TC04255

Appeal number: TC/2014/03482

PROCEDURE – Application for appeal to be stood over until 60 days after decision of CJEU in Sveda UAB v Valstybine mokesciu insoekcija prie Leituvos Respublikos finansu ministerijos – Whether decision of CJEU would be of material assistance in resolving issues before the Tribunal – No – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

OPEN HEAVENS MEDIA LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Fox Court, Gray's Inn Road, London WC1 on 15 January 2015

Barbara Belgrano, counsel instructed by BDO LLP, for the Appellant

Erika Carroll of HM Revenue and Customs, for the Respondents

DECISION

1. Open Heavens Media Limited ("OHML"), which was registered for VAT on 1 March 2005, operates a "free to air" television channel, OHTV, on Sky to promote Black culture.

2. While OHML earns its income mainly through advertising and the sales of programme rights it also sells CDs, DVDs and advertising space. Prior to its launch in 2008 OHML received funds from the Redeemed Christian Church of God, a Nigerian organisation, which has since advanced further funds to OHML to support OHTV's running costs. Although there was originally no written agreement between OHML and the Redeemed Christian Church of God in relation to these funds on 23 August 2012 they entered into a secure loan agreement under which OHML is required to repay the sums received at a rate of 3.5% per anum.

3. OHML considers that it is engaged in a wholly business activity and has sought to recover all input tax it has incurred in its VAT periods from 1 October 2008 to 31 March 2013 (12/08 – 04/13).

4. However, although HM Revenue and Customs ("HMRC") do not dispute that the sale of CDs, DVDs and advertising space are business activities they do not accept that the production and broadcasting of programmes on OHTV are. HMRC is also of the view that the funds received from the Redeemed Christian Church of God were donations to OHML and therefore not business income for VAT purposes.

5. As such HMRC contends that OHML carries out both business and non-business activities and should apportion the VAT it incurred to ensure that only the proportion of VAT attributable to the performance of its business activities for a consideration is recovered.

6. In a decision, upheld by a letter dated 27 May 2014 following a statutory review, HMRC have denied VAT credits in the sum of £616,011 in respect of the VAT periods 12/08 – 04/13.

7. OHML appealed against this decision to the Tribunal on 25 June 2014.

8. On 5 September 2014 HMRC applied for OHML's appeal to be stood over until 60 days after the publication of the decision of the judgment of the Court of Justice of the European Union ("CJEU") in Case C-126/14 *Sveda UAB v Valstybine mokesciu insoekcija prie Leituvos Respublikos finansu ministerijos* ("*Sveda*"). As at the date of HMRC's application judgment in *Sveda* was expected "in the next 18 months", ie by June 2016.

9. According to an email sent by HMRC to BDO LLP, OHML's accountants, on 24 September 2014:

> … *Sveda* concerns a Lithuanian company that acquired/constructed capital goods such as car parks and trail walks through the forest. 90% of the funding for this came through the Lithuanian departments for Agriculture. One of the conditions for the grant was that Sveda was obliged to allow free access to the path etc. Sveda intended to make taxable supplies of catering (among other things) and the trail path/car parks etc. were seen as means of attracting visitors to the area who would potentially then purchase Sveda's taxable goods/services.

10. The following question was referred to the CJEU by the Lithuanian Court:

> May Article 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax be interpreted as granting a taxable person the right to deduct the input VAT paid in producing or acquiring capital goods intended for business purposes, such as those in the present case, which (i) are directly intended for use by members of the public free of charge, but (ii) may be recognised as a means of attracting visitors to a location where the taxable person, in carrying out his economic activities, plans to supply goods and/or services?

11. For HMRC, Erika Carroll contends that the central issue in the present case is whether, and if so to what extent, the cost of an input is a component of either the price of a particular output transaction or the price of OHML's economic activity as a whole which, she submits, is materially similar to the issue in *Sveda*. As such, she submits, it is appropriate for the present case to be stayed behind *Sveda* which, Ms Carroll says, may assist the parties and result in a saving of Tribunal time and costs.

12. Barbara Belgrano, who appears for OHML, opposes HMRC's application on the basis that the decision of the CJEU in *Sveda* would not be of material assistance to the Tribunal in resolving the issues arising in this appeal and that the stay, if granted would result in unnecessary and significant delay in the present proceedings which would cause serious prejudice to OHML. I accept her submission that, given HMRC's view of the funds received from the Redeemed Christian Church of God, the issues to be determined by the Tribunal in the present case are:

> (1) Does OHML, in producing and broadcasting programmes on OHTV, carry out non-business activities in addition to the activities that are business activities and if OHML carries out non-business activities, have HMRC adopted a reasonable basis for apportionment (the "Business Activities Issue"); and
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> (2) Whether the funds from the Redeemed Christian Church of God a loan, donation or something else (the "Loan Issue").

13. Ms Belgrano contends that both issues concern questions of fact and that the outcome of the appeal will depend on the evidence before the Tribunal and the particular facts of OHML's activities. She submits that there is already sufficient guidance from the domestic courts on the legal principles to be applied in cases such as this (see eg *Customs and Excise Commissioners v Lord Fisher* [1981] STC 238, *Customs and Excise Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1 and *HMRC v Longridge on the Thames* [2014] UKUT 504 (TCC)).

14. She also referred to the decision of the Court of Appeal in *HMRC v London Clubs Management Ltd* [2011] EWCA Civ 1323 in support of her argument that *Sveda* is irrelevant to the Business Activities Issue. In that case Etherton LJ, giving the judgment of the Court said, at [41], after referring to the decision of the Tribunal in Aspinall's Club (2002)(No 17797):

> "That case and the reasoning of the Tribunal, with which I agree, is illustrative of three points of principle. First, it shows the importance in these cases of close attention to the facts in order to understand the economic or commercial reality underlying the use of the relevant VAT inputs. Secondly, identification of the source or potential source of profit in a business may be an important feature of a business throwing light on whether or not the standard method or a PESM [Partial Exemption Special Method] is a more fair, reasonable and accurate method of attribution. It all depends on the facts of each case: cf. *Banbury Visionplus Ltd v Revenue and Customs Commissioners* [2006] STC 1568 at [68]. Thirdly, depending again on the precise factual situation under consideration, the approach of the Tribunal in *Aspinall's Club* at [49] may well be appropriate in a case where the taxable supplies are not, in themselves, a source of profit:
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> > "Those costs are funded by the gaming. That in itself does not make them cost components of those exempt supplies. But in this case it is additional proof, if any is needed, that gaming is the foundation of the business and it is the furtherance of that gaming which causes and is seen as justifying commercially the decisions to incur the expenditure.""

15. Ms Belgrano also contends that *Sveda* is irrelevant to determining the Loan Issue. In *Sveda* it is not disputed that it received a significant amount of non-business income whereas there is an issue regarding the precise nature of the funds received from the Redeemed Christian Church of God in the present case.

16. It is not disputed that if this case were to be stood over until 60 days after the publication of the decision in *Sveda* there would be an adverse impact on OHML as it has been denied recovery of the input tax it has claimed .

17. In *HMRC v RBS Deutschland Holdings GmbH* [2007] STC 814, Lord Osborne delivering the opinion of Court of Session said, at [20]:

> "…the Tribunal made a pronouncement to the effect that it would sist [stay] proceedings against the wish of one of the parties pending a decision in another court only where that decision would be determinative of the issues before the Tribunal. We do not recognise that proposition as one reflecting normal practice in relation to the exercise of a discretion to sist. As we would see it, a Tribunal or court might sist proceedings against the wish of a party if it considered that a decision in another court would be of material assistance in resolving the issues before the Tribunal or court in question and that it was expedient to do so."

18. In relation to the question, which clearly arises in the present case, of whether activities undertaken are business or non-business, after considering the relevant authorities in *HMRC v Longridge on the Thames*, Rose J said at [34]:

> "These cases show that there is a dividing line to be drawn between a situation akin to that in *Morrison's Academy* where the activities do amount to the furtherance of a business even though the activities are not aimed at making a profit and a situation akin to that in *Finland* where the activity is not conducted as a business even though payment is made by the recipient for the services provided. In my judgment, it is also clear it is for the First-tier Tribunal to decide, on the basis of all the facts before it, on which side of the line the instant case falls."

19. Given the highly fact sensitive nature of both the Business Activities Issue and the Loan Issue in the present case together with the guidance already available to the Tribunal, to which Ms Belgrano referred, in relation to the first issue, I do not consider that the decision of the CJEU would be of material assistance in resolving these issues in this appeal. Also, as judgment in *Sveda* is not expected until June 2016, in view of the accepted adverse effect on OHML that would inevitably arise I do not consider it expedient for this appeal to be stayed.

20. I therefore dismiss HMRC's application for this appeal to be stood over pending the outcome of *Sveda* and direct that HMRC provides a Statement of Case to the Tribunal and the appellant within 60 days of the release of this decision.

21. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 28 January 2015