

IN THE HIGH COURT OF JUSTICE

ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN on the application of GOOD LAW PROJECT

Claimant/Respondent

-and-

HM COMMISSIONERS FOR REVENUE AND CUSTOMS

Defendant/Applicant

UBER LONDON LIMITED

Interested Party

UBER LONDON LIMITED'S SKELETON ARGUMENT
For hearing on 6 November 2019

Introduction

1. Uber London Ltd (“**ULL**”) resists the application for an order permitting HMRC to disclose information concerning its tax position to the Claimant (“**GLP**”). The order sought by HMRC would contravene the important principle of taxpayer confidentiality, a principle which has statutory protection and which has long been recognised by the common law. There is no good reason why GLP, who has no statutory or other role to act as the regulator of ULL’s tax affairs, should - by bringing its unmeritorious claim for judicial review against HMRC - be permitted to obtain such information.

Procedural history

2. The background to the current application is a long running but unsuccessful campaign of litigation by GLP and/or its founder and principal director, Jolyon Maugham QC (“**JMQC**”), seeking to obtain a judicial ruling that ULL is liable for VAT on transportation services provided by drivers to passengers.
3. Rather than allowing the issue of ULL’s VAT liability to be determined through the correct statutory process of: (1) investigation by HMRC; (2) then (if appropriate) the raising of a VAT assessment/s by HMRC; and then (3) a statutory appeal of such assessment by ULL

to the First-tier Tax Tribunal (“FTT”), GLP and JMQC have instead sought to take on the mantle of trying to enforce, through litigation, what they believe to be the correct VAT treatment of ULL’s business.

4. Thus in May 2017, JMQC issued a claim in the Chancery Division, seeking a declaration that ULL should provide him with a VAT invoice for £1.06 in relation to a journey that he had taken using the Uber app. That litigation has now effectively come to an end, following JMQC’s failed attempt to obtain a Protective Costs Order (“PCO”) in his favour: see *Jolyon Maugham QC v Uber London Ltd* [2019] EWHC 391 (Ch). In addition to rejecting all of JMQC’s arguments of principle (asserting that he was conducting public law and public interest litigation justifying a PCO), the Court also took into account the fact that JMQC’s litigation was funded, to a significant extent, by the black cab trade, who obviously had a strong commercial interest that was adverse to ULL. On 24 July 2019, the Court of Appeal refused JMQC permission to appeal from the High Court’s decision refusing the PCO. In giving reasons for refusing PTA, Henderson LJ observed:

“The body with care and management of VAT and its enforcement in the public interest is HMRC, and the appropriate forum for the resolution of any such dispute would normally (and exclusively) be the First-tier Tribunal: see generally the *Autologic* case [2006] 1 AC 118.

5. In addition to the Chancery Division claim mentioned above, JMQC has also sought to litigate the issue of ULL’s tax liability by bringing an appeal in the FTT in November 2017 against HMRC’s decision refusing to allow him to deduct £1.06 as input tax. However JMQC withdrew that appeal following the Court of Appeal’s judgment in *Zipvit Limited v HMRC* [2018] EWCA Civ 1515, which held that in the absence of a valid VAT invoice showing the tax that had been paid, a taxpayer was not entitled to a deduction for the input tax which he asserts was chargeable in relation to the supply.

The Current Claim for Judicial Review

6. In a third attempt to litigate the underlying issue of ULL’s VAT liability, GLP has issued the present claim for Judicial Review against HMRC in May 2019, challenging “*HMRC’s failure to raise a VAT assessment in relation to [ULL]*”. GLP seeks a mandatory order from the Administrative Court, requiring HMRC to raise such VAT assessments.
7. GLP’s claim for judicial review advances four grounds of challenge. These are not altogether easy to follow, but in essence GLP asserts that HMRC failed to understand and

apply their statutory powers of assessment against ULL, and that it was unlawful for HMRC to continue their internal processes of considering whether or not to issue “protective” VAT assessments. For example at §96 of the Statement of Facts and Grounds, GLP argue that “*HMRC does not need to reach a ‘firm conclusion’, nor does HMRC need to have reached the end of its investigations before it can assess*”. GLP also asserts that it would be *Wednesbury* irrational for HMRC to await the outcome of the Supreme Court decision in *Aslam v Uber BV* (appeal from the majority decision of the Court of Appeal [2018] EWCA Civ 2748) before taking a decision concerning whether or not to assess ULL.

8. As the Court will appreciate, permission to bring the JR claim has not yet been decided. This Skeleton Argument is not the place to set out ULL’s submissions on the merits of GLP’s claim. Suffice it to say that ULL agrees with the conclusion in HMRC’s Pre-Action Protocol (“**PAP**”) response letter of 12 April 2019, that GLP’s claim has no arguable merit; and with HMRC’s rejection of GLP’s standing to bring the claim in any event.
9. More relevantly for present purposes, ULL specifically agrees with the following passage in HMRC’s PAP letter:

“In light of the response below to your clients’ proposed grounds for judicial review, we consider it neither necessary nor appropriate (in the light of s.18 CRCA) at this stage to set out the Commissioners’ possible analysis on Uber’s operations and transportation services supplied by or via its drivers. In particular we consider it would be objectionable, as a matter of public policy, good administration and fairness to the party concerned [ULL], to disclose to the public at large, let alone private individuals or groups, any view of another party’s tax liability, particularly before that view had been notified to that party and it had the opportunity of responding”.

10. It is notable that HMRC’s current application now seeks an order which in effect would disclose HMRC’s current view of ULL’s tax liability to GLP. In other words, HMRC now seek an order, the effect of which they previously described as “*objectionable, as a matter of public policy, good administration and fairness to the party concerned [ULL]*”.

General principles concerning taxpayer confidentiality

11. In *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1982] A.C. 617 at 633B-E (the “*Fleet Street Casuals*” case), Lord Wilberforce explained that it was contrary to the public interest to allow one taxpayer to challenge the Revenue’s treatment of another taxpayer:

“Not only is there no express or implied provision in the legislation upon which such a right could be claimed, but to allow it would be subversive of the whole system,

which involves that the commissioners' duties are to the Crown, and that matters relating to income tax are between the commissioners and the taxpayer concerned. No other person is given any right to make proposals about the tax payable by any individual: he cannot even inquire as to such tax. The total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system. As a matter of general principle I would hold that one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-assessed or over-assessed: indeed, there is a strong public interest that he should not and this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have an interest.” (emphasis added)

12. In *R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835, 864, Lord Templeman said:

“The commissioners possess unique knowledge of fiscal practices and policy. The commissioners are inhibited from presenting full reasons to the court for their decisions because of the duty of confidentiality owed by the commissioners to each and every taxpayer.

13. These principles have continuing force today. In *R(Ingenious Media plc) v HMRC* [2016] 1 WLR 4164, the Supreme Court held that HMRC had breached the protection of taxpayer confidentiality conferred by s.18 of the Commissioners for Revenue and Customs Act 2005 (“**CRCA**”) in revealing confidential matters concerning the claimant to the press. Giving the leading judgment, Lord Toulson JSC said at [17]:

“Unfortunately the courts below were not referred (or were only scarcely referred) to the common law of confidentiality. The duty of confidentiality owed by HMRC to individual taxpayers is not something which sprang fresh from the mind of the legislative drafter. It is a well established principle of the law of confidentiality that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes. The principle is sometimes referred to as the Marcel principle, after *Marcel v Comr of Police of the Metropolis* [1992] Ch 225. In relation to taxpayers, HMRC's entitlement to receive and hold confidential information about a person or a company's financial affairs is for the purpose of enabling it to assess and collect (or pay) what is properly due from (or to) the taxpayer. In *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 , 633, Lord Wilberforce said that “the whole system ... involves that ... matters relating to income tax are between the commissioners and the taxpayer concerned”, and that the “total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system”. See also *Conway v Rimmer* [1968] AC 910, 946 (Lord Reid); and *R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835, 864 (Lord Templeman).”

Submissions

14. The disclosure order sought by HMRC would contravene the long-standing protection referred to above, and is neither necessary nor appropriate.
15. HMRC say (Skel §13) that the application is “*founded on the need to protect taxpayer confidentiality as far as reasonably possible*”. Yet HMRC fail to explain why there is any need to disclose to GLP whether “*there has been a decision to assess ULL for any particular prescribed accounting period*” (para 1 of the draft order sought). Still less do they explain why there is a need for disclosure that is sufficiently compelling to outweigh ULL’s right to confidentiality.
16. The furthest HMRC go is simply to assert (Skel §4) that “*In order for HMRC to be able properly to respond to this claim, some limited disclosure of confidential information may be required*” (emphasis added). Yet HMRC do not explain why disclosure is required in order to defend any of the four grounds of challenge advanced by GLP. In other words, they do not explain why such disclosure is necessary “*for the purposes of civil proceedings... relating to a matter in respect of which the Revenue and Customs have functions*” (s.18(1)(c) CRCA), even assuming that the present JR claim constitute such proceedings. This omission is striking, in particular given the contrary position stated by HMRC in their PAP response letter, as set out above.
17. Likewise, if such disclosure is not strictly necessary for HMRC to defend the claim for judicial review, it is very difficult to see how there can be any proper basis on which the Court can exercise its power under s.18(1)(e) CRCA.
18. Nor is HMRC’s application saved by the protection from subsequent disclosure in CPR 31.22, or by any of the conditions contained in the draft Order, including condition (2) that “*The Claimant shall not disclose the said information as to HMRC’s Position for any purpose*”. (HMRC have since confirmed (Skeleton footnote 1) that “*for any purpose*’ means other than that of the present proceedings”). That is because it is impossible to see how such restriction could operate. If the judicial review claim proceeds to a hearing (either a permission hearing or a substantive hearing), GLP clearly expects that this will take place in public: see its Grounds of Objection §10. And GLP and HMRC presumably intend, in the course of that public hearing, to refer to the very information which HMRC are now seeking to disclose (c.f. the position contemplated by Green J in *R(Privacy International) v HMRC* [2015] 1 WLR 397 at [68] and [81]).

19. Indeed if HMRC did not wish the Court to take that information into account in the judicial review, there would be no reason for them to disclose it to GLP the first place. Likewise it is clear from the GLP's own Grounds of Objection that they wish to make public information concerning Uber and about this litigation (see also GLP's website at <https://goodlawproject.org/good-law-project-sues-hmrc-ubers-tax-dodging/>).
20. GLP's Grounds of Objection at §10 seek to rely on the principle of open justice, and they cite the decision of Henderson J in *HMRC v Banerjee (No 2)* [2009] STC 1930, in support of the proposition that exceptional circumstances are required for a taxpayer's right to confidentiality to take precedence over open justice, and that any intrusion is the "price which has to be paid" for tax disputes being resolved through the judicial process. But the key point of distinction (ignored by GLP) is that in that case, Dr Banerjee had chosen to bring a tax appeal against HMRC, which she had then litigated in open court. By contrast, ULL has obviously not chosen to bring any litigation against HMRC or GLP, and instead has been brought into the current litigation which HMRC rightly describe as "*a claim by an unrelated third party about confidential tax affairs*" (Skeleton §7). The distinction (in relation to open justice) between the position before and after litigation commences was also recognised by Green J in *Privacy International*, *ibid* at [62].
21. In conclusion, it would drive a coach and horses through the important principle of taxpayer confidentiality if an unrelated third party such as GLP, who disagreed with what they perceived to be HMRC's conduct of their statutory functions, could - by bringing a claim for JR against HMRC - thereby compel HMRC to divulge confidential information about the taxpayer.

Other matters

22. ULL does not object to HMRC's application for a direction that non-parties should not be able to obtain a copy of HMRC's Acknowledge of Service ("AoS") and (if permission is granted) Detailed Grounds of Defence.
23. Timetabling: ULL agrees that HMRC should be given 21 days from the determination of the present application to file their AoS. ULL also invites the Court to grant its own application (issued on 27 June 2019) for an order extending time to file ULL's AoS to 7 days after HMRC have filed their AoS.
24. Finally, as a fall-back position, in the event that the Court grants HMRC's application for disclosure subject to the restrictions referred to in the current draft, ULL request that the

following words be added to the Order, in accordance with CPR 81.9 and PD 81: *“If you, Good Law Project Ltd, do not comply with this order you may be held in contempt of court and imprisoned or fined, or your assets may be seized”*.

SAM GRODZINSKI QC

Blackstone Chambers

31 October 2019