



[2012] UKUT 260(TCC)

Appeal number: FTC/61/2011

VALUE ADDED TAX — exemptions — appellant engaged dental nurses and supplied them as temporary staff to dentists – whether appellant made supplies of staff or of medical treatment — supplies of staff — supplies standard-rated — appeal dismissed

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

SALLY MOHER
trading as Premier Dental Agency

Appellant

- and -

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

Respondents

**Tribunal: Judge Colin Bishopp
Judge Edward Sadler**

Sitting in public in London on 22 March 2012

Rebecca Haynes, counsel, instructed by Simon Levine AIT for the Appellant

Jessica Simor, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against a decision of the First-tier Tribunal (Judge Khan and Mr Agboola) by which it dismissed the appeal of the appellant against the refusal of the respondents, HMRC, to make a repayment of output tax amounting to £609,119.31. The appellant claimed to have overpaid that sum between 1 January 1985 and 31 December 1996, by accounting for output tax on supplies which were properly to be treated as exempt from VAT.

2. The background facts found by the First-tier Tribunal were that the appellant, who is a qualified dental nurse, established an employment business in 1976. Her principal activity was the supply to dentists of temporary dental staff (“temps”), mainly nurses but some auxiliaries; that activity comprised about 97% of her turnover. The remainder consisted of commission on the introduction to dentists of permanent staff. We are concerned in this appeal only with the supplies of temporary staff. The dentists were charged fees arrived at by multiplying an hourly rate by the number of hours worked; the fees exceeded the cost to the appellant of engaging the nurses and the difference represented her commission.

3. Throughout the relevant period the appellant added VAT to the entirety of her charge to the dentist, and accounted to HM Customs and Excise, the respondents’ predecessors, for that tax. She later came to the view that the supplies she had made were after all exempt and, when the decision of the House of Lords in *Fleming (t/a Bodycraft) v Revenue and Customs Commissioners* [2008] STC 324 made it clear that a late claim for overpaid output tax, made pursuant to s 80 of the Value Added Tax Act 1994, was possible, she made such a claim.

4. Section 80(1), as it is now, and was in force at the time the claim was made, provides that

“(1) Where a person—

- (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
- (b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount.”

5. The respondents refused the repayment on the grounds that the appellant had correctly treated her supplies as standard-rated, that there was consequently no amount brought incorrectly into account as output tax, and that no repayment was due. The tribunal agreed with them, and dismissed the appeal.

6. The tribunal’s decision describes the respondents’ own doubts, one might say confusion, about the correct VAT treatment of such supplies over a number of years—doubts which, it seems, may have stemmed from a failure to distinguish properly between supplies made directly to patients and supplies made to medical practitioners who themselves made the supplies to the patients. The tribunal dealt with the evolution of the Commissioners’ published guidance at some length, and it was clearly a matter which featured prominently in the arguments advanced by the parties before it. It recorded that a company controlled by the appellant and her husband, to which she transferred her business in 1999, made a partially

successful claim for a refund of over-paid output tax, which the respondents now say they agreed to make by mistake, and it appears that there was also some evidence before the tribunal that the appellant's competitors had not accounted for VAT on their supplies. The principal issue before the tribunal and (subject to a further matter with which we deal below) the only issue now before us, however, is whether the appellant's supplies were exempt or standard-rated.

7. The exempting provisions on which the appellant relies are to be found, first, in art 13(1) of the Sixth VAT Directive, 77/388/EEC, since repealed and replaced but in force throughout the relevant period. So far as material that article, which listed "Exemptions for certain activities in the public interest" provided that

"1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

15 ...

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;

...

(e) services supplied by dental technicians in their professional capacity and dental prostheses supplied"

8. Those provisions are implemented in the United Kingdom's domestic legislation by various Items within Group 7 (entitled "Health and welfare") of Schedule 9 to the Value Added Tax Act 1994, replacing without significant amendment corresponding provisions of the Value Added Tax Act 1983, which was in force for most of the relevant period. Item 2, as it was at that time, exempted

"The supply of any services or the supply of dental prostheses, by —

(a) a person registered in the dentists' register;

(b) a person registered in any roll of dental auxiliaries having effect under section 45 of the Dentists Act 1984; or

(c) a dental technician."

9. Note (2) to the Group provided that

"(2) ... paragraphs (a) and (b) of item 2 include supplies of services made by a person who is not registered or enrolled in any of the registers or rolls specified in those paragraphs where the services are wholly performed or directly supervised by a person who is so registered or enrolled."

10. The tribunal had also to deal with a number of subsidiary issues of fact, in particular whether the temporary staff were the appellant's employees, or in some other contractual relationship with her. We cannot discern any conclusion on that point from its decision. The appellant's evidence, and her argument, was that she treated them as her employees, but that was inescapable, because s 44 of the Income Tax (Earnings and Pensions) Act 2003, re-enacting without significant amendment earlier provisions of the Income and Corporation Taxes Act 1988 to the same effect, requires an agency carrying on a business such as the appellant's to treat its workers as employees for income tax and national insurance purposes. It is also apparent from its decision that the tribunal heard argument on the

question whether the appellant supplied staff as agent or principal, and again we discern no clear conclusion. Nevertheless it did make a clear finding—though one drawn from a concession on the appellant’s part—that once a temp had been supplied to a dentist, it was the dentist who gave instructions to, and controlled, the temp during the period of the assignment. The tribunal accordingly concluded that the appellant supplied staff, and that to the extent that an exempt supply of medical care was made, it was made by the dentists. The tribunal made the point that there was no available evidence of the extent to which the nurses and auxiliaries provided medical care and of the extent to which they undertook other tasks, such as acting as receptionists.

11. Miss Rebecca Haynes, counsel for the appellant, argued that the tribunal was wrong to reach that conclusion: it should instead have decided that the appellant, acting as principal, made exempt supplies through the medium of the nurses and auxiliaries. Those were precisely the factors HMRC themselves had considered relevant when the guidance to which we have referred was published, and they were right to do. The contractual relationships between the parties was not necessarily determinative of the tax consequences: see *Customs and Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588. As Laws J said in that case, it is necessary to examine all of the facts of the case in order to determine what is actually being supplied.

12. Here, the appellant supplied qualified nurses who in turn provided medical treatment to the dentists’ patients. The nurses had no contractual relationship of their own with the dentists and had no control over the charges made for their services. The appellant charged the dentists hourly rates; she did not add a discrete commission charge. It followed that the appellant, acting as a principal, was making exempt supplies of medical care, provided on her behalf by the nurses. The exemption is dependent upon the nature of what is supplied, and not on the characteristics of the supplier: see *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* (Case C-141/00) [2002] ECR I-6833, a case whose outcome is in any event consistent with Note (2).

13. For the respondents, Miss Jessica Simor of counsel argued that the tribunal’s conclusion that the appellant’s supplies were of staff and not of medical services was a finding of fact, unassailable in this tribunal unless it could be shown to be irrational, a task which the appellant had not even attempted. The tribunal had, she said, examined all the relevant evidence, particularly about the contractual relationship between the appellant and the dentists, had considered the appellant’s concession that once assigned to a dentist the nurses and auxiliaries were under the dentist’s control and merely did as they were directed, and had correctly concluded from all those factors that the appellant supplied staff to the dentists, and it was the dentists who supplied the medical care to their patients.

14. In our judgment those arguments are unanswerable; indeed, it is difficult to see how one could rationally conclude that the appellant was making supplies of medical care, once it is accepted that the nurses and auxiliaries were under the control of the dentist to whom they were assigned. This is so even if (assuming, in the appellant’s favour) that the nurses were to be regarded as employees of the appellant. The appellant did not control—or even know—whether, and if so, the extent to which, the dentist directed a nurse or auxiliary to carry out other duties which themselves were not exempt supplies, such as acting as receptionist or

5 assisting with cosmetic dentistry. Even in relation to dental services which were
exempt, the appellant did not dictate the treatment offered to the patients, or play
any part at all in determining what treatment was offered or how it was provided,
nor did she supervise the nurses and auxiliaries. She had no relationship,
10 contractual or otherwise, with the patients to whom the medical care was
provided. It is in our view beyond argument that her supply was of staff to
dentists, who (as the tribunal found) assumed all the responsibility for directing
the nurses as to what they should do, and for determining the treatment to be
15 offered to the patients and the manner of its delivery. That the staff (and, indeed,
the appellant herself) had a medical qualification cannot affect the nature of the
supply. The tribunal correctly concluded that the appellant could not benefit from
the exemption, and that the respondents were right to refuse the repayment.

15 15. During the course of the hearing Miss Haynes asked for permission to
amend the grounds of appeal to add an argument that, if the appellant did not
make wholly exempt supplies, she was instead liable to account for output tax
only on the commission element of her charges to the dentists. That proposed
argument was based upon the conclusions of the First-tier Tribunal in *Reed*
20 *Employment Ltd v Revenue and Customs Commissioners* [2011] UKFTT 200
(TC), [2011] SFTD 720, in which similar (though not identical) arrangements for
the supply of temporary staff were in issue. The decision in that case was given
after the decision of the tribunal in the appellant's case. Miss Simor opposed the
application.

25 16. We refused to give permission. The proposed argument is in our view quite
clearly not an added ground of appeal against the First-tier Tribunal's decision. It
amounts to a completely different claim, one not before the First-tier Tribunal and
(so far as we are aware) not hitherto made to the respondents. The decision of the
First-tier Tribunal in the *Reed Employment Ltd* case may have highlighted a line
of argument which had not previously occurred to the appellant, but it has always
30 been open to her to use that argument to found the alternative claim which Miss
Haynes raised on the appellant's behalf for the first time at the hearing before us.
The time for making such a claim is not in the course of a hearing before an
appellate tribunal.

17. The appeal is dismissed.

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Colin Bishopp
Upper Tribunal Judge

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Edward Sadler
Upper Tribunal Judge

Release date: 27 March 2012