Neutral Citation: [2023] UKFTT **** (TC)

Case Number: TC08682

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2021/03151
TC/2021/06771
TC/2021/03152

PROCEDURE – applications to strike out – VAT - whether an appealable decision – yes – Standing – financial interest – yes – applications refused

Heard on: 29 September 2022
Judgment date: 09 January 2023

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

(1) ISLE OF WIGHT NHS TRUST
(2) BETSI CADWALADR UNIVERSITY HEALTH BOARD
(3) SOUTHPORT & ORMSKIRK HOSPITAL NHS TRUST

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Zizhen Yang of Counsel, instructed by Berthold Bauer VAT Consultants Ltd

For the Respondents: Jennifer Newstead Taylor of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs Solicitor's Office

DECISION

INTRODUCTION

1. On 3 December 2021, the respondents ("HMRC") lodged with the Tribunal strike-out applications in each of these appeals in accordance with Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules").

2. On 10 December 2021, HMRC lodged further strike-out applications for a number of other similar appeals.

3. In all of the appeals lodged with the Tribunal the appellants are either NHS Trusts, Health Boards or CICs (Community Interest Companies). For ease of reference hereinafter those appellants are referred to collectively as the "NHS Trusts" unless the context demands otherwise.

4. On 23 December 2021, the appellants' representative ("BB") lodged a Response which was the same for all of the appeals.

5. Following correspondence, in February 2022, Judge Rankin directed that the applications should be dealt with using these three appeals as being representative of three categories. Six appeals are stayed behind the first appellant ("Category 1"), and three behind each of the other two ("Category 2 and Category 3").

6. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

7. I had a Hearing Bundle extending to 1,145 pages, a revised Authorities Bundle extending to 251 pages and Skeleton Arguments for both parties. At my request, thereafter, there was lodged with the Tribunal a copy of an email from Berthold Bauer VAT Consultants Ltd ("BB") dated 20 September 2022 responding to an enquiry from HMRC which enclosed a copy of an engagement letter and an explanation of the relevance of the documents at page 245 *et seq* of the Bundle.

The substantive issue in the appeals

8. The substantive issue was described in the Skeleton Argument for the appellants as being:-

> "whether past supplies to [the NHS Trusts] of locums as deputies for doctors who are registered with the General Medical Council ("GMC"), being a supply of staff, are exempt from VAT under the Value Added Tax Act 1994 ("VATA") Schedule 9 Group 7 Item 5 ("Item 5").

9. Item 5 exempts "The provision of a deputy for a person registered in the register of medical practitioners". The NHS Trusts disagree with the decision of the First-tier Tribunal in *Rapid Sequence v HMRC* [2013] UKFTT 432 (TC) ("Rapid") and argue that Item 5 ought to be construed in a way that exempts supplies of locum doctors as staff.

The categories of appellants

10. Between 30 August2021 and 3 October 2021, 15 appellants lodged appeals in this matter. The Category 1 appellants are those who were named in a letter from BB dated 30 June 2021 which I define as the "Opening Letter" and who had supplied a VAT Schedule.

11. The Category 2 appellants were named in the Opening Letter but did not supply a VAT Schedule. The Category 3 appellants were not named in the Opening Letter but there was reference to the possibility of further appellants.

The Email

12. On 30 June 2021, BB sent an email (the "Email") to HMRC enclosing what they described as a technical submission which was stated to be "on behalf of a growing number of NHS and healthcare organisations across the UK". In the Email BB requested that HMRC review the submission which comprised the Opening Letter, a technical submission and 13 appendices.

13. The Email articulated the "Overview" which was:-

> "We believe that the supply of temporary doctors (agency staff) should be VAT exempt under Item 5 Group 7 VATA 94. We realise this was considered in the case of Rapid Sequence back in 2013, but we believe that perhaps the relevant information was not provided to HMRC or indeed the Tribunal for it to reach a fully considered decision…".

14. The Email stated that the Technical Submission would be followed by formal claims under section 80 VATA in the coming weeks and that BB had enclosed "sample figures for some of the Clients to give you an idea of the scale." Those figures were the VAT Schedules for Category 1 appellants.

The letter dated 30 June 2021 from BB (the "Opening Letter")

15. The Opening Letter was headed "VAT Exemption for the Provision of a Deputy for a Person registered in the Register of Medical Practitioners – Item 5 of Group 7 of Schedule 9 of the VAT Act 1994 (Item 5)".

16. The Opening Letter has no sub-headings but is divided into four sections, being what the appellants describe as a general introductory paragraph at paragraph 1, a response regarding the VAT exemption at paragraphs 2 and 3, a response regarding the NHS Trusts' status as section 80 claimants at paragraphs 4 to 7 and what the appellants describe as a "general sign off".

17. The Opening Letter stated *inter alia* that:-

(a) BB were writing on behalf of 13 NHS and other healthcare clients, 11 of whom are the Category 1 and 2 appellants, to request HMRC to review its policy. BB stated that more were "in the process of joining".

(b) BB stated that:-

> "HMRC policy, contained in section 6.5 of VAT Notice 701/57 states '*Where a locum doctor is supplied by an employment business or similar body to a third party (like a GP Practice) which controls and directs him or her, it is a supply of staff. Supplies of staff do not fall within the exemption and are therefore taxable, with VAT being charged at the standard-rate.'*"

(c) In the first paragraph it is argued that BB believed that HMRC policy and guidance were contrary to the intention of the legislation and therefore incorrect.

(d) In the fourth paragraph BB urged HMRC to review the issue "comprehensively and objectively".

(e) Under a heading "Content & Objectives of this Submission" the fifth paragraph stated that the Opening Letter and 13 appendices provided the evidence and information supporting the view that the VAT exemption should be applied and:

> "…We request that HMRC-
>
> - reviews this letter and the attached submission,
> - reviews and corrects its policy regarding the Item 5 VAT exemption, and

- confirms that VAT exemption is applicable to the supply of locum doctors under Item 5 as "*The provision of a deputy for a person registered in the register of medical practitioners".*

At paragraph seven, and still under that heading, there was a summary of what the submission included. One of the six bullet points was comment on, and analysis of, the Tribunal decision in *Rapid* and HMRC's approach to that.

(f) At paragraphs eight and nine under the heading "The Intention of Item 5" there was an analysis of the alleged legislative intention. It concluded by stating:-

> "One thing we think is certain is that Item 5 was intended to exempt the performance of medical services, manifest in the treatment of patients requiring medical care by RMPs." (Registered Medical Practitioners)

(g) At paragraphs 10 to 12 there was then a summary of the arguments.

(h) Under a heading "Section 80 Claimants", paragraph 13 was a request for clarification of the status of the NHS Trusts as claimants for section 80 claims. Paragraph 14 referred to the schedules for the Category 1 appellants stating that they had been prepared on the basis of tax invoices received from locum doctor suppliers and show the VAT borne by those appellants for the previous four years.

(i) Under the heading "Next Steps", at paragraph 15 it stated that:-

> "Our objective in requesting a review of HMRC's policy on this issue is to help and benefit all healthcare organisations in their provision of healthcare, but particularly the NHS in completing the covid-19 immunisations ….".

That paragraph concluded by stating that BB were committed to working with a range of healthcare organisations:-

> "to achieve the intended application of the Item 5 VAT exemption. We are very keen to find a resolution and would be pleased to discuss the issue …".

18. The Opening Letter was accompanied by the 28 page technical submission with 13 appendices addressing the reasons why the supply of locum doctors should be properly exempt from VAT. Enclosed with that were the seven schedules which were included in order to demonstrate that VAT had been incurred on the supply of locum doctors for the Category 1 appellants.

Letter of 3 August 2022 to BB from HMRC (the "Reply")

19. Given that the issue at the heart of the strike-out applications is whether or not a letter of 3 August 2022 from HMRC, responding to the Email and Opening Letter is an appealable decision, I narrate it in full:-

> "Thank you for your letter dated 30th June 2021 addressed to my colleague Mike Barlow. Your letter has been passed to me to respond to you. Please accept my apologies for the slight delay in replying to you.
>
> You have asked HMRC to review its policy in connection with the supply of locum doctors. You believe the supply of locum doctors by agencies should be exempt from VAT under Item 5 of Group 7, Schedule 9, VATA 94. The technical paper you submitted sets out your view of the legislation and your analysis of a number of cases that you believe supports that view.

HMRC's policy in respect of the services of locum doctors is set out in Paragraph 6.5 of VAT Notice 701/57 *Health professionals and pharmaceutical products'* and HMRC Guidance at VATHLT2080 and VATHLT2085. HMRC is content that the Guidance properly reflects the scope of the VAT exemption as regards to healthcare and has no current plans to review or change it as a result of your views. For the avoidance of any doubt, HMRC does not share the views set out in your letter/report.

In your letter you ask for clarification regarding your clients' (NHS Trusts) status as claimants and you say that you are working with your clients, and potentially locum doctor suppliers, to submit Section 80 VATA claims for overpaid VAT on the basis that you believe the services to have been incorrectly treated as standard-rated for VAT.

Ordinarily, it is the responsibility of the supplier to establish the correct liability of the supplies they make. HMRC Guidance covering who is entitled to make a s.80 claim is set out in VRM4100. Section 80(1) only allows HMRC to refund the person who accounted for any wrongly charged output tax i.e. the supplier, not their customer who paid the VAT to the supplier. Any overpayment is a commercial matter between the customer and their supplier and the right to claim against the supplier will depend on the terms of the contract under which the goods or services were supplied.

Where a supplier believes it has overpaid output tax on supplies, it should submit a s.80 claim, not the customer who paid the VAT to the supplier. Where payment of a s.80 claim would unjustly enrich the supplier/claimant, the supplier can be refunded on condition that it provides an undertaking to reimburse its customers. Further information on the reimbursement scheme is detailed in VAT Notice 700/45.

Each case is fact specific and will be considered on its own merits with consideration given to the contracts between the parties and the economic reality of the situation.

I hope this addresses your enquiries."

Overview of the salient points from the correspondence that followed

20. On 11 August 2021, BB wrote to HMRC expressing surprise that they had not been given the right to a review of the decision or to appeal to the Tribunal. They cited section 83(1)(b) VATA and relied upon *Iveco Ltd v HMRC* [2013] UKFTT 763 (TC) ("Iveco") arguing that it stated:-

> "… that s 83(1)(b) is capable of encompassing appeals on all questions relating to the chargeability of supplies of goods and services " and "… HMRC … argued that s83(1)(b) relates to the question of what is the VAT chargeable on the supply of goods or services and might typically include the question what legislative exemptions apply."

They asked HMRC to confirm their right to a review or appeal. They said that they would be prepared to continue a dialogue with HMRC but given the brevity of the Reply they would have to explore other avenues (impliedly and appeal to the Tribunal).

21. On 30 August 2021, the appeals for the first and third appellants were lodged with the Tribunal and on 1 September 2021, the appeal for the second appellant was also lodged with the Tribunal. Those appeals stated that they appealed the Reply.

22. The first paragraph of the Notice of Appeal in each case reads:-

"This appeal concerns the incorrect charging of irrecoverable VAT to our organisation. Our view is that supplies of locum doctors should be exempt from VAT by virtue of VAT Act 94, sch 9, grp 7, Item 5, introduced by art 3(c) SI 1979/246 (VAT (Medical Goods and Services) Order 1979), as the provision of a deputy for a person registered in the register of medical practitioners and described in the explanatory note as the provision of a deputising service for doctors."

23. The box "Desired outcome" reads:

"The supply of a locum doctor who performs medical services to patients for the principal purpose of protecting the health of those patients to be exempt from VAT, and that the irrecoverable VAT incorrectly charged be refunded to our organisation to reduce the cost of our provision of healthcare."

24. On 3 September 2021 ("the September letter"), HMRC wrote to BB referring to the letter of 11 August 2021 stating that the Reply did not constitute a decision letter which attracted appeal rights. Further:

"HMRC has not yet received or considered any claim or detailed information about specific supplies from a VAT registered supplier seeking to claim an amount of overpaid output tax on supplies made to your clients, NHS bodies".

It went on to say that if any such claim was lodged by any of the clients of BB then HMRC would consider the facts of that case. They rejected the argument that *Iveco* supported an alternative analysis.

25. On 9 September 2021, BB replied maintaining that the Reply constituted an appealable decision under section 83(1)(b) of VATA and that that provision included no requirement for a claim with a monetary value.

26. On 23 September 2021, HMRC responded stating that they had nothing further to add to their previous letters.

27. On 10 November 2021, BB made an application to the Tribunal "to formally consider hearing the existing cases, and any subsequently lodged appeals, as a single lead case with the others sitting behind."

The basis for the strike out applications

28. HMRC have made the applications on the basis that:-

(a) The Tribunal lacks jurisdiction because HMRC have not made an appealable decision; they simply issued a letter which responded to what HMRC viewed as a speculative, theoretical and general enquiry. Their response to that enquiry was not intended to be, and was not, a decision. They have made no decision on the VAT liability on a specific supply or for a particular taxpayer, and

(b) In the event that the Tribunal does have jurisdiction, the appellants lack standing because they have not shown that they have a sufficient interest in the appeals and/or were not party to the communication with HMRC.

29. For the purposes of this hearing alone, and without prejudice to any further proceedings, Ms Newstead Taylor, having objected to the documents in the Bundle from Page 245 to the end which had been provided after the HMRC applications had been lodged, stated that HMRC was prepared to proceed on the assumption that the NHS Trusts had a financial interest in the appeals. The email to which I refer at paragraph 7 explained that those documents, which included sample contractual documents, invoices and payment confirmations and GMC register entries, had been produced with the intention of demonstrating that the NHS Trusts

had contracted to receive supplies of staff under their control and bore the economic cost of VAT charged on those supplies.

30. The Category 3 appellants were not clients of BB as at 30 June 2021 so HMRC's letter was not addressed to them or indeed any of the appellants but was addressed to BB. The Category 3 appellants could have no standing to appeal a decision in which they were not involved and where HMRC knew nothing of them.

31. The NHS Trusts, being recipients of supplies and not suppliers, are unable to bring section 80 VATA claims. The reimbursement to the NHS Trusts of any VAT (allegedly) incorrectly charged is a matter between them and their suppliers potentially by way of a civil claim, albeit it is recognised that the prospects of success would be very slim.

32. Rule 8(2)(a) of the Rules reads:-

> "(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; …".

That is a mandatory provision and the Tribunal has no discretion.

33. A refusal to review the policy is not an appealable decision.

Overview of the arguments for the NHS Trusts

34. The NHS Trusts argue that neither ground advanced by HMRC is made out.

35. They accept that there has to be a decision about an appealable matter.

36. They say that there was a clearly defined, or crystallised, issue expressed in the Email and the Opening Letter. HMRC had expressed a "concluded view" on that issue in the Reply. Such a determination does not require to be expressed as an appealable decision. There is no need to identify a specific supply or claim; all that is required is that "there is actual tax chargeable and an actual supply made". The Reply was an appealable decision.

37. In particular, the last sentence in paragraph 3 of the Reply is a concluded view on an issue which is clearly set out in the Email and Opening Letter.

38. The right to appeal is specified in section 83(1)(b) VATA which provides that:-

> "83. Appeals
>
> (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters –
>
> …
>
> (b) The VAT chargeable on the supply of any goods or services …".

39. The appellants did have standing. The Opening Letter made it clear that the NHS Trusts received supplies of locum doctors and had borne the economic cost of VAT on those supplies. The Notices of Appeal did the same. The Reply was addressed to BB and expressly referred to "your clients (NHS Trusts)".

40. The right to appeal to the Tribunal does not depend on the appealable matter or decision having been intimated to an appellant. Reliance is placed on section 83G(1)(a)(ii) VATA which reads:-

> "83G – Bringing of appeals
>
> (1) An appeal under section 83 is to be made to the tribunal before –

(a) The end of the period of 30 days beginning with –

(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or

(ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision …".

Discussion

Observation

41. Before I turn to the strike out applications, as an observation, it seemed to me that there was a lack of clarity as to what precisely might be the substantive issue before the Tribunal should these appeals not be struck out. As can be seen from paragraph 8 above, the issue was described as being whether **past** supplies of locum doctors were exempt or not. Paragraph 4 of Ms Yang's Skeleton Argument articulated it in those terms. I accept that the reason for so doing was to establish the factual basis for the appeals i.e. that the NHS Trusts had borne the VAT cost of the supplies of locum doctors.

42. I have highlighted the word "past" because:-

(a) As I have pointed out at paragraph 23 above the NHS Trusts had articulated in their Notices of Appeal that they were seeking to recover VAT, on past supplies, from HMRC.

(b) In their application for strike-out, having pointed out at paragraph 7 that the appellants were seeking a refund of VAT paid, HMRC argued at paragraph 16(d) that in *Mather v HMRC* [2014] UKFTT 1062 (TC) ("Mather") at paragraph 31, the Tribunal had decided that the definition of the term "decision" should not be unnaturally wide where there is an effective remedy elsewhere. That paragraph 31 reads:

> "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."

As I have pointed out at paragraph 31 above, HMRC argue that the appellants should litigate with their suppliers.

(c) In her Skeleton Argument, at paragraph 37, Ms Yang stated unequivocally that:-

> "That is irrelevant here as the NHS Trusts are (a) not asking the tribunal to adopt 'an unnaturally wide definition to the term 'decision' and (b) not seeking to recover any VAT from HMRC. Rather, the NHS Trusts rely only on established principles set out in existing case law, which they do not seek to extend, entitling them to appeal on the issue whether VAT is chargeable on the supply of locum doctors. Thus [31] of *Mather* is simply irrelevant".

Jurisdiction

43. The facts are not in dispute. Although I heard extensive argument and I was referred to a large number of cases, ultimately the primary issue was simply what constitutes an appealable decision. In the event that the Reply is not an appealable decision then the issue of standing falls away. However, there is an inevitable overlap between jurisdiction and standing.

44. I agree with Judge Mosedale at paragraph 90 of *Mather* where, albeit in regard to standing, she states:-

> "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 respondents".

It is for the NHS Trusts to establish that this Tribunal does have jurisdiction.

45. This Tribunal, like all Tribunals, has a statutory jurisdiction. In the present case there is no dispute that that is only to be found in section 83(1)(b) VATA.

46. I agree with Judge Mosedale at paragraph 3 in *Mather* where, having considered the Upper Tribunal decision in *HMRC v Earlsferry Thistle Golf Club* [2014] UKUT 250 (TCC) ("Earlsferry"), she agreed that there could be no appeal to this Tribunal under section 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.

47. I also agree with her, as do the parties, that when I consider whether or not the Reply was a decision, then that is a matter that must be determined objectively and in its context which includes the Email and the Opening Letter to which it was a response. Subsequent correspondence is also relevant.

48. Clearly, HMRC refused to conduct a review of their policy and guidance. In summary, Ms Newstead Taylor argued that that should have been the end of the matter since, in general, such a refusal to review is not an appealable decision.

49. I was not referred to it but HMRC are absolutely correct when they state in their Guidance on Non-Statutory Clearances that "There's no general right of appeal against advice given by HMRC, except where rights to appeal are set out in statute." I say that because, in essence, HMRC argue that the Reply and the September letter amounted to advice.

50. Both parties referred to *Olympia Technology Ltd v HMRC* [2006] VATTR 19984 ("Olympia") at paragraph 12 where the Tribunal stated:

> "In my judgment in order for the Tribunal to have jurisdiction there must be an issue between the parties which has been sufficiently crystallised to constitute a decision falling within one of the paragraphs of section 83. Such decision will normally be writing (sic) and be clearly expressed as a decision subject to appeal whether or not the word decision is used. Where a determination is not expressed as an appealable decision it may nevertheless constitute such a decision in the light of its contents and the surrounding circumstances. There may on analysis be a clear determination although there is no mention of the right of appeal. On the other hand a letter by the Commissioners may clearly be intended not to give rise to a right of appeal …".

51. I have added emphasis as both parties were agreed that the words "sufficiently crystallised" were very important. Ms Newstead Taylor argued that that made it clear that it required identification of specific supplies and claims or specific instances.

52. By contrast, Ms Yang argued that the words meant that the parties knew exactly the area of dispute between them, namely whether or not a supply of locum doctors as staff is exempt from VAT under Item 5.

53. Furthermore, she relied on the case of *Morrison Central Garage Limited & Others v Commissioners of Customs & Excise* (3 March 1980) ("Morrisons") for the proposition that there is no need to identify a specific supply or claim for there to be an appealable decision; the only requirement is that "there is actual tax chargeable and an actual supply made".

54. The Chairman of the Tribunal, Mr R A Bennett QC, went on to say that he could not read into the legislation any requirement that a decision of HMRC must be specific as to the supply

referred to or the amount of tax payable in a context where, from the facts, it was plain that both parties knew perfectly well the area in dispute between them. Ms Yang argued that that is precisely the position in this instance.

55. Ms Newstead Taylor argued that the law had evolved since 1980 and the more recent case law does not refer to *Morrisons* and those cases point to a need for fact specific decisions.

56. Firstly, it is relevant to note that the only difference between the wording in section 83 (1)(b) and the predecessor legislation is that section 83 refers to "VAT" instead of "tax"; therefore the point about statutory interpretation remains valid.

57. Secondly, I agree that more recent cases do not refer to *Morrisons* but the principles in *Morrisons* can be seen in a number. For example, Judge Berner and Judge Herrington in the Upper Tribunal in *HMRC v SDI (Brook EU) Ltd and Another* [2017] UKUT 0327 (TCC) ("SDI") stated at paragraph 47:-

> "It is clear that appeals are not confined to cases where HMRC have decided the precise amount of VAT to be charged. Cases may proceed on questions of principle which are related to the chargeability of VAT, such as questions as to the nature of particular class of supply and whether those supplies are standard rated, exempt or zero rate. Section 83(1)(b) cannot therefore be construed narrowly; it must be construed broadly so as to encompass any issue between taxpayer and HMRC, in respect of which HMRC has made a decision, which is material to the chargeability of the taxpayer to VAT."

Of course, that decision binds this Tribunal.

58. In 2013, Judge Berner in *Iveco Limited v HMRC* [2013] UKFTT 763 (TC) had expressly addressed section 83(1)(b) VATA and the Tribunal's jurisdiction at paragraphs 55 *et seq*. Specifically he stated at paragraph 59:-

> "In my view, s 83(1)(b) is capable of encompassing appeals on all questions relating to the chargeability of supplies of goods and services. It is wide enough to include such questions arising from the direct application of a VAT Directive, in so far as those questions bear upon the chargeability of a taxable person to VAT, which includes questions as to the manner in which domestic provisions may be applied, or construed in applying, to the proper charge to tax as provided for under either domestic or EU law."

59. Ms Newstead Taylor argued that these two cases both referred to "chargeability" and in that context, although a Tribunal would require to construe the section broadly, nevertheless the issue in question would require specificity as to the supply.

60. She accepted that Judge Brooks, at paragraph 11, in *NT ADA Limited v HMRC* [2016] UKFTT 0642 (TC) had said that for a decision to be within the scope of section 83(1)(b) does not require an amount of VAT to have been determined by HMRC. He explained that:-

> "these words are not included in s83(1)(b) VATA and had Parliament intended them to be included it would have expressly done so as it had been in s83(1)(c), (g), (j), (p) and (q)."

I agree.

61. She did not refer me to the following paragraphs but I note that at paragraphs 12 and 15 Judge Brooks went on to say:-

> "12. In *Colaingrove v C&E Commrs* [2000] VATTR 19681, the Chairman of the VAT and Duties Tribunal (Mr Theodore Wallace) said at [10]:

> 'I accept that a decision by the Commissioners is a pre-requisite for the right of appeal, see *Marks & Spencer plc v Commissioners of Customs and Excise* (No. 2) [1997] V&DR 344. What constitutes a decision is however inevitably a matter of fact and degree.'
>
> ….
>
> 15. That issue … is not in the abstract or on a hypothetical basis (if it were it is clear from *Odhams* that the Tribunal would not have jurisdiction). As such, I consider it to be sufficiently crystallised to constitute a decision 'in respect to' … within …VATA".

62. I agree with Judge Mosedale in *Mathers,* at paragraph 96, where she said:-

> "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".

At paragraph 87 Judge Mosedale had pointed out, in my view correctly, that a legal interest does not have to be financial. I do accept that the NHS Trusts have a very real legal interest in the taxation of the supply of locum doctors. It is also a significant financial interest.

63. The key issue is what constitutes a decision. Both parties cited and relied upon Judge McNall in *Iqbal t/a Platinum Executive Travel v HMRC* [2015] UKFTT 0215 (TC) ("Iqbal") where he found at paragraph 11 that:

> "The Oxford English Dictionary defines a decision as 'the final and definite result of examining a question; a conclusion; the making up of one's mind on any points or on a course of action; a resolution or determination'. All these definitions share a theme, which is one of finality. On occasion, the courts have been called upon to determine the meaning of decision, and have held it to be a popular and not a technical word, meaning little more than a concluded opinion: see, for instance, *Re Dover and Kent County Court* [1891] 1 QB 75.

I agree.

64. However, in the following paragraph, on the facts in that case he explains that the Tribunal found that the letter in question expressed nothing more than a provisional view on the basis of the evidence and information supplied to HMRC. It did not definitively rule out a claim for input tax. The very last sentence "I await your comments" was an invitation to further dialogue giving the taxpayer the opportunity to respond before any decision is reached.

65. HMRC argue that the penultimate paragraph in the Reply was analogous to that. Unsurprisingly, the NHS Trusts disagree. They have consistently argued that the second and third paragraphs of the Reply address the questions asked of HMRC in regard to Item 5. Paragraphs 4 to 6 move on to the discrete issue of the section 80 claims and the penultimate paragraph relates to that and not to the decision which is in the third paragraph.

66. The Reply falls to be read as a whole and in the context of the Email and the Opening Letter.

67. I accept the argument from HMRC that, as the Email made clear, the starting point was that BB were asking HMRC to review the position and engage in dialogue; the then intention was to make section 80 VATA claims. It was perceived as the start of a process. That is fair.

68. What I do not accept is HMRC's contention at paragraph 29(a) of their Skeleton Argument that the Opening Letter "was <u>not</u> written to obtain a decision" from HMRC.

69. HMRC do not accept that the bullet points in the Opening Letter, which I quote at paragraph 17(e) above, were a request for a review and a decision.

70. HMRC relied on the fact that the Email had said that BB were "…hoping for a prompt and pro-active approach to resolving this" and would welcome any meetings or discussions to "…move any part of the technical consideration on…" for their argument that it was simply a general and non-specific enquiry from BB.

71. HMRC also rely on the concluding sentence in the Opening Letter which reads: "We are keen to find a resolution and would be pleased to discuss the issue….".

72. HMRC argue that the reference to the section 80 claims means that that was the express intention for BB. It was only when BB discovered that section 80 claims were not possible that they used the Opening Letter as a way of arguing their point with HMRC, effectively, in my words, by the back door.

73. Putting to one side the fact that the NHS Trusts could not make section 80 claims, the intended claims would have been predicated on establishing that the supplies should have been treated as exempt in the first place which was the clearly expressed intention of the Email and Opening Letter.

74. Ms Newstead Taylor argued that the proper approach for the NHS Trusts would have been to apply for non-statutory clearance. I am not convinced, since HMRC do not give advice under that service where they do not think that there are genuine points of uncertainty. As their own guidance on that service makes clear, in that instance they "will explain why we think this and direct you to the relevant online guidance". In a way that is what the Reply did do.

75. HMRC correctly state that the NHS Trusts cannot make section 80 claims. I do not accept that their remedy is to litigate with their suppliers. I agree with Ms Yang that, unless and until HMRC decide that such supplies should be exempt that would not be a remedy and it certainly would not be an "effective" remedy. I say "effective" because Lord Tyre made it clear in *Earlsferry* that there is a need for an effective remedy.

76. Ms Newstead Taylor relied on paragraph 47 in *Mather* and argued that the Reply was not a statement about the VAT liability of a particular supply. I do not think that *Mather* assists HMRC because as Judge Mosedale pointed out at paragraph 7, the decision letter in question in that case said:-

> "Although I cannot provide you with a definitive response I can give you the following advice …".

77. Ms Yang points to the request in the Opening Letter that HMRC "confirms that (sic) VAT exemption is applicable to the supply of locum doctors under Item 5" which was a specific request for a ruling and what she describes as a definitive response being the final sentence in the third paragraph of the Reply which reads:-

> "For the avoidance of any doubt, HMRC does not share the views set out in your letter/report."

78. HMRC relied on paragraphs 67 to 69 of *Morfee v HMRC* [2016] UKFTT 0601 (TC) where Judge Walters, QC and Mr Coles referenced *Earlsferry* arguing that "an appeal cannot be brought under section 83(1)(b) VATA in the abstract to put in issue a 'matter' consisting of the VAT chargeable on the supply of goods or services".

79. However, I agree with Ms Yang that the reason why it was decided that the letter in question was not a decision in that case is set out at paragraph 69. It was because an HMRC

Complaints Officer was addressing an issue of possible maladministration on HMRC's part, not any issue of VAT liability.

80. Turning to the bullet points from the Opening Letter that I have quoted at paragraph 17(e) I find that it is clear from the Reply that HMRC knew what had been asked of them.

81. Ms Yang did not advance any arguments in relation to HMRC's intimation that they did not intend to review their policy or guidance and I think rightly so. Rather, her argument is that although the Reply was not expressed as an appealable decision, and it was not, the area of dispute between the NHS Trusts and HMRC was clearly identifiable. It was.

82. I find that the Email and Opening Letter clearly set out, at considerable length, what the NHS Trusts perceived to be a discrete and crystallised issue, namely the VAT treatment of the supply of locum doctors. It was not an abstract or hypothetical argument. Specifically in the case of the Category 1 appellants there was particularised detail.

83. Paragraphs two and three of the Reply make it clear that HMRC understood and recognised the issue.

84. The crucial words are indeed "For the avoidance of doubt, HMRC does not share the views set out in your letter/report." Had those words been omitted HMRC would have had a very much stronger case for the Applications. Taken with the wording of the rest of that paragraph and the preceding paragraph, it is clear that the technical submission had been considered and rejected. That sentence clearly expresses a "concluded view" and a considerable element of "finality" in relation to the VAT treatment of the supply of locum doctors. "For the avoidance of doubt" is an unequivocal statement. It does not invite further dialogue.

85. I agree with Ms Yang that, as *SDI* makes clear, cases can proceed on a question of principle. BB had identified the nature of the supply and the principles involved. The case law to which I have referred above and with which I agree makes it clear that there is no need to identify a specific supply or for an amount of VAT to have been determined. There is a need to identify, and it has been identified, the chargeability to VAT, or not, of a type of supply. There is actual tax chargeable and actual supplies are made.

86. I do not accept the argument that because the words "consideration will be given to the contracts between the parties and the economic reality of the situation" appear in the penultimate paragraph of the Reply then that meant that that paragraph is not referring, as Ms Yang argues to the section 80 claims but rather to the whole letter.

87. The Email and Opening Letter dealt with the question of exemption and section 80 claims as separate matters and that is how I read the Reply. As I have indicated the third paragraph makes it explicit that the question of exemption was considered closed.

88. There were two arguments that I did not believe should be weighed in the balance. The first was the question of public interest because the NHS Trusts argued that the question of exemption, or not, was a "matter of major public interest". The Tribunal's function is simply to find the facts and apply the law as enacted. It is for Parliament, if so minded, to take account of public interest.

89. The second was the argument for HMRC that they did not intend to make a decision. That is not the issue; the issue is whether they did, or did not, make an appealable decision.

Standing

90. Some aspects of standing, such as financial or other interest, have already been addressed in relation to jurisdiction.

91. HMRC accepted in their Applications that Judge Mosedale had found at paragraph 65 of *Mather* that the recipient of a supply can have sufficient interest in the VAT status of a supply to bring an appeal (*Williams &Glyn's Bank* [1974] VATTR 262, *Cresta Holidays Ltd* [2001] EWCA Civ 215, *Canterbury Hockey Club* [2005] UKVAT V19086).

92. Plainly the NHS Trusts were, and are, recipients and bore the VAT costs. Given Ms Newstead Taylor's concession for the purposes of this hearing only that the financial interest had been established, in my view that suffices to establish that the Category 1 and 2 appellants do have standing. Whether that can be proved in due course is another matter and is not an issue for this Tribunal at this stage.

93. That leaves the Category 3 appellants. Ms Yang relies on the wording of section 83G(1)(a)(ii) VATA (see paragraph 40 above) which she argues makes it explicit that someone other than a taxpayer who has been notified of a decision can bring an appeal if they have standing. I agree. The wording is very clear.

94. Ms Newstead Taylor argued that HMRC could not possibly know who might lodge an appeal and it could open a floodgate. Firstly, the Opening Letter made it clear that there would be other appellants, as indeed there have been and continue to be. Secondly, as Ms Yang pointed out Group Litigation is by no means unknown in the Tribunal.

95. Whether or not there is a flood of appellants is not a material consideration; the only question at this juncture is whether the Category 3 appellants can establish standing. *Ex facie*, an NHS Trust would not lodge an appeal unless it paid for a supply of locum doctors. Therefore, provided it could prove its financial interest, as with the other two categories of appellants, it would have standing. I therefore find that for the purposes of determining the strike-out applications all of the NHS Trusts have standing.

Decision

96. For all these reasons I find that the Reply was an appealable decision in terms of section 83 VATA and the NHS Trusts have standing. Accordingly the Applications are dismissed.

Right to apply for permission to appeal

97. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 09th JANUARY 2023