Neutral Citation: **[2024] UKUT 00106 (TCC)**

Case Number: UT/2023/000067

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
London EC4A 1NL

Value Added Tax – supplies of gold - whether record keeping requirements of sections 6.4 and 7.1 of VAT Notice 701/21 (Gold Imports and Exports) apply – appeal allowed

Heard on: 11 March 2024
Judgment date: 23 April 2024

Before

JUDGE GREG SINFIELD
and
JUDGE GUY BRANNAN

Between

QUBIC ADVISORY SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Denis Edwards, counsel, instructed by Qubic Advisory Services Limited

For the Respondents: Charlotte Brown, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Between 29 November 2019 and 11 March 2020, the Respondents ('HMRC') assessed the Appellant, then called AssetHound Limited but later called Qubic Advisory Services Limited (together 'QASL'), for penalties ("the penalties") amounting to £14,821,380 under section 69A of the VAT Act 1994 ('VATA').

2. A penalty arises under section 69A VATA 1994 where a person fails to comply with a requirement of regulations made under section 13(5)(a) or (b) of the Finance Act 1999. The regulations are found within the Value Added Tax Regulations 1995 ('VAT Regulations') and in particular regulation 31A(1) which requires taxable persons who make specified supplies of investment gold to issue invoices and maintain records containing such details "as may be specified in a notice published by the Commissioners for the purposes of this regulation". The relevant notice is Notice 701/21 Gold Imports and Exports, published in January 2013, ('the Notice').

3. HMRC imposed the penalties because they considered that QASL had breached:

   (1) the invoicing requirements set out at paragraph 6.4 of the Notice; and

   (2) 'records to be kept' requirements at paragraph 7.1 of the Notice, including the accounting record and the customer record.

4. QASL appealed to the First-tier Tribunal (Tax Chamber) ('the FTT') on the grounds that the record keeping requirements of sections 6.4 and 7.1 of the Notice did not apply to QASL's transactions. The FTT directed that the following question should be heard as a preliminary issue:

> "Did the record keeping requirements of sections 6.4 and 7.1 of VAT Notice 701/21 (Gold Imports and Exports) apply to the Appellant in relation to the transactions for which HMRC has issued penalties?"

5. The only issue at the preliminary issue hearing was whether the record keeping requirements applied to QASL's transactions. QASL submitted that the record keeping requirements in the Notice did not apply because the investment gold which was the subject of the relevant transactions was never "delivered or otherwise made available to [QASL's] customer" as required by Section 6.1 of the Notice or "delivered or available to be taken away" by QASL's customers as required by Section 7.1. HMRC contended that the invoicing and record keeping requirements in section 6.4 and 7.1 of the Notice applied to QASL because the gold was made available to the customers or, alternatively, it was delivered to them. HMRC submitted that, in both cases, a right of possession (which may be de jure or de facto), is sufficient.

6. In a decision released on 4 April 2023 ('the Decision'), the FTT held, at [55], that:

> "55. The gold bullion is therefore delivered or available to be taken away within the meaning of section 7.1 of the Notice and accordingly the Appellant should have complied with the requirements set out in the Regulations."

7. With the permission of the FTT, QASL now appeals to the Upper Tribunal on nine grounds, namely that the FTT:

   (1) ignored the terms and effect of a waiver between Qubic's customer and Galmarley Limited trading as "BullionVault" ("BullionVault") (the entity from which QASL purchased the gold bullion in question);

(2) impermissibly applied the terms of the Notice wider than the terms of regulation 31A(1)(b) of the VAT Regulations;

(3) failed to have regard to the Notice being internally inconsistent;

(4) failed to take account of paragraph 9 of the Notice and the purpose of section 69A VATA;

(5) failed to distinguish between a supply of the transfer of ownership of investment gold and a further supply in seeking delivery of the gold;

(6) failed to have regard to the unascertained nature of the investment gold;

(7) failed to have regard to the practical impossibility of taking delivery of the gold;

(8) failed to take account of a distinction between investment gold and other gold, with the former being immovable whereas physical movement is an essential feature of the VAT Regulations and article 346 in Directive 2006/112/EC; and

(9) failed to consider the principle of proportionality.

8. Essentially, QASL contends that the FTT reached the wrong conclusion when it decided that QASL sold exempt investment gold which was delivered or available to be taken away by its customers within the meaning of section 7.1 of the Notice. The issue in this appeal turns on whether the FTT was wrong to conclude that the terms of the agreements between QASL and its customers meant that the gold was delivered or available to be taken away. As it was before the FTT, the central question in this appeal is the meaning of "delivered or made available" and "available to be taken away" in paragraphs 6.4 and 7.1 of the Notice when read in the light of regulation 31A(1).

9. QASL was represented by Mr Denis Edwards and Ms Charlotte Brown appeared for HMRC. We are grateful to both counsel for their submissions.

FACTUAL BACKGROUND

10. The FTT briefly described how the gold was supplied at [9] and [10]:

> "9. [QASL] purchased all of the gold bullion in question from BullionVault following orders from customers. [QASL] then sold this gold to customers pursuant to a Supply of Services Agreement between [QASL] and the relevant customer with [QASL] receiving reimbursement of the cost of the gold pus [sic] a 1% commission.
>
> 10. Under the terms of these agreements title for the gold bullion vested in one or more individuals referred to as Designated Employees. Separate agreements were entered into between [QASL] and the Designated Employees. Both [QASL] and the Designated Employees had a BullionVault trading account so that title of the gold could be transferred. The gold bullion in question was stored by BullionVault in one of the agreed vaults. This storage was covered by BullionVault's Terms and Conditions. BullionVault's records of ownership and money held are updated daily and published in a Daily Audit."

11. That description of the transactions is not disputed. Although there was a prior transaction involving the supply of the gold from BullionVault to QASL, this appeal is only concerned with the supply of gold from QASL to its customers.

12. All gold bullion sold by QASL between 1 October 2015 and 31 March 2016 in respect of which the penalty assessments were raised was purchased by QASL from BullionVault. The FTT recorded the evidence given on behalf of QASL by Mr David Graham, who at all material times was the sole director of QASL, at [22] – [26]:

"22. … In his witness statement he explained that all gold bullion sold by [QASL] between 1 October 2015 and 31 March 2016 in respect of which the penalty assessments were raised was purchased by [QASL] from Galmarley Limited trading as BullionVault. BullionVault's Terms and Conditions of Sale were applicable to BullionVault users during the period relevant to this appeal. BullionVault is a member of the London Bullion Market Association (LBMA). BullionVault operated an on-line market for account holders to buy and sell gold bullion. Its Terms and Conditions confirmed that all gold bullion purchased from it remained in the vault location specified by the buyer, such vaults being controlled by a vault operator, subject to agreement between the vault operator and BullionVault.

23. BullionVaults Terms and Conditions included the following:

> "You acknowledge that your ownership does not necessarily relate to a specific bar but to a specific quantity of bullion in a specific vault. BullionVault acknowledges that the bullion you own exists, is in the vault, is yours, and that being physical it is ultimately capable of being sub-divided into measurable amounts of material which you could take into your possession…"

24. Mr Graham's witness statement continued by stating that a request to withdraw gold bullion would be permitted only for such quantities and form of gold specified in BullionVault's Terms and Conditions. In addition, any withdrawal would be subject to separate BullionVault withdrawal procedures. Accordingly, the gold bullion sold by [QASL] was never physically delivered or made available to be taken away. If persons wished to withdraw the gold bullion from the relevant vault the individual would have been required to address that directly with BullionVault following the purchase and subject to BullionVault's further withdrawal procedures.

25. When a client of [QASL] purchased gold bullion a BullionVault Terms and Conditions Waiver Acknowledgment was signed and the Appellant issued invoices which included the following information:

(i) [QASL]'s full name, registered address and trading address;

(ii) The client name and address;

(iii) The invoice number;

(iv) The invoice date;

(v) The quantity and purity of the gold bullion under the heading 'Description';

(vi) The unique client reference number, referred to as "Account";

(vii) [QASL]'s VAT number;

(viii) The value of the gold bullion purchased;

(ix) The Gold Dealing fees charged by [QASL]; and

(x) The total amount payable including any element of VAT.

26. Mr Graham stated that the withdrawal of gold bullion from a vault would be subject to restrictions on the quantity and form of gold bullion as provided by the BullionVault Terms and Conditions and subject to the additional withdrawal procedures of BullionVault (a member of the LBMA). As a result, the invoices did not include a physical description of the gold bullion, other than the weight and purity nor a date or address to which delivery was made, as it was not delivered."

13. Mr Paul Tustain was a director of BullionVault. In his witness statement, he explained that BullionVault is an internet-based retail-accessible platform, for buying, storing and selling physical gold bullion. It provides individuals (retail investors) with access to the professional bullion markets which had previously been very difficult. The FTT described Mr Tustain's evidence at [28] – [34] of the Decision, the material parts of which are as follows:

> "28. The LBMA is the trade body, regulator and administrator at the centre of the London market and as part of its functions it provides the specification which must be met for gold bullion to be classed as "Good Delivery" gold bars, which is the standard form of gold bar traded in the professional bullion market. BullionVault's service allows private investors to trade and securely hold a fraction of a "Good delivery" 400 ounce large bullion gold bar which is worth about £600,000 in a pooled client storage account. Instead of buying individual coins and small bars from the retail gold market at 7% trading spreads retail investors can use BullionVault to participate in the professional market and buy any whole gram multiple quantity of physical gold with round trip trading costs reduced to about 1%. Clients also benefit from the low cost of storage services and insurance. The actual gold is stored in one of five vaults in London, New York, Singapore, Toronto and Zurich each of which is run by a vaulting member of LBMA.
>
> 29. Mr Tustain states in his witness statement that LBMA has a long-standing agreement with HMRC contained in "Administrative agreements with trade bodies (VAT Notice 700/57)" and entitled "Agreement with the London Bullion Market Association" under which gold bullion which remains stored within its authorised vaults, known as "the black box", is zero rated for VAT. The agreement states in paragraphs 2 and 3 of section 1:
>
> > '2. Under the terms of the Value Added Tax (Terminal Markets) Order 1973 there's provision for zero rating supplies of bullion where both parties to the transaction are LBMA members. In addition, supplies to and from an LBMA member and a non-member are zero-rated provided the transaction does not lead to physical delivery. Supplies on the market which are zero-rated can be regarded as taking place within a VAT-free ring or 'black box', the term used in this agreement.
> >
> > 3. It's been agreed, broadly in confirmation of existing working practises within the market, that with certain exceptions all supplies of bullion, including loans, should be treated as being zero-rated, provided the bullion is not physically removed from the black box. This will apply to all supplies of bullion irrespective of the counterparties involved (whether LBMA members or non-members, or whether the bullion is allocated or unallocated).
> >
> > Bullion will be regarded as having been so removed when effective control is transferred from an LBMA member to a non-member. The term effective physical control includes cases where bullion leaves the possession of an LBMA member but remains under the member's control and responsibility. Where physical bullion leaves the black box because an LBMA member relinquishes effective physical control, VAT will be charged and accounted for by the LBMA member so relinquishing control….'
>
> 30. Mr Tustain confirmed that all gold held at anytime by [QASL] remained within the black box. None of it was physically delivered to a client of [QASL] nor at any time escaped the physical control of BullionVault.
>
> 31. An optional BullionVault service allows clients with a sufficiently large gold balance – in excess of 400 oz – and a long term outlook, to permanently

> associate their name to a single identifiable bar. There is a small fee for this service which thereafter links that particular bar with that particular client within BullionVault's records and this link is recognised within BullionVault's daily audit. However, no recognition of an individual client's relationship to an individual bar is maintained by the vault operator who recognises only one pooled "BullionVault Clients" account. Only one client of [QASL] has ever made use of this optional service.
>
> 32. In Mr Tustain's view no client of [QASL] had a storage relationship with the vault operator. No client could have approached a vault operator seeking possession nor could they have approached BullionVault itself as there is never any gold available at BullionVault's premises. Therefore, the bullion cannot be sensibly described as being available for collection. The bullion was always held within the LBMA black box under BullionVault's control where the gold is zero-rated for VAT. This was so even for the one client who was connected to an identifiable gold bar.
>
> 33. No client of [QASL] ever used the relatively complex and costly procedure where the client can demand, in extremis, to have the gold shipped to them.
>
> 34. Finally, Mr Tustain informed the Tribunal that a client's gold is held within BullionVault as part of one or more 400 oz bars. While, in extreme circumstances, bars could be sub-divided with a metal cutter, this was not a commercially practical way of operating."

CONTRACTUAL FRAMEWORK

14. QASL operates an account with BullionVault through which it was able to buy and sell from the BullionVault market gold bullion. In order for QASL to transfer title in the gold to Designated Employees of its client, a Bullion Vault account was opened by the relevant Designated Employee.

15. We were supplied with a Supply of Services Agreement dated 23 February 2016 between QASL and its client ('the Client'), ie the employer of the Designated Employee, under which the Client appointed QASL to buy or supply gold for the Designated Employees. The agreement states at clause 2.2 that:

> "For the avoidance of doubt, the title to the Assets purchased by [QASL] pursuant to this Agreement shall vest in [QASL], [QASL] shall transfer the title in the Asset to the appropriate Designated Employee."

16. BullionVaults' Terms and Conditions (effective until 18 January 2018) confirmed that all gold bullion purchased from it remained in the vault location specified by the buyer, such vaults being controlled by a vault operator, subject to agreement between the vault operator and BullionVault. Those Terms and Conditions included the following:

> "You acknowledge that your ownership does not necessarily relate to a specific bar but to a specific quantity of bullion in a specific vault. BullionVault acknowledges that the bullion you own exists, is in the vault, is yours, and that being physical it is ultimately capable of being sub-divided into measurable amounts of material which you could take into your possession, subject to paying the physical withdrawal fee according to the Tariff."

17. The contract between QASL and its Client states:

> "2.2 For the avoidance of doubt, the title to the Assets purchased by [QASL] pursuant to this Agreement shall vest in [QASL], [QASL] shall transfer the title in the Asset to the appropriate Designated Employee."
>
> …

> 5.6 Provided [QASL] has received from the Client (or its nominee) the Deposit or Further Deposit (as applicable), [QASL]shall purchase the Asset specified in the Order in the name of [QASL] whereupon [QASL] shall:
>
> > 5.6.1 notify the Client that the Asset has been purchased and is available; and
> >
> > 5.6.2 transfer title to the Asset to the Designated Employee identified by the Order provided that the Client has supplied the information required by [the Appellant] under Clause 4.1.3 (time shall not be of the essence)."

18. There were also two different BullionVault Terms and Conditions Waiver Acknowledgements ('First Waiver' and 'Second Waiver') relating to a Client of QASL and the Designated Employee of the Client. The First Waiver, dated 24 February 2016, was between BullionVault and QASL. It states that:

> "We hereby confirm that the Company account registered at BullionVault under the USERNAME: 1ASSETHOUND1 [QASL] has been opened to facilitate the purchase of gold to the value of £2,000,000 which after settlement will be transferred to the [Designated Employee of the Client] who also have accounts registered at BullionVault.
>
> …
>
> When the transfer takes place, gold will be freely delivered to the Beneficiaries' BullionVault accounts, in the stated proportions within the BullionVault system. Any non-BullionVault transaction consideration owing shall pass from the Beneficiaries to the Company outside of BullionVault under terms agreed directly between the Company and the Beneficiaries.
>
> *The Company, Company Directors and all Beneficiaries understand and accept that the provisions of the underlined statements below from the stated section headings of BullionVault's published Terms and Conditions … listed below are duly waived*:
>
> …
>
> *Your right of withdrawal*
>
> *You have a right of withdrawal of your gold and silver from BullionVault but you acknowledge BullionVault is not designed primarily as a service for those who wish to take physical possession of bullion.*" (Emphasis added)

19. The First Waiver was signed by Mr David Graham as director of QASL and also on behalf of the Scheme Administrator, Qubic Tax Limited.

20. The Second Waiver, also dated 24 February 2016, stated:

> "I hereby confirm as Managing Agent for the account registered at BullionVault under the USERNAME: [Designated Employee of the Client] has been opened to facilitate the receipt of gold to be transferred from the BullionVault account USERNAME: 1ASSETHOUND[1]1
>
> Any non-BullionVault transaction consideration owing shall be settled outside of BullionVault under terms agreed directly between the Company and the Beneficiaries.
>
> *I understand and accept that the provisions of the underlined statements below from the stated section headings of BullionVault's published Terms and Conditions listed below are duly waived:*

[1] i.e. QASL

…

Your right of withdrawal

You have a right of withdrawal of your gold and silver from BullionVault, but you acknowledge BullionVault is not designed primarily as a service for those who wish to take physical possession of bullion." (Emphasis added)

21. The Second Waiver was signed by Mr David Graham for QASL. In signing the Second Waiver, QASL was acting as agent on behalf of the Designated Employee under another Supply of Services Agreement, dated 24 February 2016, between QASL and the Designated Employee for the purpose of buying and selling gold. This Supply of Services Agreement made it clear that QASL was acting as agent for the customer in buying the gold. Clause 2.1 of this Agreement stated:

> "Subject to the terms of this Agreement, You appoint and hereby authorise [QASL] to be Your agent for the management of the Portfolio throughout the Term unless this Agreement is validly terminated prior to expiry in accordance with Clause 8. [QASL] accepts the appointment on the terms set out in this Agreement."

LEGISLATION

22. Article 346 of Directive 2006/112/EC (the PVD) exempts certain supplies of investment gold and is as follows:

> Member States shall exempt from VAT the supply, the intra-Community acquisition and the importation of investment gold, including investment gold represented by certificates for allocated or unallocated gold or traded on gold accounts and including, in particular, gold loans and swaps, involving a right of ownership or claim in respect of investment gold, as well as transactions concerning investment gold involving futures and forward contracts leading to a transfer of right of ownership or claim in respect of investment gold."

23. The exemption for investment gold is implemented in the United Kingdom by section 31 and Group 15 of Schedule 9 VATA. Group 15 is headed "Investment gold" and exempts (so far as material):

> "1 The supply of investment gold.
>
> 2 The grant, assignment or surrender of any right, interest, or claim in, over or to investment gold if the right, interest or claim is or confers a right to the transfer of the possession of investment gold.
>
> 3 The supply, by a person acting as agent for a disclosed principal, of services consisting of-
>
> (a) the effecting of a supply falling within item 1 or 2 that is made by or to his principal
>
> …."

24. As regards these supplies, regulation 31A(1) of the 1995 Regulations ("regulation 31A(1)") provides for invoice and record keeping obligations where:

> "31A(1) This regulation applies where a person—
>
> …
>
> (b) makes a supply of a description falling within item 2 of Group 15 of Schedule 9 to the Act, which subsequently results in the transfer of the possession of the investment gold".

25. Where regulation 31A(1) applies, the person must keep and maintain a record of the supply containing such details as may be specified in a notice published by HMRC for the purposes of the regulation.

26. A penalty under section 69A VATA 1994 arises where a person fails to comply with requirements of regulations made under section 13(5)(a) or (b) of the Finance Act 1999 "for specified persons to keep specified records in relation to specified transactions concerning gold" and "for specified persons to give specified information to the Commissioners about specified transactions concerning gold." Regulations made pursuant to section 13(5) are in the VAT Regulations.

27. Specifically, regulation 31A(2) of the VAT Regulations imposes invoicing, record keeping and notification requirements on taxable persons making supplies of investment gold under Items 1 and 2 of Group 15 of Schedule 9 VATA 1994. Regulation 31A(2) provides as follows:

> "…
>
> (b) keep and maintain a record of the supply containing such details as may be specified in a notice published by the Commissioners for the purposes of this regulation;
>
> …
>
> (d) keep and maintain a record of the recipient of the supply containing such particulars pertaining to the recipient as may be specified in a notice published by the Commissioners for the purposes of this regulation;
>
> (e) keep and maintain such other records and documents as may be specified in a notice published by the Commissioners for the purposes of this regulation to allow the proper identification of each recipient of the supply;"

THE NOTICE

28. The Notice is the relevant notice as referred to by the VAT Regulations. The relevant invoice and record keeping obligations in this case are those in sections 6.4 and 7.1 of the Notice. Section 6 is headed, "Invoice requirements for trading in exempt investment gold." Section 6.1, which is not legally binding, provides:

> "6.1 Basic information about requirements
>
> There are special notification, invoicing, accounting and record keeping requirements for persons who trade in exempt investment gold.
>
> The requirements apply when you sell exempt investment gold and the gold is delivered, or otherwise made available to your customer.
>
> If you do not meet your notification, invoicing, accounting and record keeping obligations you may become liable for a penalty, see section 9.
>
> The requirements and penalties apply whether or not you're registered or liable to be registered for VAT."

29. Section 6.4 of the notice, which is legally binding, goes on to provide:

> "6.4 Details to include on invoices for sales of exempt investment gold
>
> This section has force of law.
>
> Each invoice must contain the following details if appropriate:
>
> • name and address of seller; your name and address (if different to the seller); name and address of the purchaser; delivery address (if different); unique customer reference (see paragraph 7.1(b)).

> • date of invoice; delivery date; type of supply (for example, sale).
>
> • your VAT registration number if you, or your principal are registered for VAT, or the seller's VAT registration number (if you're not the seller); and
>
> • a description of the gold supplied;
>
> > • for bars and wafers: form, weight and purity, any other identifying feature (including any proprietary mark, hallmark and serial number where applicable); or
> >
> > • for investment gold coins: the coin type, country of origin and whether or not the coin is included on the list of gold coins reproduced in Notice 701/21A Investment gold coins.
>
> • the number of items; and
>
> • the total amount payable"

30. Section 7 of the Notice is headed "Records to be Kept" and sets out the further record keeping obligations. Section 7.1, which is legally binding, provides:

> "If you sell exempt investment gold which is delivered or available to be taken away by your customer you must keep the following information as part of your business records…."

THE FTT'S DECISION

31. Having set out the parties' submissions, the FTT set out its reasoning at [52] - [55]:

> "52. BullionVault's Terms and Conditions include the following:
>
> > 'BullionVault acknowledges that the bullion you own exists, is in the vault, is yours, and that being physical it is ultimately capable of being sub divided into measurable amounts of material which you could take into your possession, subject to paying the physical withdrawal fee according to the Tariff.'
>
> 53. The agreement between HMRC and LBMA states that supplies to and from an LBMA member to a non-member are zero-rated provided the transaction does not lead to the physical delivery. Bullion will be regarded as having been removed when effective control is transferred from an LBMA member to a non-member. The term effective physical control includes cases where bullion leaves the possession of an LBMA member but remains under the member's control and responsibility.
>
> 54. BullionVault's Terms and Conditions make it clear that the gold bullion belongs to the customer and could be taken into the customer's possession. The fact that there will be additional fees and procedures for the customer to have their gold bullion delivered to them or made available to them means that the exemption does not apply to the Appellant.
>
> 55. The gold bullion is therefore delivered or available to be taken away within the meaning of section 7.1 of the Notice and accordingly the Appellant should have complied with the requirements set out in the Regulations."

32. Accordingly, the FTT dismissed QASL's appeal.

SUMMARY OF SUBMISSIONS

33. It is convenient to summarise the parties' submissions in relation to Grounds 1 and 2, which are closely related, together. Ground 1 was that the FTT had ignored the terms and effect of a waiver between QASL's customer and BullionVault which meant that the Designated Employee did not have any right to seek or take possession of the gold. Ground 2

was that the FTT had wrongly applied the terms of the Notice more widely than was permitted by regulation 31A(1)(b) VAT Regulations.

QASL's submissions

34. Mr Edwards, appearing for QASL, submitted that there was never any physical delivery of investment gold and no prospect of it or right to it. In any event, adequate records were kept with specific information which is substantially the same as that if the record keeping and invoice obligations applied. The investment gold which was the subject of the relevant transactions was neither "delivered" nor "otherwise made available to" QASL's customer as required by Section 6 of the Notice or "delivered" or "available to be taken away" by QASL's customers as required by section 7.1 of the Notice. The investment gold remained in the designated vaults (i.e. within the "black box" described by Mr Tustain) and was never removed. In these circumstances, there was no necessity to impose the record keeping obligations in relation to the relevant transactions and, indeed, it was disproportionate to do so.

35. Mr Edwards relied particularly on the terms of the Second Waiver by which, he submitted, the Designated Employee (of QASL's Client) waived his/her right to take delivery of the investment gold. The Second Waiver was signed by Mr David Graham, the director of QASL, as agent for the Client pursuant to Supply of Services Agreement, dated 24 February 2016, between QASL and the Designated Employee referred to at paragraphs 20 and 21 above. The FTT had erred in law by ignoring the effect of the Second Waiver.

36. The terms of regulation 31A(1)(b), the provision which provided the statutory authority for the Notice, applied to a supply within item 2 of Group 15 of Schedule 9 to the Act "*which subsequently results in the transfer of the possession of the investment gold*." (Emphasis added). This made it clear, in Mr Edwards's submission, that the terms of the Notice could only apply in cases where there was a transfer of possession of the investment gold. It was not possible for the terms and the meaning of the Notice to be wider than the language used by regulation 31A(1)(b) which was limited to cases where there was a transfer of physical possession.

HMRC's submissions

37. Ms Brown, appearing for HMRC, argued that the FTT was entitled to reach the conclusion that it did. The FTT had not, she said, ignored the effect of the Second Waiver, referring to it at [25]. QASL's complaint was merely that the FTT did not attach the same weight to it that QASL wished.

38. The Upper Tribunal should only interfere, in Ms Brown's submission, if the Decision was irrational. The FTT had accepted that the investment gold was never intended to leave the vaults. The FTT's decision, however, was based on BullionVault's terms which stated that the gold belonged to the customer and could be taken into its possession. It was HMRC's case that the Notice did apply to the transactions in dispute because, primarily, the gold was made available to QASL's customers or, alternatively, it was delivered. In both cases, a right of possession was sufficient.

39. Ms Brown contended that the Second Waiver did not assist QASL. The waiver was between QASL and BullionVault. The FTT made clear at [23] that BullionVault's terms and conditions specified that the investment gold was held in the customer's name and was physically held in the vault on the customer's behalf. There was no waiver which prevented the customer from removing its gold from the vault.

40. In relation to Ground 2, Ms Brown submitted that the FTT had dealt with the interplay between the Notice and the legislative scheme at [17]. In short, the owner of the investment

gold would have possession in the legal sense (i.e. the right to obtain physical possession) and that actual physical possession was not required.

41. For the avoidance of doubt, HMRC's position, as set out in paragraph 45 of its skeleton in the FTT hearing, was that the agreement between HMRC and the LBMA was not applicable to the transactions in question, being those between QASL and its customers, none of whom were members of the LBMA.

DISCUSSION OF GROUNDS 1 AND 2

42. As already indicated, it is convenient to deal with Grounds 1 and 2 together.

43. It was common ground that the underlying supplies of investment gold fell within Item 2 Group 15 of Schedule 9 to VATA. It was also common ground that the statutory authority for the Notice was regulation 31A(1)(b) which applied where there was a supply of investment gold within Item 2 "which subsequently results in the transfer of the possession of the investment gold." From this it followed that the transactions in question had to involve the transfer of possession of the investment gold. Finally, it was common ground that QASL's customer at no time obtained physical possession – the investment gold was held in a vault by a third party under a contract of bailment.

44. Essentially, HMRC argued that, although QASL's customer (the Designated Employee) did not have physical possession, the customer did have *the right* to obtain physical possession of the investment gold. That right was sufficient to establish that the gold was "delivered, or otherwise made available to" QASL's customer (Section 6.1 of the Notice[2]) or "delivered or available to be taken away by" by QASL's customer (Section 7.1 of the Notice). Section 6.4 of the Notice, which does have the force of law, requires an invoice to contain the name and address of the purchaser of the investment gold and the delivery address, if different. The reference in regulation 31A(1)(b) to the subsequent "transfer of the possession of the investment gold" included, on HMRC's case, the transfer of the right to obtain possession.

45. It is not, in our view, necessary to determine whether the right to obtain physical possession was sufficient for the relevant provisions of the Notice to apply. This is because we have come to the conclusion that the Designated Employee of QASL's client did not have the right to obtain possession of the gold that QASL purchased on his/her behalf. As Mr Edwards submitted, the Second Waiver had the effect that the Designated Employee waived the right to obtain physical possession of the investment gold. It is also clear that when Mr Graham, the director of QASL, signed the Second Waiver he was doing so as agent for the Designated Employee pursuant to the Supply of Services Agreement, dated 24 February 2016, between QASL and the Designated Employee. Therefore, the Designated Employee had no right to the delivery or physical possession of the investment gold.

46. The FTT at [25] referred to the Second Waiver in passing but without apparently appreciating or, possibly, having its attention drawn to its significance. It follows, therefore, that the FTT's conclusion that the investment gold was delivered or available to be taken away and that, therefore, QASL should have complied with the invoicing and record keeping requirements set out in the regulations, was an error of law.

47. We accept, as did the parties, that the scope of the Notice could not be wider than the scope of the language used in regulation 31A(1)(b), viz that the supply of the investment gold had to result in the subsequent "transfer of the possession of the investment gold". However, for the reasons we have given, it is not necessary for us to express a concluded view on the width of the meaning of this expression (i.e. whether it included the mere right to obtain

[2] Although it is to be noted that Notice 6.1 does not have the force of law.

physical possession) because the Designated Employees had neither physical possession nor the right to obtain physical possession of the investment gold.

48. It is also unnecessary for us to reach a view on a point we raised with the parties in argument in relation to the application of the presumption against doubtful penalisation to the interpretation of the Notice (and the wording of regulation 31A(1)(b)).

49. The parties' submissions included references to the case-law in relation the need to determine the economic reality of the transactions in order to establish the nature of the supplies being made. However, it seems to us that the contractual framework in this case clearly expresses the economic reality of the transactions, that the nature of the supplies was not in dispute and that it was therefore unnecessary to address these authorities.

50. For the reasons given above, the Decision cannot stand and QASL's appeal must be allowed.

51. In reaching this conclusion, it would be harsh, in our view, to express undue criticism of the Decision. The effect of the Second Waiver was not raised or even mentioned in QASL's skeleton argument before the FTT (Mr Edwards informed us that he was instructed very shortly before the FTT hearing). Mr Edwards also informed us that, whilst the Second Waiver was mentioned in cross-examination by Ms Brown and in his reply, he accepted that his submissions before the FTT on this point had not been made with the same force as they were made before us. It seems likely, therefore, that the terms and significance of the Second Waiver were not fully drawn to the attention of the FTT.

GROUNDS 3-9

52. In the light of our conclusions on Grounds 1 and 2, it is unnecessary for us to express any view on Grounds 3-9.

CONCLUSION

53. We consider that the FTT's error of law was clearly material to its conclusion. For the reasons given above, we set aside the Decision.

54. Under Section 12 Tribunals, Courts and Enforcement Act 2007 we have the power to remit the Decision to the FTT or to remake the Decision.

55. We see no reason to remit the Decision. The question of the effect of the Second Waiver is self-contained and is apparent on the face of the documents.

56. For the reasons given above, we remake the Decision, allowing the appeal and setting the penalties aside.

COSTS

57. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

JUDGE GREG SINFIELD
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

Release date: 23 April 2024