[2019] UKFTT 126 (TC)

TC06992

Appeal number: TC/2018/00940

TYPE OF TAX – VAT – supply – criminal conduct resulting in a total failure of consideration – whether a "supply" of goods or services – No.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR OWEN FRANCIS SAUNDERS **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES QC.
MRS C. de ALBUQUERQUE.

Sitting in public at Taylor House, London on 12 February 2019

Mr. H. Thompson for the Appellant.

Miss O. Donovan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On a date which was not specified, but in 2016, the appellant was convicted at the Canterbury Crown Court on an indictment containing several counts. Surprisingly neither party saw fit to produce a copy of that indictment. Nonetheless it is beyond doubt that the prosecution was initiated by Trading Standards and so it seems probable to us that the indictment contained counts relating to trading standards offences rather than offences under the Theft Act 1968 and/or the Fraud Act 2006. It is also overwhelmingly probable that the offences of which the appellant was convicted had as a constituent element a requirement that the prosecution should prove dishonesty. The Courts are well familiar with the typical trading standards offences where the case put by the prosecution is that a person has either taken an advance of money against work promised to be done, which it never is done (and was never intended to be done) or is deceived into believing that a far greater quantum of work (for example roof tile replacement) needs to be done than is truly justified.

2. On 12 September 2016, further to the convictions upon indictment, the Court made a Confiscation Order against the appellant in the sum of £68,330. For our purposes it is important to appreciate the way in which the Crown Court judge dealt with this matter. As she was entitled to do, she made the Confiscation Order and directed that the confiscated amount be paid by way of compensation to the victims of the criminal conduct. Initially a Confiscation Order was made in the sum of £68,330 and it was then directed that that sum be divided between the several named victims of the criminal conduct, as compensation. We need not identify the victims – they are named in the (draft) Confiscation Order which became a finalised Order upon being made by the judge. It was common ground before us that the amount of the confiscated amount directed by the Crown Court to be paid to each of those individuals as compensation, represented 100% of the monies paid by each of those individuals to the appellant.

3. The appellant had earlier been sentenced to 12 months imprisonment for his various offences.

4. The principles upon which a compensation order can be made by the Crown Court are straightforward. The jurisdiction is truly compensatory; not punitive. We make that point for reasons which will appear below. In other words, the Crown Court judge must assess the appropriate sum to be paid to each victim with a view to that sum being a proper assessment of that victim's loss. The assessment was that each victim had lost, and so should be compensated in respect of, 100% of the monies paid by each of those victims to the appellant.

5. The principles for assessing compensation in a Crown Court are no different, in any significant way, to an assessment in civil law. We consider it to be an overwhelming inference from the facts that we have set out above, that the Crown Court judge concluded that each of the victims to whom compensation was ordered to be paid,

received no consideration for the monies which he/she had paid to the appellant. If the Crown Court judge had not so concluded, she could not have awarded 100% of the monies paid by each of those victims to the appellant, as compensation. She would have had to award a lower amount if she had ruled that those victims, or any of them, had received only partial consideration. For example, if the Crown Court judge was faced with a case where somebody had undertaken roofing work which was properly needed and contracted for at a price of £200, but then the contractor deceived the house owner into believing that further (unnecessary) work needed to be done at a cost of £800, upon conviction for the deceit/fraud in respect of the second part of the work, a compensation order could be made for £800 only; not the entire £1000. When this inevitable inference was dealt with by Miss Donovan she speculated that the victims of the appellant's crimes might still have the paving, tarmac or roof tiles for which they contracted and that if the Crown Court judge had been of the view that there was only a partial failure of consideration, not a total failure of consideration, she might nonetheless have ordered 100% of the sum paid by the appellant to his victims to be paid to them as compensation so as to punish the appellant for his wrongdoing. In our judgement we simply cannot accept that analysis because, if we did, we would be making the wholly inappropriate assumption that the Crown Court judge simply did not know what she was doing and had made an egregious error of law. Judicial comity prevents us from proceeding based upon any such unwarranted assumption. The punitive element in a Crown Court is achieved by passing sentence. It would be wrong in principle for a judge to award more by way of compensation than is properly justifiable (applying normal civil law principles), as some kind of additional punishment over and above that provided for by the sentence of the Court. On the facts which were made known to us, and which were common ground, there is no doubt in our minds that the only available inference is that the Crown Court judge concluded that each of the victims fell to be compensated as to 100% of the monies paid to the appellant because there had been a total failure of consideration in respect of the payment of such monies.

6. When the respondents found out about the appellant's conduct and his convictions, it opened an enquiry into his VAT tax status. The appellant was not and has not been registered for VAT. The respondents decided that for the period 6 April 2012 – 31 March 2015 the appellant was engaged in business activity with turnover that exceeded the applicable VAT registration threshold, in circumstances where that limit was exceeded only if the sums obtained by the appellant as a result of his dishonest or deceptive criminal conduct were taken into account as part of his turnover.

7. At this juncture it is important that we point out that the issue in this case is not that the appellant was engaged in criminal conduct. It is perfectly possible for somebody engaged in criminal conduct to supply goods or services and have a turnover which exceeds the applicable VAT registration threshold. For example, a drug dealer might sell drugs worth many hundreds of thousands of pounds. He/she undoubtedly provides (title to) goods and the fact that such goods are provided in the course of criminal activity does not negate that fact.

8. In our judgement the crucial issue in this case is whether there was ever any supply of any goods or services by the appellant which resulted in him being paid monies by his victims.

9. In the respondents' Review Conclusion Letter dated 21 December 2017, it is pointed out, entirely correctly, that for a person to be within the scope of VAT there must be :

(1) a supply of goods or services,

(2) such supply must be within the United Kingdom,

(3) the supply must be made by a taxable person, and

(4) the supply must be made in the furtherance of a business.

10. We recognise that a person might properly be said to sell goods or services in furtherance of a business even if that business involves criminal conduct. The drug dealer and the fence who handles and then sells stolen goods, are good examples. However, there is an important distinction between those two classes of criminal. The drug dealer is highly likely to have title to the goods/drugs that he/she sells. When a person enters into a contract to purchase goods, although the man in the street regards his/her ability to possess those goods and to treat them as they see fit as the reality of what is being purchased, the essential part of the transaction relates to title. When I buy a chocolate bar in a shop I am buying title to that particular chocolate bar. My ability to possess it and do with it as I please, is simply an incident of my title (ownership). However, the fence who sells stolen goods, of necessity, gives no consideration to the person who pays him for those goods. That is because he cannot pass title to the would-be purchaser. As between the handler of stolen goods and a person who purchases such goods from him, there is inevitably a total failure of consideration for the money paid by the purchaser, because the handler of those stolen goods cannot pass good title to them.

11. Upon the respondents' submissions every boiler house scammer should be registered for VAT assuming that he/she reaches the applicable annual VAT threshold. Thus in a case where the fraudster dupes a hapless victim into parting with £100,000 against a promise to hold 100 fine ounces of gold in a secure vault, with the "purchaser" having certificated ownership of that gold, but where no such gold or asset exists and the whole scheme has simply been an exercise in obtaining money by deception, on HMRC's case there has been a supply of services and the scammer should be registered for VAT. In our judgement the scammer, however reprehensible his/her conduct has been, falls to be dealt with by the criminal courts but cannot be said to have been making a supply of goods or services, regardless of whether one regards the scamming to have taken place in the course or furtherance of (illegal and deceptive) business.

12. Thus the issue that we have to address, pertinent to the facts of this case, is whether there can be a supply of services where the consideration for which the monies were paid by the victims has wholly failed. We can put it another way. If I deceive somebody into paying me a sum of money against my promise to perform certain work which I do not perform (and had never intended of performing), am I providing a service or am I simply obtaining money by deception? If I deceive a person into paying a sum of money for work which I should do properly but have no intention of doing properly so as to confer any meaningful benefit upon that person, am I providing valuable

consideration or simply obtaining money by deception? The distinction is highly important. In our judgement the person who obtains money by deception cannot properly be said be somebody who is making a supply of goods or services when those concepts are considered in their normal civil law context; otherwise it would probably follow that every fraudster and every person operating a boiler house scam should be registered for VAT (assuming that he/she reaches the annual turnover threshold), irrespective of whether he/she had provided any valuable consideration.

13. When we apply that approach to this appeal we find that in respect of the persons to whom the Crown Court judge found there to have been a total failure of consideration for the sums paid by them to the appellant, there was no supply of goods or services. In our judgement that conclusion follows from the fact that the Crown Court decided that there had been a total failure of consideration, evidenced by the fact that compensation was assessed at 100% of the amount paid by each of those victims to the appellant.

14. It follows that because the assessment of £11,503 against the appellant was made on the basis that his turnover (from non-impugned trading) exceeded the VAT registration threshold only upon adding thereto monies received by him from his aforesaid criminal conduct, the assessment and associated penalties must be quashed because, on our finding, the appellant did not reach the VAT threshold in either of the assessment years (6 April 2012 – 5 April 2014).

15. Although ordinarily one might expect a point of law relating to whether the appellant does or does not have a right of appeal to appear at the outset of a Decision, we have left this matter until the end. The respondent submitted that the appellant had no right of appeal against the assessment to VAT because he had not submitted any VAT returns. The submission was that to provide himself with an appeal to this Tribunal, the appellant must register for VAT, submit nil VAT returns, await them to be amended by the respondents and then appeal those amendments.

16. We are satisfied that that approach is not justified either pragmatically or in law.

17. We reach that conclusion because we are entirely satisfied that the appellant has a right of appeal given to him by section 83(1)(b) Value Added Tax Act 1994. It is to be noted that that sub- subsection is to be read disjunctively, not conjunctively. In other words, that sub- subsection confers a right of appeal to this Tribunal in respect of:

> (1) the VAT chargeable on the supply of any goods or services, or
>
> (2) the VAT chargeable on the acquisition of goods from another member State, or
>
> (3) the VAT chargeable on the importation of goods from a place outside the member States.

18. In our judgement it is impossible to read the foregoing three limbs of sub-subsection (b) conjunctively as if each limb of that sub-subsection was joined by the word “and”.

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

GERAINT JONES QC.
TRIBUNAL JUDGE

RELEASE DATE: 18 FEBRUARY 2019