[2022] UKUT 00040 (TCC)

Appeal number: UT/2021/000038

VAT –whether taxpayer receiving taxable supplies and entitled to credit for input tax – no – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Y4 EXPRESS LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE JONATHAN RICHARDS**
JUDGE ANDREW SCOTT

Sitting in public at the Royal Courts of Justice, Strand, London on 20 January 2022

Tim Brown, Counsel, instructed by SKS (GB) Limited for the Appellant

Joseph Millington, Counsel, instructed by the General Counsel and Solicitor for Her Majesty's Revenue & Customs for the Respondents

DECISION

1. Until 2013, the appellant company ("Y4") was able to obtain preferential rates on postage from the Royal Mail ("RM"). When RM refused to allow Y4 to continue to use that service, Y4 sought to circumvent the problem by using RM accounts set up in the names of Mr Pat Ning Man ("Mr Man") and Colemead Limited ("Colemead"). The issue raised in these proceedings is the extent to which Y4 is entitled to credit for input VAT in connection with payments that it made to Mr Man and Colemead.

2. In a decision released on 10 July 2020 (the "Decision"), the First-tier Tribunal (the "FTT") held that Y4 was not entitled to input tax credit. The FTT also held that Y4 was not entitled to credit for input tax in respect of goods and services supplied to it by the courier company Yodel and that Y4 was liable to a penalty in respect of inaccuracies in its VAT returns. With the permission of the FTT, Y4 appeals against some, but not all, of the FTT's determinations.

The decision of the FTT

3. In this section, references to numbers in square brackets are to paragraphs of the Decision unless we say otherwise.

Findings relating to Y4's business

4. Y4 was incorporated on 27 May 2010. Its business at material times included arranging for the importation of goods from companies based in China and Hong Kong. That business involved it collecting the goods from the airport, storing them if required and arranging delivery to the final customer ([7]).

5. The FTT made no express finding that Y4 was registered for VAT at material times but it was common ground that Y4 was so registered.

6. Y4's business required it to use the services of delivery companies including RM. Until 2013, Y4 used RM's Printed Postage Impressions ("PPI") service. The PPI scheme provided Y4 with access to preferential rates and required it to make daily declarations by means of an online business account ("OBA") of the items it was sending. In June 2013, RM became concerned that Y4's declarations were not accurate and eventually suspended Y4's access to the PPI scheme. Y4 agreed to pay RM £600,000 ([13]). The FTT did not explain precisely what that payment was for, but it can be inferred that it was to compromise some claim that RM had against Y4 for alleged under-declarations of postage due to RM.

7. Mr Samuel Yeung was, at material times, the company secretary of Y4. He had a personal friendship with both Mr Man ([14]) and Mr Fung, the sole director and shareholder of Colemead ([93]). Mr Samuel Yeung devised a plan to use his friendship with both men to get around the problems Y4 was having with RM.

Y4's use of Mr Man's account

8. The outcome of Mr Samuel Yeung's plan, so far as involving Mr Man, was as follows:

> (1) Mr Samuel Yeung asked Mr Man to open an OBA with RM in Mr Man's name, but on the understanding that Mr Man would permit Y4 to use this account. Mr Samuel Yeung said that the reason for the request was so that Y4's customers would not know that Y4 was itself obtaining goods from another supplier which could have become apparent from statements that Y4 would obtain from RM if Y4 operated an account in its own name. Mr Samuel Yeung did not mention the difficulties that Y4 was having with its own PPI account with RM ([14] and [113]).
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> (2) Mr Man agreed to the request which he regarded as a "favour to a friend rather than as a business venture" ([113]). He opened the OBA with RM in 2012 although this did not become active until July 2013 ([15]). He provided Mr Samuel Yeung with details of his OBA that enabled Y4 to access the account and use RM for deliveries ([16]).
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> (3) In practice, Y4 made payments to Mr Man at least equal to sums that RM charged Mr Man in respect of postage charged to his OBA ([21]).
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> (4) The FTT appears to have found that Y4 made some other payments to Mr Man that were additional to the sums referred to in (3) above ([121] and [122]). Parts of these passages of the Decision read as recitations of evidence. However, the FTT's statement at [122] that the "documentation provided, however, points to Mr Man having received a payment from Y4 on more than one or two occasions" reads as a finding of fact.
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> (5) Y4 prepared invoices, addressed to itself, recording sums payable to Mr Man ([24]). The FTT recorded Mr Man's evidence that he could not remember seeing these invoices at the time and that he was not asked to approve them but did not say expressly whether it accepted that evidence or not ([114]).
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> (6) Mr Man played no part in dealing with RM and arranging for Y4's goods to be delivered using RM's network. Y4 did all of that, using the access to Mr Man's PPI account that he had provided.

9. In paragraph [8] above, we have set out the FTT's findings as to what actually happened, including some payments that were in practice made by Y4 to Mr Man. The FTT did not set out all in one place findings as to the precise character of any arrangement under which these payments were made. There is a finding, at [14], that Mr Man regarded the arrangement as involving a "favour to a friend". There is a finding at [23] that there was no written contract in place between Y4 and Mr Man and instead there was a "verbal agreement". Read in isolation, that might suggest that the FTT regarded the arrangement as contractual, albeit not in writing. However, the FTT could not have been concluding that there was any contract in place given its finding at [120]:

> It is clear that no terms were agreed between Mr Man and Y4 as to any income to be received from Y4 with respect to the allowed use of the RM account by Y4.

10. If this is a finding that there was no arrangement at all for Y4 to pay Mr Man anything, it might be thought puzzling since the FTT referred to payments being made in practice. The FTT referred, at [116] of the Decision, to invoices that Mr Man had sent for material sums of "postage fees". It recorded Mr Man's evidence, quoted at [117] of the Decision, that he did not make any profit on the arrangement because "…purchase invoices I received from the Royal Mail were matched in value by the sales invoices raised by Y4". At [21] of the Decision, the FTT made a finding that Y4 transferred sums to Mr Man's account, first by way of single transfers, and later by direct debit.

11. However, the finding becomes less puzzling once it is appreciated that in putting its case to the FTT, Y4 was not inviting the FTT to attach any significance to the presence or otherwise of any arrangement for Mr Man to receive what we will term "make whole" payments sufficient to enable Mr Man to meet RM's postage costs. Instead Y4 made its case on the basis that payments (described as "income" or "commission") that Y4 made in addition to those "make whole" payments constituted consideration for taxable supplies and demonstrated that Mr Man was carrying out an economic activity. Accordingly, we read the quote that we have set out in paragraph [9] above as a rejection of Y4's case that there was an arrangement for it to pay "income" or "commission" to Mr Man, but as making no finding as to whether there was a more limited arrangement for Y4 to pay Mr Man "make whole" amounts and, if so, the nature of that arrangement, because it had not been suggested to the FTT that there was any significance to the presence or absence of such an arrangement.

12. The FTT made no finding as to whether Mr Man was, or was not, registered for VAT at material times. There was some evidence, set out in Mr Man's witness statement, and a witness statement from Officer Burns, that Mr Man successfully applied to be registered for VAT from July 2013. However, on 28 May 2015, Mr Man applied to be deregistered and for that deregistration to be backdated to July 2013. The FTT did find, however, that Mr Man never submitted any VAT returns ([26]).

13. The FTT referred, at [116] and [121], to invoices that Y4 prepared and delivered to itself, ostensibly on Mr Man's behalf. It made no finding as to whether these documents satisfied the formal requirements necessary to be valid VAT invoices.

Y4's use of Colemead's account,

14. Colemead was the personal company of Mr Fung, who was, as we have noted, a personal friend of Mr Samuel Yeung. It was incorporated for the purpose of giving effect to the arrangement described below.

15. The outcome of Mr Samuel Yeung's plan, so far as involving Colemead, was very similar to that of the plan involving Mr Man's OBA. In particular:

(1) Colemead was established with Mr Fung as director. Colemead opened an OBA with RM which was active from April 2014 until December 2016. Mr Fung provided Y4 with access to Colemead's account so that Y4 could use that account as its own ([29] to [32]).

(2) Y4 paid Colemead by direct debit sums equal to those that RM charged Colemead in relation to the OBA ([33]).

(3) Y4 prepared invoices that were ostensibly then issued by Colemead to Y4. Mr Fung did not approve these invoices on behalf of Colemead ([37]).

(4) Colemead played no active part in the arrangement and was, as the FTT put it at [95], "totally hands off". All that Mr Fung (and by extension Colemead) did was to open the OBA and provide the log-in details to Y4.

(5) Y4 arranged for Man & Co accountants to deal with Colemead's VAT returns. Such VAT returns were prepared and Mr Fung signed them on behalf of Colemead without checking their accuracy.

16. The FTT did not set out in one place its findings as to the precise nature of any arrangement between Y4 and Colemead, echoing the narrative approach it followed when making findings as to the arrangement with Mr Man. At [38], the FTT described the arrangement between Colemead and Y4 as "verbal, informal and hands-off with no specific terms attached to it". That suggests, although the FTT did not make the suggestion explicit, that it did not consider that there was any contract at all. The FTT also appears to have found that there was no arrangement or understanding, and by extension no contract, entitling Colemead to receive payments of "commission" or "income" from Y4 at [103] and [105] of the Decision saying:

> 103. … No terms were agreed between Colemead and Y4 as to the amount of any income to be received by Colemead from Y4. Neither was there any agreement as to the timing or basis of calculation of any income to be received by Colemead from Y4.
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> …
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> 105. There was no agreement for Y4 to pay Colemead a fixed amount per month for use of the RM account and neither was there any agreement between Y4 and Colemead for Y4 to pay Colemead a sum dependent upon the amount of usage by Y4 of the RM account. Nor was there any agreement between Y4 and Colemead for Colemead to be paid on any other basis.

17. As we have noted in paragraph [11] above, Y4 was not inviting the FTT to conclude that there was any significance to the presence or absence of an arrangement to make "make whole" payments. Rather, it relied entirely on the averred arrangement to pay "commission" or "income" as constituting the consideration that Y4 paid for Colemead's taxable supplies Therefore, as with Mr Man, the FTT appears to have rejected Y4's case that there was an arrangement to pay income or commission without making any finding as to whether there was an arrangement to pay "make whole" amounts, because it had not been suggested to the FTT that any such arrangement would be significant.

18. The FTT made no findings as to whether Colemead was registered for VAT at material times although its finding that Colemead submitted VAT returns suggested that it was proceeding on the basis that Colemead was VAT registered. Evidence that Officer Burns gave to the FTT indicated that Colemead had two VAT registration numbers with one of those being cancelled with retrospective effect.

19. The FTT made no findings as to the nature of invoices that Y4 delivered to itself, ostensibly on Colemead's behalf, and so did not say whether it considered those invoices to satisfy the formal requirements necessary to be VAT invoices.

The FTT's analysis of the arrangements

20. At [49], the FTT recorded the issues before it. The parties agree that it correctly described the issues for determination as:

> 49. In respect of Mr Man, Colemead and Yodel, the issue is whether or not Y4 received taxable supplies and incurred input tax that it is entitled to recover.
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> 50. In respect of the penalties charged, the issue is whether or not HMRC was correct to charge penalties and in the amounts calculated.

21. At [51] to [65], the FTT set out extracts from provisions of the Principal VAT Directive ("PVD") and UK primary and secondary legislation.

22. At [66] to [72], the FTT summarised HMRC's submissions and both parties agree that the FTT's summary was accurate. HMRC were arguing that neither Mr Man nor Colemead had made any taxable supplies to Y4 because: (1) there was no direct link between the consideration that they received from Y4 and the services they provided; and (2) neither Mr Man nor Colemead was carrying on an economic activity as demonstrated by the absence of "an intention to obtain income on a continuing basis" ([72]).

23. At [73], the FTT correctly summarised Y4's "primary" case as being that both Mr Man and Colemead had, contrary to HMRC's analysis, made taxable supplies to it.

24. The FTT's reference to Y4's "primary" case suggests that Y4 also had a "secondary" case. Such a case was set out in Y4's skeleton argument: it was argued that, if Colemead and Mr Man had not made taxable supplies to Y4, considerations of "economic reality" meant that RM had made taxable supplies directly to Y4. Y4 relied on the judgment of the Supreme Court in *HMRC v Airtours Holiday Transport Limited* [2016] STC 1509. In view of Y4's argument that the FTT failed adequately to address its secondary argument, we set out in full how the FTT described the argument based on *Airtours*:

> 75. Reference was made to the case of *Revenue & Customs Commissioners v Airtours Holiday Transport Ltd* [2016] STC 1509 where it was stated that a fundamental criterion is for there to be a consideration of economic realities (paragraph 45) which may differ from the contractual position. That case related to Airtours (the

> taxpayer) and its creditors who instructed a professional services firm (PwC) to prepare a report on the financial position of Airtours. The original terms of appointment were addressed to the engaging institutions (or creditors) of Airtours and it was stated that the report was for the sole use of the engaging institutions who countersigned the terms of appointment. The taxpayer was also a signatory to the contract and paid the invoices of PwC. The issue was whether or not Airtours could deduct VAT as input tax.
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> 76. In respect of Y4, it was submitted that there has been a supply of services based upon a verbal agreement which had been carried out for consideration with payments having been made by Y4 to Mr Man and to Colemead.

25. It will be seen that paragraph [75] of the Decision set out in the extract above summarises the facts of *Airtours* but does not state the conclusion Y4 sought to derive, namely that applying the principle stated in *Airtours*, RM could be regarded as supplying services directly to Y4. The extract set out in paragraph [76] could not be referring to Y4's argument based on *Airtours* since Y4 was not arguing that there was any "verbal agreement" between itself and RM. Indeed the very reason for Y4 involving Mr Man and Colemead was that RM was no longer prepared to enter into any agreement with Y4.

26. The FTT then considered various authorities of the Court of Justice of the European Union ("CJEU", which expression we will use to embrace the predecessor European Court of Justice) and the UK courts on the meanings of an "economic activity" (for the purposes of Article 9 of the PVD) and the concept of a supply of services for a consideration within the meaning of Article 2(1)(c) of the PVD.

27. The FTT did not state expressly what it considered to be the questions it needed to determine in order to decide whether Y4 was entitled to input tax credit, but the structure of its later reasoning demonstrates that it considered the relevant questions to be (i) whether Mr Man and Colemead were supplying their services for a consideration and (ii) whether Mr Man and Colemead were carrying on an economic activity. The parties were agreed that these were the two relevant questions.

28. On the question of "consideration", the FTT quoted passages from the judgment of the CJEU in *Gemeente Borsele* (Case C-520/14) which indicated that the question was whether there was a legal relationship between the provider of the service pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied by the recipient. At [89], the FTT included a quote, also from *Borsele*, to the effect that it is not relevant, when determining whether there is a transaction effected for consideration, to consider whether the supplier charges more than cost price. Rather, the question is whether there is a "direct link between the … provision of services and the consideration actually received by the taxable person."

29. At [91], the FTT considered the judgment of the Court of Appeal in *Wakefield College v HMRC* [2018] STC 1170 and quoted extracts from that judgment that gave guidance on the meaning of the terms "consideration" and "economic activity" for VAT

purposes. It was common ground that the extracts that the FTT quoted were correct statements of the law.

30. At [108], the FTT stated its conclusion that Colemead was not supplying any services for a consideration. That conclusion was evidently based on the FTT's determinations in [106] and [107] as to the absence of a connection between the payments that Colemead received and its provision of the account with RM. In this regard, the FTT said at [107] and [108]:

> 107… There is no connection between any income (or remuneration) received by Colemead and the value to Y4 of being able to use the RM account of Colemead. At most, it appears that regular monthly payments (rather than irregular payments as claimed by Mr Fung) were made by Y4 to Colemead in the form of income to Colemead and that these payments may have been made as reward for the effort that Colemead went to in setting up the RM account for use by Y4, for allowing it to remain open and for, on occasion, dealing with any ongoing issues.
>
> 108. Colemead, after taking the necessary steps to have a RM account opened in its name, did little or nothing other than to allow the RM account to remain open. In respect of article 2 of the Principal VAT Directive, we do not find that the arrangement between Colemead and Y4 is sufficient to constitute a supply of goods or services for consideration for the purposes of article 2.

31. At [109], the FTT concluded that Colemead was not carrying out any "economic activity" as follows:

> 109. Even if we had found that the test for a supply for consideration under article 2 was satisfied, we find having considered all the objectives circumstances that there was no 'economic activity' for the purposes of article 9 considering all the objective circumstances. Mr Fung opened and allowed use by Y4 of the RM account due to a longstanding friendship with both Mr Samuel Yeung and Mr William Yeung. We do not accept that the arrangement between Colemead and Y4 was one that was, or would be, entered into as a means of obtaining income in that the payments that appear to have been made by Y4 to Colemead had no agreed basis. Neither do we accept that the arrangement was entered into by Colemead for the purposes of obtaining income on a continuing basis.

32. Therefore, in essence the FTT concluded that Y4 was not entitled to credit for input tax on services supplied by Colemead because: (1) Colemead was not supplying services for a consideration; and (2) Colemead was not carrying out any "economic activity". At [123] to [125], the FTT expressed similar conclusions in relation to Mr Man.

33. After setting out its conclusions relating to Mr Man, the FTT said this, in a passage that we will quote in its entirety because of its central relevance to Y4's second ground of appeal:

> 126. Both Colemead and Mr Man entered into a delivery service agreement with RM which constituted a legally binding agreement.

> Despite the terms and conditions of those agreements with RM not having been provided to us, we consider it reasonable to assume that those agreements would have contained a contractual provision similar to that found in the Yodel Service Agreement entered into by Y4 which was referred to earlier. Namely, a provision that expressly prohibited Y4 from re-selling the delivery services to a third party. In other words, preventing the delivery services of RM being provided to Y4.
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> 127. In any event, it is not in dispute that RM had expressly prohibited Y4 from making use of the PPI scheme of RM which is the very reason why Y4 sought a way around that prohibition by engaging the assistance of Mr Fung and Mr Man. RM refused to provide such services to Y4.
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> 128. RM issued invoices to Colemead in accordance with the OBA of Colemead. Colemead then made payments in respect of those invoices from its bank account directly to RM. Similarly, RM issued invoices to Pat Ning Man in accordance with the OBA of Mr Man. Mr Man then made payments from his bank account directly to RM with respect to those invoices. We agree with HMRC that RM provided services to Colemead and to Pat Ning Man.

The grounds of appeal against the Decision

34. Y4 applied to the FTT for permission to appeal on the grounds that the FTT erred when it:

> (1) found that neither Mr Man nor Colemead made taxable supplies on which Y4 could claim input tax ("Ground 1"); and
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> (2) did not consider Y4's alternative argument that it had received the supplies directly from RM ("Ground 2").

35. In a short decision issued on 3 December 2020, the FTT granted permission to appeal on both grounds.

36. Little difficulty arises as regards the scope of Ground 2, which is clear from Y4's application. However, the summary of Ground 1 alone which we have set out in paragraph [34] above does not itself explain the full scope of that ground. While it is stated that the FTT erred in reaching a particular conclusion, the summary does not itself say precisely <u>how</u> it erred. Conceptually, the FTT could have erred by, for example, (i) basing its conclusions on flawed findings of facts or (ii) applying the law wrongly to the facts that it had (appropriately) found.

37. Y4's application to the FTT for permission read as a whole, however, made it clear that Y4 is not seeking to challenge the FTT's purely factual findings and rather it was challenging the legal conclusion that the FTT drew from the factual findings that it made. That was demonstrated by paragraph 7 of Y4's application to the FTT for permission to appeal which focused on four factual matters that the FTT had accepted and asserted that, having made those factual findings, the FTT should have found that Mr Man and Colemead had made taxable supplies to Y4 on which Y4 was entitled to recover input tax.

38. Moreover, Y4's application to the FTT on Ground 1 contained none of the ingredients that would be expected if it was challenging the FTT's factual findings. There was no reference to the underlying evidence, no assertion, as regards Ground 1 that irrelevant considerations had been taken into account or relevant considerations ignored, no criticism of the reasoning underpinning the FTT's factual findings and no assertion that any particular factual finding was against the weight of the evidence. The matter was made abundantly clear when, in answer to questions from the Tribunal, Mr Brown confirmed on behalf of Y4 that Ground 1 involved a challenge to the way the FTT applied the law to the facts.

The applicable statutory regime

39. Before addressing the detail of Y4's appeal, we consider it is helpful to set out in one place the requirements that Y4 needed to meet in order to establish an entitlement to input tax credit in relation to services that it received. The parties made their submissions on the law by reference to the PVD and we will therefore similarly focus on the PVD rather than provisions of domestic UK law.

40. The starting point is Article 168 of the PVD which provides, so far as relevant:

> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> > (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person…

41. Therefore, Y4 is entitled to credit by operation of Article 168 if it can establish that:

(1) Y4 is a taxable person.

(2) Mr Man and Colemead were taxable persons.

(3) Mr Man and Colemead made supplies to Y4 on which VAT was due or paid.

(4) Y4 used the supplies that Mr Man and Colemead made for the purposes of its taxed transactions.

42. No difficulty arises in this case in relation to requirements (1) and (4) as it was common ground that they were met. Therefore, the key issues before the FTT were (i) whether Mr Man and Colemead were taxable persons and (ii) whether they were making taxable supplies to Y4, that is to say supplies on which VAT was due or paid.

43. Article 9 of the PVD defines a taxable person as follows:

> 1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

44. Therefore, Article 9 makes relevant the question whether Mr Man or Colemead were carrying on an "economic activity" since, if they were not, they would not be "taxable persons". We pause briefly to note that domestic UK law provides for a different definition of taxable person which provides, by s3 of the Value Added Tax Act 1994 ("VATA"), for a person to be a taxable person while registered or required to be registered. However, neither party invited the FTT to proceed on the basis that the status of Mr Man or Colemead as "taxable persons" was determined by the fact of their VAT registration, and indeed the FTT made no findings as to their VAT registration or the effect of what was described as "retrospective" cancellation of that registration. Both parties proceeded before the FTT on the basis that it was necessary to determine whether Mr Man or Colemead were carrying on an "economic activity" as defined in Article 9 of the PVD. They re-iterated that common understanding in the hearing before us. We will, therefore, determine this appeal on the basis of the parties' agreed approach.

45. That leaves the question whether Mr Man or Colemead were making taxable supplies. The answer to that is to be found by applying Article 2 of the PVD which provides, so far as material, as follows:

> 1. The following transactions shall be subject to VAT:
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> …
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

46. Therefore, given the agreed approach of the parties, to determine the issues in dispute, the FTT needed to decide (1) whether Mr Man or Colemead were making supplies of services for a consideration and (2) whether they were carrying on an economic activity.

The correct approach to the two issues of "consideration" and "economic activity"

47. In Case C-16/93 *Tolsma* [1994] STC 509, the CJEU held, in paragraph 14, that a supply is for consideration only if:

> there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

48. That statement, therefore, envisages that the requisite reciprocal performance must take place "pursuant to" a "legal relationship" between provider and recipient. The CJEU gave guidance on the type of "legal relationship" required in Case C-498/99

Town and County Factors Ltd [2002] STC 1263. That judgment was given in the context of a weekly "Spot the Ball" competition published in a newspaper under which competitors had to pay a weekly fee but the rules of the competition provided that the competition organiser had no obligation to provide a prize beyond an obligation "binding in honour only". At [37] to [39] the CJEU said:

> 37. In the light of art 2 of the directive and the case law of the court cited above, that criterion of 'legal relationship' is not to be understood in isolation as meaning a particular specific legal characteristic which a transaction must display. The 'legal relationship' concerns rather the link between supply and consideration.
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> 38. Whether there is a 'legal relationship' in the *Tolsma* sense cannot depend, moreover, on the presence of specific legal characteristics, in particular contractual or procedural ones, such as enforceability in legal proceedings. Since the conditions for the existence and content of legal relationships vary according to national legal systems, that would also be incompatible with the principle of fiscal neutrality and the objective of harmonisation of VAT. Otherwise the inclusion of a 'binding in honour only' clause could open the way to tax evasion.
>
> 39. All that need be examined is whether the components of reciprocal performance are exchanged in the framework of agreements—even ones that are binding in honour only—from which it is apparent that there is a direct link between them.

49. At [40] and [41] of its judgment, the CJEU contrasted the situation before it with that considered in *Tolsma* (involving the question whether donations received by a street musician from passers-by were "consideration" for a taxable supply) saying:

> 40. In the *Tolsma* case there were no agreements of any kind whatever which might have created a link between service and payment sufficient for it to be possible to speak of a transaction 'for consideration' within the meaning of art 2 of the Sixth Directive; the 'provider of the service' (in that case a street musician) admittedly received certain sums 'for his service', but the 'recipients of the service' paid them purely voluntarily and in principle received the service regardless of their 'consideration' (see [1994] STC 509, [1994] ECJ I-743, para 17).
>
> 41. In contrast to the *Tolsma* case, in cases such as that in the main proceedings there is indeed a type of agreement under which the entry fee is paid for the service provided by the organiser of the competition. To be able to take part in the competition, the competitor must accept the rules imposed by the organiser and undertake to comply with all the terms of the agreement, including the rules of the competition. Only if the contestant—on the one hand—submits the entry form under those conditions and pays the corresponding fee can he—on the other hand—take part in the competition and be given a chance of winning a prize.

50. Therefore, we consider that the correct approach to the question of whether Mr Man or Colemead received consideration for a taxable supply involves asking:

(1) whether there was reciprocal performance with the sums paid to Mr Man and Colemead constituting the "value actually given" in return for their provision of services to Y4; and

(2) whether that reciprocal performance took place under some agreement, or framework of agreements, even if not contractually binding, that establishes the requisite link between supply and consideration.

51. The parties were agreed that the FTT had stated the law on the nature of an "economic activity" correctly in the extracts from the Court of Appeal's judgment in *Wakefield College* set out at [91] of the Decision. We will therefore apply the principles as set out in those extracts which can be summarised as follows:

(1) The supply of goods or services for a consideration is a necessary condition for the carrying out of an economic activity, but is not sufficient. An economic activity involves something more than effecting supplies for a consideration, namely the purpose (determined objectively) of obtaining income from those supplies on a continuing basis.

(2) The presence or absence of an economic activity will involve a wide-ranging enquiry. That enquiry is objective. Subjective considerations, such as whether the supplier has an intention to make a profit, are irrelevant.

(3) The existence of an economic activity does not depend on whether there is a "sufficiently direct link" between services provided and consideration received. It is relevant to consider the link or otherwise between services and consideration as part of the wide-ranging enquiry to be undertaken, but there is no separate test in that respect.

Consideration of Y4's grounds of appeal

Ground 1

52. We will start with Y4's challenges to the FTT's conclusions as to the absence of "consideration".

53. Y4 argues that the FTT's conclusion, that neither Mr Man nor Colemead were making supplies of services for a consideration, was wrong in law in the light of the following findings of the FTT:

(1) That Mr Fung had given evidence about Colemead's receipt of payments, albeit irregular from Y4 ([103]) and the FTT had made no finding that Mr Fung was an unreliable witness.

(2) That Colemead had no other customers or activity other than the arrangement with Y4.

(3) That Colemead had submitted invoices for "postage commission" ([106]).

(4) That Mr Man gave evidence, which the FTT accepted, that he had received "one or two" payments from the Appellant ([119] and [122]) and

> that there was evidence of invoices for postage commission being submitted. The FTT did not find that Mr Man was an untruthful or unreliable witness.

54. Having made those findings, Y4 argues that the FTT was not entitled in law to conclude that the requisite "direct link" between payments and use of Mr Man's and Colemead's RM account was not made out.

55. In our judgment, these submissions understate some of the findings of fact that the FTT did make. There was not just evidence of Mr Man and Colemead receiving payments. The FTT made findings that they did receive payments (see, for example, [21] and [33]). Moreover, the findings in relation to Mr Man seem to be that Mr Man received more than "one or two" payments of "commission" ([122]) and that he received frequent payments that were equal in amount to sums that RM was taking from his bank account ([21]). However, we nevertheless reject Y4's argument set out in paragraph [53] above.

56. In places, Y4's argument read as a suggestion that because Colemead and Mr Man had received some payments of "income" or "commission" from Y4 the FTT was obliged to conclude that they were both receiving consideration for taxable supplies. That this premise is incorrect is demonstrated by the fact that the street musician in *Tolsma* received payment, but that payment was not treated as consideration for any taxable supply. The FTT's task, therefore, was to look beyond the fact of payment. It needed to ascertain the nature, if any, of the "legal relationship" between Y4 and Colemead and Mr Man. It then needed to decide whether the payments made to Colemead and Mr Man constituted "reciprocal performance" under that legal relationship. That was a fact-sensitive exercise.

57. Y4 could only succeed in establishing that it was making supplies for a consideration if it could establish that there was some "legal relationship", which need not be legally binding, between it and Mr Man or Colemead under which Y4 would be paid. However, the only "legal relationship" proposed was an arrangement that Y4 would pay "income" or "commission" to Mr Man and Colemead. As we have noted in paragraphs [11] and [17], the FTT rejected Y4's case that there was any such arrangement and there is no appeal against that factual finding.

58. Conceptually, Y4 could have chosen to make its case differently before the FTT. Instead of resting on the proposition that there was an arrangement for Y4 to pay Mr Man or Colemead "commission" or "income", it might have chosen to argue that there was, at the very least, an arrangement for Y4 to pay "make whole" amounts. Even if those payments only enabled Mr Man or Colemead to secure cost recovery, rather than to make any kind of profit, Y4 might have sought to argue that the existence of an arrangement to pay these sums constituted consideration and indicated, moreover, that Mr Man and Colemead were carrying on economic activities. Of course, such an argument would have required the FTT to make further factual findings as to the nature of any arrangement between Y4 and Mr Man/Colemead that went beyond its rejection of Y4's case that there was an arrangement for Y4 to make payments of "income" or "commission".

59. In fairness to Y4, we did not understand it to be seeking to pursue this argument for the first time on appeal. If it had sought permission to do so, given that the facts and evidence would have had to be explored in a different way before the FTT if the issue had been raised there, we would not have granted that permission given the summary of the law in this area set out by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360:

> 15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
>
> 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] RTR 22 at [29]).

60. Y4 also challenges the FTT's conclusion to the effect that neither Mr Man nor Colemead was carrying on an economic activity. That argument must also fail. As we have explained, *Wakefield College* establishes that the supply of goods or services for a consideration is a necessary ingredient of an economic activity. Since the FTT permissibly concluded that neither Mr Man nor Colemead was supplying services for a consideration, it therefore follows that they were carrying on no economic activity.

61. In any event, we reject the specific and limited criticisms that Y4 makes of the FTT's conclusion on economic activity. Y4 argues that, in finding at [109] that "Mr Fung opened and allowed use by Y4 of the RM account due to a longstanding friendship with both Mr Samuel Yeung and Mr William Yeung", the FTT was impermissibly basing its conclusion on subjective, rather than objective, considerations. Y4 argues that a similar error of law was made at [124] in relation to Mr Man, and the FTT engaged in a further examination of subjective factors when it said that it did not "accept Mr Man approached the arrangement with Y4 as a means of obtaining income".

62. However, these arguments involve a mis-reading of the Decision, or at least a failure to read the Decision as a whole. As we have noted, the FTT, in its recitation of passages from *Wakefield College*, specifically directed itself that the enquiry into whether there was an economic activity was wide-ranging, but limited to objective factors. In paragraphs [109] and [124] it included further reference to the need to consider objective circumstances. The fact that both Mr Man and Mr Fung were personal friends of Mr Samuel Yeung was a factor relevant to an objective analysis of the activities. There was no error of law in the FTT taking that factor into account in

performing the "wide-ranging enquiry" that *Wakefield College* requires. Moreover, the reference to Mr Man's "approach" to the arrangement in the penultimate sentence of paragraph [124] read in context is a conclusion on objective factors. It could not reasonably be regarded as otherwise given the FTT's specific reference in paragraph [124] itself to the need to consider "objective circumstances".

63. Y4 also argues that, in paragraphs [126] to [128], the FTT was impermissibly swayed by its perception that Mr Man and Colemead were acting in breach of their agreements with RM in allowing Y4 access to their RM accounts and that this necessarily precluded their arrangements with Y4 from constituting an economic activity. However, for reasons that we give in our analysis of Ground 2, that involves a misreading of paragraphs [126] to [128] which were concerned with the FTT's consideration, and rejection, of Y4's alternative argument based on *Airtours*.

64. Finally, Y4 relies on the judgment of the Court of Justice of the European Union in *Saudaçor—Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública* (Case C-174/14) as authority for the proposition that the activities of Mr Man and Colemead in allowing Y4 to use an asset for its business necessarily constituted an economic activity. We reject that argument. The FTT was not concluding that Mr Man's and Colemead's activities were inherently incapable of being "economic activities". Rather, its conclusion, that Mr Man and Colemead were not, as a matter of fact, supplying services for a consideration led inexorably to the conclusion that they were not carrying out any "economic activity".

65. We dismiss Y4's appeal on Ground 1.

Ground 2

66. The short answer to Y4's appeal on Ground 2 is that its alternative argument, based on *Airtours,* was considered, and rejected, in paragraphs [126] to [128] of the Decision.

67. We acknowledge that the FTT would have done better, in paragraph [75] of the Decision, to summarise the essence of Y4's argument rather than simply providing a high-level summary of the facts of *Airtours*. However, it is clear that the FTT realised that *Airtours* underpinned a secondary argument, otherwise it would not have referred in paragraph [73] to Y4's "primary" case. Moreover, it is clear that Y4's secondary argument depended on an analysis of *Airtours*. There would have been no reason for the FTT even to mention the *Airtours* case unless it had that secondary argument firmly in mind.

68. Paragraphs [126] to [128] appear in a section headed "Pat Ning Man", most of which is concerned with whether Mr Man specifically was supplying services for consideration or carrying out an economic activity. However, paragraphs [126] to [128] refer both to Colemead and to Mr Man and so any inference that might otherwise have been drawn from the heading of the relevant section is immediately displaced.

69. Paragraphs [126] to [128] develop a single point. In [127] the FTT explains reasons why Y4 would not have been able to transact directly with RM even if it had wished to.

In [126], the FTT sets out its reasons for concluding why it considered Mr Man and Colemead were in breach of their contracts with RM in engaging in a stratagem to enable Y4 to get around this difficulty. In [128], the FTT explains that the flow of payments and invoices were consistent with the conclusion that RM provided its services to Colemead and to Mr Man. It is difficult to see what else the FTT could have had in mind, other than an intention to reject Y4's *Airtours* argument, in the final sentence of paragraph 128:

> We agree with HMRC that RM provided services to Colemead and to Pat Ning Man.

70. In any event, for Y4's *Airtours* argument to succeed, Y4 would need to establish that the "economic reality" was that RM was supplying services to Y4 directly, rather than to Colemead and Mr Man. That argument simply could not be maintained in the face of the FTT's factual conclusion that RM was not prepared to deal with Y4 until 2016 (see [13] of the Decision). Whether or not it was permissible for the FTT to speculate as to the terms of the contract between RM and Mr Man/Colemead, as it did in paragraph [126] of the Decision, on any view the FTT's findings demonstrated that, viewing the matter objectively (i) RM could not have known that Y4 was the effective user of services RM thought it was supplying to Mr Man and Colemead and (ii) if RM had known, it is most unlikely that they would have continued to make OBAs available to Mr Man or Colemead. Moreover, RM was invoicing Mr Man and Colemead for its postage and could not, on the FTT's findings, have had any right to obtain payment by proceeding directly against Y4. We would ourselves regard those findings as fatal to Y4's argument based on "economic reality". We agree with the FTT's conclusion set out in paragraph [128] of the Decision: considerations of economic reality pointed firmly to the conclusion that RM was supplying its services to Mr Man and Colemead and not to Y4.

71. We dismiss Y4's appeal on Ground 2.

Disposition

72. Y4's appeal is dismissed.

Signed on Original

JUDGE JONATHAN RICHARDS

JUDGE ANDREW SCOTT

RELEASE DATE: 17 February 2022