contends that HMRC should have made the VAT repayment and wrongly categorised the whole of the services provided by Opus as business entertainment."

20. The Appellant, in submissions received after the hearing, submitted that the Commissioners acted unreasonably in a number of ways. This included:

1. Making uninformed decisions without proper consideration of the evidence, law and representations.

2. Failing to "show their hand" in February 2008

3 Relying on Notice 741 para.12.3.3 without regard to the decision in Commission V France (Case C-68/92) on cross border delivery of services

4. Failing to apply the concession in Business Brief 44/10 on business entertainment provided overseas

5. Failing to give a reasoned decision and a proper review

21. They say that the Commissioners stated in 2008 that since there was "an event" all services was provided in the UK and standard rated. They were not informed until 2009 of the Commissioners' view that the expenses incurred were for business entertainment and this delay in communicating that information operated to disadvantaged them in making a claim. They say that the Commissioners in not raising the business entertainment point earlier and in not responding to their accountants' arguments on outside the scope meant they were not given an opportunity to raise a claim (within the time limits) for that argument.

22. The appellant also says that the services supplied by Opus were "advertising services" for the purposes of paragraph 2, Schedule 5 VATA and were treated as supplied in Switzerland and were outside the scope of VAT.

Arguments of the Commissioners

23. The Commissioners say that the Appellant's claim for a VAT refund is not available to the Appellant under the 13th Directive or s.39 VATA 1994 and Reg. 186 of the 1995 Regulations because the tax incurred would not be creditable to a taxable person under s.25 VATA 1994 by virtue of the fact that it was incurred on services used for the purposes of "business entertainment".

24. The Commissioners say that the Notice of Appeal does not dispute that the launch held in April 2008 constituted business entertainment within the definition set out in Article 5(3) VAT (Input Tax) Order SI 1992/3222.

25. The Commissioners refute the Appellant's argument that the services provided by Opus were not business entertainment and not capable of being used for the purposes of business entertainment since they amounted to advertising. They say that the services provided by Opus were in the nature of an event organiser and that the Appellant actually used the services made to them by Opus for the purposes of

business entertainment and that the role of Opus was to provide the "infrastructure" for which the entertainment was provided to guests .

26. The Commissioners also say that the place of supply was not stated as a ground for appeal and was not raised in the Notice of Appeal and should not be entertained. The Commissioners say that the Appellant must choose between the place of supply argument and the advertising services. The place of supply issue is not something the Tribunal can deal with since it has not been stated as a ground of appeal in the Notice of Appeal.

27. The Commissioners say that the Tribunal can allow the argument to be raised out of time but there has been no application to do so and given there should be finality of litigation if permission is given to appeal out of time then Opus should be joined as an interested party. They have not indicated that they wish to be so joined. The Commissioners say that this argument should be struck out.

Relevant law

28. The 13th VAT Directive (86/560/EEC) provides for the repayment of VAT to taxable persons not established in the EU. Article 2 of that Directive provides that:

> *Article 2*
>
> *1. Without prejudice in Article 3 and 4, each Member State shall refund to any taxable person(as defined)(1) not established in the territory of the Community, subject to the conditions set out below, any value added tax charged in respect of services rendered or moveable property supplied to him in the territory or the country by either taxable persons or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transaction referred to in Article 17(3)(a) and (b) of Direction 77/388/EEC or of the provision of services referred to in point 1(b) of Article 1 of this Directive.*
>
> *2. Member States may make the refunds referred to in paragraph 1 conditional upon the granting by third States of comparable advantages regarding turnover taxes.*
>
> *3. Member States may require the appointment of a tax representative.*

[1]By Art 4(1) of the Sixth Directive (now Art 9, Principal VAT Directive), "taxable person" means any person who independently carries out in any place any economic activity specified in [Art 4(2)], whatever the purpose or results of that activity. It is common ground that the Appellant is a "taxable person" for these purposes.

29. Article 3 provides requirements for the claim process, while Article 4 reads as follows:

> *Article 4*
>
> *1. For the purposes of this Directive, eligibility for refunds shall be determined in accordance with Article 17 of Directive 77/388/EEC as applied in the Member State where the refund is paid.*
>
> *2. Member States may however, provide for the exclusion of certain expenditure or make refunds subject to additional conditions.*
>
> *3. This Directive shall not apply to supplies of goods which are or may be exempted under point 2 of Article 15 of Directive 77/388/EEC.*

30. The terms of the 13th VAT Directive have been implemented into UK law by s.39, VATA 1994 and regulations 185-197 of the VAT Regulations 1995 (SI 1995/2518). Section 39, as the relevant time, stated:

> *39 Repayment of VAT to those in business overseas*
>
> *(1) The Commissioners may, by means of a scheme embodied in regulations, provide for the repayment, to persons to whom this section applies, of VAT on supplies to the, in the United Kingdom or on the importation of goods by them from places outside the member States which would be input tax of theirs if they were taxable persons in the United Kingdom.*
>
> *(2) This section:*
>
> *(a) applies to persons carrying on business in another member State, and*
> *(b) shall apply also to persons carrying on business in other countries, if pursuant to any*
>
> *Community Directive, rules are adapted by the Council of the Communities about refunds of VAT to persons established elsewhere than in the member States, but does not apply top persons carrying on business in the United Kingdom.*
>
> *(3) Repayment shall be made in such cases only, and subject to such conditions, as the scheme may prescribe (being conditions specified in the regulations or imposed by the Commissioners either generally or in particular cases); and the scheme may provide –*
>
> *(a) for claims and repayments to be made only through agents in the United Kingdom;*
> *(b) either generally or for specified purposes –*

(i) for the agents to be treated under this Act as if they were taxable persons; and

(ii) for treating claims as if they were returns under this Act and repayments as if they were repayment of input tax;

(c) for generally regulating the methods by which the amount of any repayment is to be determined and the repayment is to be made.

31. The VAT Regulations 1995, insofar as relevant, provide:

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Subject to the other provisions of this Part a trader shall be entitled to be repaid VAT charged on goods imported by him into the United Kingdom in respect of which no other relief is available or on supplies made to him in the United Kingdom if that VAT would be input tax of his were to be a taxable person in the United Kingdom.

…

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(1) Save as the Commissioners may otherwise allow, a trader to whom this Part applies who is established in a third country being a comparable system of turnover taxes will not be entitled to any refunds under this Part unless that country provides reciprocal arrangements for refunds to be made to taxable persons who are established in the United Kingdom

…

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(1) The following VAT shall not be repaid –

(a) VAT charged on a supply which if made to a taxable person would be excluded from any credit under section 25 of the Act,

…

32. Section 25, VATA 1994, it (relevantly) provides that:

25 Payment by references to accounting periods and credit for input tax against output tax.

…

(7) The Treasury may by order provide, in relation to such supplies, acquisitions and importations as the order may specify, that VAT charged on them is to be excluded from any credit under this section, and …

(a) any such provision may be framed by reference to the description of goods or services supplied or goods acquired or imported, the person by whom they are supplied, acquired or imported or to whom they are applied, the purposes for which they are supplied, acquired or imported, or any circumstances whatever; and

(b) such an order may contain provision for consequential relief from output tax.

33. The VAT (Input Tax) Order 1992 (SI 1992/3222) was made under the predecessor to s.25 (7), VATA 1994, Article 5 of the Order states that:

(1) Tax charged on any goods or services supplied to a taxable person, or on any goods acquired by a taxable person, or on any goods imported by a taxable person, is to be excluded from any credit under section 25 of the Act, where the goods or services in question are used or to be used by the taxable person for the purposes of business entertainment.

…

(3) For the purposes of this article, "business entertainment" means entertainment including hospitality of any kind provided by a taxable person in connection with a business carried on by him, but does not include the provision of any such entertainment for either or both …

(a) employees of the taxable person;

(b) if the taxable person is a body corporate, its directors or persons otherwise engaged in its management;

unless the provision of entertainment6 for persons such as are mentioned in sub-paragraph (a) and (b) above is incidental to its provisions for others.

34. Section 84(4), VATA 1994 provides that:

(4) Subject to subsection (11)[2] below, where –

(a) there is an appeal against a decision of HMRC with respect tom, or to so much of any assessment as concerns, the amount of input tax that may be credited to any person or the proportion of input tax allowable under section 26, and

(b) that appeal relates, in whole or in part, to any determination by HMRC –

(i) as to the purposes for which any goods or services were or were to be used by any person, or

(ii) as to whether or to what extent the matters to which any input tax was attributable were or included matters other than the making of supplies within section 26(2), and

The tribunal shall not allow the appeal or, as the case may be, so much of it as relates to that determination unless it considers that the determination is one which it was unreasonable to make or which it would have been unreasonable to make if information brought to the attention of the tribunal that could not have been brought to the attention of HMRC had been available to be taken into account when the determination was made.

EVIDENCE

35. The tribunal was provided with two ring binders, one of documents and one of authorities. There was one witness for the Appellant, Ms J A Vogel.

Witness evidence of Ms Jessica-Anne Vogel

36. The witness provided a three page Witness Statement signed on 10 December 2010. She was cross-examined on the statement at the hearing.
The following evidence is relevant:

1. Ms Vogel was the Events Coordinator for the London subsidiary of the Appellant

2. She confirmed that there was no payment for food, drink, accommodation or entertainment at the launch and the event was organised for marketing the ship and its facilities. There was no obligation on attendees to complete any forms or to write a review.

3. The role of Opus was to "choreograph the event and to take the lead role in the marketing side of the event both as to planning and execution of the Christening".

4. Guests were invited to enjoy the "indulgencies and entertainment" and would "convey the message to the public by way of news items, travel brochures and articles".

Discussion

35. The Tribunal has to answer the simple question of whether the Appellant qualifies for a VAT refund under section 39 VATA 1994 and reg. 186 of the 1995 Regulations or whether there is no entitlement to such a credit due to the fact that the input tax was incurred on services used for the purposes of "business entertainment".

36. Taxable persons in the UK are normally able to recover, as input tax, VAT incurred in goods and services used for a business purpose. However, input tax incurred on the provision of business entertainment is blocked from recovery by virtue of an order made under VATA 1994 section 25(7). Business entertainment means entertainment (including hospitality of any kind) provided by a taxable person in connection with a business carried on by him. The Commissioners in their Public Notice (Notice 700/62/02) gave the following examples of entertainment, which includes the provision of food and drink, provision of accommodation, provision of theatre and concert tickets and entry to sporting events and facilities. The question which arises in this case is whether the launch event or the christening of the ship was business entertainment in that invited guests were provided with food, drink, entertainment and accommodation all of which was free of charge.

37. In the case of *CEC v Shaklee International & Another* [1981] STC 776 at 782, Lord Brandon observes:

> "In this case a taxpayer had supplied to them by hotels or similar establishment, goods or services in the form of meals and accommodation, and they use those meals and they an accommodation for the purpose, as I see it, of entertaining these various people who came to these meetings. I say, "for the purpose of entertaining" because to give people free meals and to give them free accommodation is, to my mind, to entertain them within the ordinary and natural meaning of the word … Most people who receive free meals and are put up free in hotels would, I think, regard themselves as receiving hospitality. I certainly would regard them as doing so".

38. While the Commissioners say that provision of free food, drink, entertainment and accommodation constituted hospitality and or entertainment, the Appellant says that the event was in the nature of a product demonstration rather than entertainment. The Appellant says that the event was attended by the press and travel agents, who were expected to take away a "vision" of the ship, which would allow them to promote the business and sell cruise holidays to the public. The event provided a "first-hand experience" of the product in order to promote sales. It was their experience which allowed them to recommend the cruise to holidaymakers and they took responsibility for the recommendations they made and the expectations which customers had if they purchased a cruise. The Appellant says that the travel agents were not invited to the Christening of the ship to be entertained but were invited to

"sample and to take that experience away with them". This was confirmed in the evidence of the event coordinator, Ms Vogel. They draw an analogy to opening a new restaurant and inviting food critics and the Press to sample the menu. The Appellant says that attendees have an interest in the event which is not simply the enjoyment of the event. They draw reference to the case of *W R Ltd v C&E Commissioners* (1992) VTD 6968, where the appellant argued that the provision of theatre tickets to producers to view a play, for the specific purpose of deciding whether to enter into an arrangement which would result in a benefit to the appellant, was not business entertainment. The producers were doing the play as part of their work. In such a situation the provision of the theatre ticket was not business entertainment. The appellant draws heavily on this case to suggest that the potential customers who attended the launch were not treated to a day. They were predominantly business people who were there for a specific business purpose namely to assess the quality and functionality of the ship's facilities.

39. Let us look at these assertions.

40. In the first instance the fact that an event can be described as a product demonstration does not prevent it being treated as business entertainment since the definition of business entertainment includes "hospitality of any kind", which makes the definition very wide. It points to the relationship between the guests and the host and the way in which the guests are treated and entertained. The Christening of the Ship and the elaborate nature of the arrangements made for entertaining the guests went well beyond a product demonstration and certainly would be more than one would expect, for example, when compared to a short tour of the Ship and its facilities. The budget was sizeable and significant with several months planning, big name performers and a very public marketing event. The Appellant draws reference to the case of *BMW (GB) Ltd v Customs and Excise Commissioners* QB (1997) where the tribunal was asked to decide on a matter involving the promotional activities of the car and motor cycle manufacturer who held "track days" where dealers, who bought products from BMW, could invite their own customers along to try out the various vehicles and see their demonstrations. Customers received food and drink, golf clinics and clay pigeon shoots among other benefits. The dealers contributed on a per capital basis for customers and guests invited by them but BMW bore the major costs. Guests paid nothing. A distinction was drawn between hospitality, which was supplied to customers and that which was supplied to the dealers. The distinction was between the amounts paid by the dealers to BMW to bring customers to the demonstrations events, and the amounts paid by BMW. The latter was treated as business entertainment and the input tax attributed to those costs was not recoverable. The simple logic is that when a person receives food, drink or similar benefits without making a payment, there is no VAT incurred on the supply and therefore the person providing the supply cannot be entitled to a credit. The case highlights the fact that business entertainment was that which was received free of charge. It was accepted that the input tax attributable to the dealer's contribution (for the right to bring guests) was recoverable since it was not business entertainment but was a payment for obtaining a right. The Appellant says that the demonstration of the Ship (product) was the primary purpose of the event and those invited such as agents and journalists,

who attended the event, were able to see the vessel and write about it even if there was nothing to eat or drink. The tribunal finds that that this case supports the view that the essential characteristic of business entertainment is the provision of something for free. The payment of money changes the supply into a commercial transaction. The gratuitous provision of a benefit amounts, in this case, to business entertainment. The rationale behind blocking the recovery of input tax in cases of business entertainment is to prevent a situation where a recipient made no payment at all for what was supplied and the supplier would seek to claim credit for input tax incurred on such supplies. Business entertainment was therefore a free supply on which input tax was irrecoverable.

41. A second point which arose concerns the position of Opus as an event organiser. It is accepted by the Appellant that Opus was an event organiser and this was confirmed in correspondence between Opus and HMRC on 25 February 2008 where a letter from HMRC stated that they did not "think you (Opus) are providing advertising services but an event and thus the place of supply is where the event takes place". The VAT in question was incurred on the services of Opus, whose role was to organise the launch party and therefore, the entertainment. This classification of their role was accepted by the Appellant's advisers (Reeves and Neylan) in their correspondence to the Commissioners on 29 April 2010 when they stated that they "absolutely agreed" with the Revenue ruling that Opus were event organisers. This confirms that the Appellant were looking at the relevant issues as a business entertainment point and not a place of supply point .The letter confirms that Opus did not provide the free food, free drink and free overnight accommodation as well as musical entertainment since they were provided by the Appellant. Opus only facilitated the event and planned the party. Opus was acting on behalf of the Appellant and the contract between the Appellant and Opus dated 27 December 2007, confirms Opus's role as the party organising all the activities on a schedule attached to the contract. In that contract, Opus provides services, created and agreed the budget, paid all costs (and reimbursed), and represented the Appellant. They also acted on their behalf and carried out their instructions in organising the event. It was an event which was hosted by the Appellant and the guests understood that there were the guests of the Appellant. They provided the entertainment, food, drink and accommodation and the guests expected to be so entertained. It would have been clear to attendees that the Appellant was providing all the gratuities. The event was branded by the Appellant with their ship, logo, advertising, brochure and presentations. The movement of the guests through the ship's numerous decks to experience the variety of shows, lounges, bars, casino and theatre was designed to showcase the quality facilities and service available on board the cruise liner. The issue is not whether the services provided by Opus were business entertainment but rather whether or not the Appellant used the supply made to them by Opus for the purpose of business entertainment. The answer to that question must be yes. The Appellant contended that it was a product demonstration and sought to explain the relationship between themselves and Opus in different ways. In their Notice of Appeal they stated that Opus provided "a mixture of marketing and the provision of the infrastructure by which the "Christening" service was advertised and presented". In a letter from Reeves and Neylan, advisers to the Appellant, dated 21 May 2009, they were

described as the party who "designed the event from concept to implementation including booking all artists, dealing with all technical details etc." On 13 January 2010, Reeves and Neylan said "… the supply provided by Opus is not, in and of itself, business entertainment, it can only ever be described as such when put to any use by the recipient" and finally they said that "Opus also provided the platform for the formal presentations by the Directors of the company which were also fully and carefully staged by Opus". In a sense, the role of Opus is secondary to the purpose of the entertainment. The purpose was to provide free hospitality to guest. It may have been a product demonstration, as the Appellant says, but that does not prevent what is provided from being business entertainment. It clearly falls into "hospitality of any kind".

42. If one looks objectively at the gratuities provided then the man in the street would say that giving people free meals, drink and accommodation constitutes hospitality. There was no obligation on attendees to complete a questionnaire or market research form and there was no contractual relationship between the Appellant and those attending .They were invited to the event based on a prepared guest list. The tribunal recognises that both parties had an interest in the event as a marketing opportunity but the primary purpose was to have an enjoyable evening in the company of the invited guests. They also experienced the marvels of the ship. However, there was no obligation on those attending to do reviews, write articles in the newspaper or a magazine or indeed to get clients for the Appellant. It was hoped that this would happen and it is possible, given the industry sector of the attendees, that they would heap high praise on the numerous features of the ship. However, the event was entirely gratuitous with no corresponding obligation. Those attending had businesses but there was no business or commercial relationship between the Appellant and the attendees. It is not disputed that input VAT is not recoverable on free supplies.

43. The supply was made in the UK and therefore attracted VAT. It is not accepted, as the Appellant argued that the services provided by Opus were either not entertainment or capable of being used for the purposes of business entertainment because they amounted to advertising and the cost was borne by the Appellant. The real test is whether what was supplied to the Appellant was used for the purposes of business entertainment and the Tribunal believes that it was so used.

OUTSIDE THE SCOPE

44. The Appellant's second contention is that Opus' services comprised "advertising services" for the purposes of paragraph 2, Schedule 5, VATA 1994, which were treated as supplied in Switzerland and so outside the scope of VAT.

45. The Appellant's contention relates to the place of supply rules. They say that the services supplied by Opus were advertising services, which for the purposes of the Sixth Directive (Directive 77/388/EEC), when performed for customers established outside the European Community, the place of supply is taken as where the supplier had established their business. In this case, the supplies would be zero rated. The

Appellant cites the *French Republic* case (EC Commission) Case C-68 [1997] STC 684, in support of this contention. In that case, the question of cross-border delivery of services arose. The European Court of Justice (ECJ) held, on an interpretation of Article 9.2 of the Sixth Directive, that supplies are taxed where the supplier has established its business. This may result in the non-taxation where the customer is established outside the European Community. Similarly in the case of *Austrian National Tourist Office v C&E Commissioners* 1998 (unreported) the place of supply rules on advertising services was in issue. A question arose as to whether supplies made to Austrian participants at a workshop in London were supplies of advertising services and should be treated as made in Austria under their place of supply rules in section 7(11) VATA 1994. The Tribunal decided that the supplies were made in London as the country where the appellant belonged and that in organising the workshops the appellant was not itself supplying advertising services; it merely provided facilities for promotional activities by the participants. The Appellant draws reference to these cases to explain the place of supply rules and zero rated advertising services, a Community concept which had to be interpreted uniformly. Advertising services, according to the case law, involves the dissemination of a message and information about a product which informs consumers and promotes sales.

46. The Tribunal while understanding the submissions of the Appellant at the hearing feels that it cannot make a decision on the place of supply rules since it has not been pleaded as part of the Notice of Appeal and therefore there is no jurisdiction in the Tribunal to make such a determination. It must be remembered that the Appellant is seeking a VAT recovery and has argued that the decision by the Commissioners to disallow the recovery of input tax was wrongly made. They cannot on the one hand argue for recovery of input tax and on the other that there should have been no input tax charged. If their argument is that there should have been no input tax charged then the proper course of action would be to withdraw this appeal and to ask Opus to repay the £111,126.64 which was charged by way of VAT and ask Opus to take the point up with the Commissioners. Secondly, the tribunal finds that Opus were event managers, who charged a fee for arranging an event. As in the Austrian National Tourism Office Case, they are facilitators of a service for promotion, which is not advertising services. For these reason the second contention of the Appellant is not considered. As explained earlier, the tribunal does not believe that the services provided are advertising services.

SECTION 84(4) VATA AND REASONABLENESS

47. The Tribunal invited the parties to make written submissions on Section 84 (4), VATA 1994 on conclusion of the hearing. This was due to time pressure at the hearing and allowed an opportunity for the parties, in particular the Appellant, to study the provision, review the correspondence and documents and identify unreasonableness on the part of the Commissioners which can be pleaded under the section.

48. The Appellant made the following submissions regarding the substantive provision. First, that s.84 (4) (a) requires there to be an "assessment" by the

Commissioners in order to engage the section. Second, that s.84 (4) only applies to specific grounds of appeal and s.39 and 83(1)(ha) do not appear to be within the ambit of the provision. Thirdly, that s. 84(4) is "prima facie directed at instances where there is likely to be an element of apportionment or attribution in mixed supplies". As explained earlier, the Appellant makes various points which indicate that the Commissioners were unreasonable in making their determination. These involve time delays, wrong application of law and practice and none consideration of representations made by the Appellant and advisors.

49. We will examine these representations. First, s.84 (4) clearly refers to a decision of the Commissioners with respect to either: the amount of input tax that may be credited to any person or the proportion of input tax allowable under s.26; or, so much of any assessment as concerns the amount of input tax that may be credited to any person or the proportion of input tax allowable under section 26.It is not necessary to have an assessment by the HMRC as a condition precedent to the application of the section. It is sufficient that there is a decision of the Commissioners with respect to the amount of input tax that may be credited to any person. A decision is normally reviewable before an appeal is lodged whereas an assessment does not have a review procedure and is a demand for a fixed amount of tax. The tribunal disagrees with the Appellant's submission. . Secondly, on a reading of the section there is nothing to support the Appellant's assertion that s.84 (4) applies only to specific grounds of appeal. This is evident from the section itself which provides in s.84(1) that "references in this section (84) to an appeal are references to an appeal under section 83". In effect, there is no restriction in s. 84(4) of the type suggested by the Appellant. Thirdly, the Appellant asserts that the subsection is directed at instances where there is likely to be apportionment or attribution in mixed supplies. The tribunal does not agree with this interpretation and can find no support for this view in the wording of the section. This leads us to consider the main question, as required under the section, which is whether the determination of the Commissioners was unreasonable.

50. The Tribunal does not believe that the Commissioners' determination was unreasonable or would have been unreasonable to make ,if information brought to the attention of the Tribunal that could not have been brought to the attention of the Commissioners, had been available to be taken into account when the determination was made. The Tribunal's view is that the hospitality/entertainment provided by the Appellant in connection with its business and was business entertainment. The Appellant's initial claim, dated 31 October 2008 and received at the Overseas Repayment Unit ("ORU") on 28 November 2008, stated that the claim was for goods and services used for "Advertising and various Port services". The three invoices for supplies made to the Appellant by Opus were submitted in support of the claim and the nature of the service provided by Opus was stated to be "Marketing for launch". On 21 May 2009, the Appellant's representation, Reeves and Neylan stated that the launch was attended by 2,336 people including travel agents, journalists, celebrities, competition winners, royalty and two of the Appellant's directors and it was free of charge to all guests. They stated that Opus had "designed the event from concept to implementation". On 5 June 2009, the bulk of the claim £111,126.54 was refused on

the basis that the VAT in question related to services which were used in the provision of business entertainment. On 5 August 2009, Reeves and Neylan wrote to the Commissioners seeking clarification of the decision and setting out the Appellant's position and stating that the launch was not a business event but a demonstration of a new product. They said that the services purchased from Opus amounted to zero-rated advertising or, alternatively, the launch did not amount to business entertainment because the majority of guests were not customers or potential customers. The Commissioners maintained in correspondence thereafter that the supplies were not advertising or promotion (gave a rebate for input tax on the Port services (£1,909.19)) but business entertainment/hospitality. There responded to the Appellant's queries and considered the information provided. There appears to be nothing unreasonable in making the determination.

51. The Appellant says that the manner in which the determination was made was unreasonable. The claim for repayment for the period 07/07 to 06/08 for £113,035.83 arising from the three invoices (numbers 17241, 17242 and 17278) were questioned by the Commissioners on 19 May 2009 who asked for further information/details concerning the event organised by Opus. The information was provided by Reeves and Neylan on 21 May 2009. On 10 June 2009 the Commissioners stated that there would be no refund for the substantial claim but only a partial refund (£1,909.19). The letter of 10 June 2009 gave the reason as business entertainment, where input tax was irrecoverable. During 2008, the Commissioners had stated that the input tax was being disallowed since Opus was providing an event organisation service in the UK (letter of 25 February 2008). Mr Shelley for the Appellant said that being told in 2009 that the issue related to business entertainment meant that the time limit for making a claim relating to supplies being outside the scope were now out of time. Therefore, they were not given an opportunity to raise a claim and arguments, within the time limit, dealing with the supplies being outside the scope to tax. The only argument which could be raised at the Tribunal is one which related to the supply being taxable as opposed to being outside the scope. The Appellants say they were prejudiced by the delay of the Commissioners in not properly communicating their reasons and their business entertainment finding.

52. The Tribunal does not find merit in this submission. There are no new facts or evidence in this case. All of the facts were known at the very start. There was no place of supply argument raised in the Notice of Appeal. It was clear from the start that the Commissioners thought that the supply was made in the UK since the supply was that of an event and this was notified to the Appellant as early as February 2008. Indeed the accountant advisers to the Appellant seemed to have accepted that Opus were "event organisers" and this would explain why they also accepted that the issue was one of business entertainment and not one of the place of supply. The grounds of appeal does not mention any arguments around the place of supply which suggests to the Tribunal that the Appellant was not disputing the charging of VAT but rather presenting arguments that it was not business entertainment but advertising. It was possible for the Appellant to raise, as an alternative argument, the place of supply rules but this was not done. What can the tribunal do in the circumstances? The Tribunal does not feel in the circumstances that they can give leave to appeal on those

grounds. There has to be a finality of litigation. Any such appeal at this point would be some eighteen months out of time. Further, the Appellant was well aware of the point at the time of the appeal and were advised by professional advisers and the issue of the place of supply was not raised or flagged by those advisors.

53. In the circumstances the Tribunal does not believe that the Commissioners acted unreasonably. Further the points raised by the Appellant relate, as the Respondents have pointed out, to the decision making of the Commissioners rather than to the reasonableness of the decision itself. We have not had any substantial points raising the reasonableness of the decision itself. The tribunal does not support the Appellant's argument that the supply was one of advertising services, which would mean that the outside the scope argument would fail in any event. Similarly, the Appellant's submission on Business Brief 44/10 on the treatment of business entertainment provided to overseas customers is not relevant since there is no evidence that the entertainment was provided to any overseas customers.

Conclusion

54. For the reasons given above therefore the Appellant's appeal is dismissed. The Appellant has not been able to show that the Commissioners' determination was unreasonable. The Tribunal agrees that the launch party was in fact business entertainment and the supply of free food, drink, entertainment and accommodation was hospitality and/or entertainment. Opus performed the role of an event organiser and the service on which the VAT was incurred was used for the purpose of business entertainment.

55. The parties may apply separately in matters of costs.

56. 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.

DR K KHAN
TRIBUNAL JUDGE
RELEASE DATE: 24 November 2011