



TC04548

Appeal number: TC/2014/04019

VAT – Supply of medical care-dentists supplying services from company via partnership to NHS Trust – standard rated supply of staff or exempt supply of medical care – held – supply of medical care –number of suppliers in chain did not change nature of supply – no evidence that partnership exercised control over dentists’ work activities - appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

City Fresh Services Limited

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Short
Mr John Coles (Member)**

Sitting in public at Priory Courts, 33 Bull Street, Birmingham on 16 June 2015

Mr Glyn Edwards of Croner Group Limited for the Appellant

**Mr Philip Shepherd, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This appeal concerns the Appellant's obligation to be registered for VAT from August 2010 on the basis that it makes standard rated supplies of staff.

2. The Appellant argues that the supplies made by City Fresh Services Limited to a dental partnership, the City Dental Practice are exempt supplies of medical care under Schedule 9, Group 7, Item 2 (and note 2) VATA 1994. HMRC argue that the supplies made are taxable supplies of staff.

Background Facts:

3. The Appellant entity, City Fresh Services Limited ("City Fresh") was set up in March 2009 by two partners of an existing dental practice, the City Dental Practice ("CDP"), as an alternative entity through which to provide their dental services to the Wolverhampton Clinical Commissioning Group, a provider of NHS dental services. ("the NHS Trust")

4. Due to issues with changing the existing contract between CDP and the NHS Trust to which those services were provided, rather than use the new company to provide the services direct to the NHS Trust, the services were provided via the existing partnership, CDP, which retained the contract with the NHS trust, but sub-contracted its dental services to the Appellant.

5. From March 2010 City Fresh invoiced CDP for the supply of "dental services" for a fixed monthly fee of £30,000.

6. Both of the partners in CDP are also the two directors and only employees of the Appellant, City Fresh and are qualified registered dentists.

7. HMRC raised queries into the VAT status of City Fresh during the course of a direct tax enquiry because City Fresh's turnover appeared to be above the VAT registration threshold. HMRC issued a letter on 1 October 2013 stating that City Fresh was required to be registered for VAT from 1 August 2010. That decision was confirmed in a review notified to the Appellant on 28 June 2014.

8. The Appellant appealed to this Tribunal on 28 July 2014.

9. It is not disputed that if the supplies made from City Fresh to CDP are taxable supplies of staff the Appellant made taxable supplies above the VAT threshold for each year from 2010 and so is liable to be registered for VAT.

10. There was no suggestion that either CDP or City Fresh had been set up other than for commercial reasons and could be treated as making the supplies in question.

Law:

11. The relevant EU legislation is Article 132(1)(c) of the Main Directive EU/2006/112:

“Article 132 (1) Member States shall exempt the following transactions:

(a)

5 *(b)*

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned”

12. The UK legislation is group 7 of Schedule 9 VATA 1994 which exempts from VAT supplies of “Health and Welfare” and in particular Item 2:

10 Item 2 *The supply of any services consisting in the provision of medical care, or the supply of dental prostheses, by-*

(a) a person registered in the dentists’ register

(b) a person registered in the dental care professionals register established under section 36B of the Dentists Act 1984

15 *(c).....*

There was no dispute that both of the shareholders and directors of the Appellant were registered dentists.

20 And Note (2) *“paragraphs (a) to (d) of Item1 and paragraph (a) and (b) of Item 2 include supplies of services made by a person who is not registered and enrolled in any of the registers or rolls specified in those paragraphs where the services are wholly performed or directly supervised by a person who is so registered or enrolled”*

This is the provision which enables corporate entities such as City Fresh to be treated as making supplies of dental services.

25 13. We were also directed to a number of case authorities;

(1) Gambro Hospital Limited v C&E Commissioners [2004] VTD 18, 588

(2) University Court of the University of Glasgow v R&C Commissioners [2005] VTD 19, 052

30 *(3) Sally Moher t/as Premier Dental Agency v R&C Commissioners [2011] TC01148 and [2012] STC 1356.*

Evidence.

14. We were provided with a witness statement of Parmajit Kaur Athwal, one of the partners in CDP and director of City Fresh dated 3 February 2015 which was taken as

read. Ms Athwal also gave oral evidence before the Tribunal and was cross-examined by HMRC.

15. Ms Athwal's witness statement explained that having set up CDP in 2005 and entered into a contract with the NHS Trust, she became aware in 2006 of a change in the rules which allowed companies to carry out dentistry services and that a corporate structure would provide asset protection and tax deferrals.

16. She discussed the proposed change with the NHS Trust for the following two to three years but it became clear that moving CDP's contract with the NHS Trust to a corporate entity would entail renegotiating the contract to CDP's disadvantage.

17. The new company, City Fresh, was set up in March 2009 intending to provide dental services and take over the contract with the NHS Trust, however because of the issues with renegotiating the contract, it was decided to sub-contract the work to City Fresh from CDP rather than City Fresh contracting directly with the NHS Trust. It was anticipated that this would be a temporary measure until all NHS contracts were renegotiated, expected to be in 2011.

18. No formal contract was drawn up between CDP and City Fresh because it was not considered that one was needed. In practice all the dentistry work of CDP was carried out by Ms Athwal and her partner in their roles as directors of City Fresh through the sub-contracting arrangement.

19. Ms Athwal told us as part of her oral evidence that her daily activities were carried out entirely at CDP's offices and entailed dealing with dental patients' correspondence and seeing patients.

20. When asked about the terms of the contract between the NHS Trust and CDP and its terms concerning sub-contracting Ms Athwal said that all the relevant conditions of clause 198 had been fulfilled. There had been no written notification to the NHS Trust of the sub contracting but notification had been made in oral discussions.

21. In response to questions from Mr Shepherd Ms Athwal said that in her view dentistry work was not carried out by CDP, but by herself and her partner through City Fresh.

22. We also saw the following documents:

(1) The Standard General Dental Services Contract between CDP and the NHS Trust dated 4 March 2006, including the following specific clauses

(a) Recitals - *"this is a general dental services contract under which the contractor is to provide primary dental services"*

(b) Clause 6 – The relationship between the parties – *"the contractor is an independent provider of services and not an employee, partner or an agent"*.

(c) Clause 12 – “*The contract does not prohibit the Contractor from sub –contracting its obligations arising under the Contract where such sub-contracting is expressly permitted by the Contract.*”

5 (d) Clause 178 – “*the person performing the services under the contract must be a dental practitioner who is included in the dental performers list for a primary care trust in England*”

10 (e) Clause 198 – 201 Subcontracting of clinical matters, including clause 198 “*The Contractor shall not sub-contract any of its rights or duties under the Contract in relation to clinical matters unless; it has taken reasonable steps to satisfy itself that (a) it is reasonable in all the circumstances and (b) that person is qualified and competent to provide the service*” and clause 199 – “*If rights and duties under the Contract in relation to clinical matters are sub-contracted the contractor must inform the NHS Trust of that fact*”

15 (2) An example invoice from City Fresh to CDP dated 30 April 2010.

(3) We were told that there was no written contract between City Fresh and CDP and no written notification to the NHS Trust of the sub contracting by CDP of its obligations to City Fresh.

20 (4) City Fresh’s financial statements for the year 31 March 2010 and 2011 describing its activities as dentist services.

(5) Certificates of Registration with the General Dental Council for both of the directors of City Fresh.

Appellant Arguments

25 *The Recipient of the Supplies*

23. The Appellant argued that the exemption in Group 7 Item 2 for the provision of medical care was not restricted to the provision of care directly to patients. That is not what the legislation or the EU directive on which it is based states; Article 132(1)(c) of the Main Directive merely refers to “*the provision of medical care in the exercise*
30 *of the medical and paramedical professions*”. In contrast with other exemptions in the UK’s VAT legislation the nature of the recipient of the supplies is not a component of the exemption. Mr Edwards referred to the exemption at Schedule 8 Group 12 item 2 VATA 1994 (Aids for the handicapped) as an example of an exemption which was made explicitly dependent on the character of the recipient and suggested that had that
35 been intended for Group 7 Item 2, it would also have been made explicit.

24. Mr Evans relied on the *Gambro Hospital* case as authority for the fact that medical care can be made through a corporate entity and via an NHS trust to patients. As stated by the Tribunal in that case: “*It is not correct to argue that from the VAT point of view supplies of medical care and treatment paid for by the national health*
40 *service can only be made by NHS Trusts or other public bodies*”.

Supply of staff.

25. HMRC's suggestion that the supply made by City Fresh to CDP was a supply of staff because it could not be a supply of dental services is a non sequitur and in any event is not correct because the provision of "staff" entails control by the recipient who should be able to direct their activities. Mr Evans referred both to the decisions in *Sally Moher* (the FTT and UTT decisions) and the *Glasgow University* decision in support of this approach. In the *Glasgow University* case the University was treated as making a supply of medical staff because it had no knowledge or control over how the individuals concerned would exercise their medical expertise while working for the NHS trust to which their services were contracted: *"The intervention of the contract between the individual and the trust separates the provision of staff and of medical services"*.

26. The *Sally Moher* decision made clear that providing individuals with medical expertise (dental nurses) would be a supply of staff if the supplier had no control over how they carried out their tasks; in that case the dental nurses were under the control of the dentists to whom their services were contracted. *"It is difficult to see how one could rationally conclude that the Appellant was making supplies of medical care, once it is accepted that the nurses and auxiliaries were under the control of the dentists to whom they were assigned."* The essence of the supply of staff is that they are under the control and supervision of the recipient who determines what they are used to do. This is consistent with HMRC's Notice 700/34. This was not the case here since the "staff" were directors of City Fresh and partners in the recipient CDP partnership and so could not be controlling themselves.

HMRC Arguments.

Recipient of Supply

27. HMRC pointed out that the "provision of medical care" is not defined and that the exemption for medical services is not intended to apply to all types of supplies made by dentists.

28. HMRC argued that despite the decision in *Gambro Hospital*, medical care has to be made directly to a patient and that was not what City Fresh were providing. HMRC accepted that it was possible to provide medical care through an NHS Trust, but not through another intermediate in a chain such as City Fresh via CDP. They did not fully explain their reasons for making this distinction.

29. HMRC accepted that CDP were making supplies of general dental services under their contract with the NHS Trust, but stressed that under this arrangement CDP's services were being supplied to patients. Only one entity in a chain could be making a supply of exempt medical services to patients and that was CDP. City Fresh was making supplies to CDP, not to patients. Both City Fresh and CDP could not be making the same supply. If City Fresh was making a supply of dental services to CDP, that was not an exempt supply because it was not made to a patient. Therefore City Fresh's supply to CDP was a supply of staff.

Supply of Staff

30. HMRC said that City Fresh was providing staff because the two dentists were under the control of CDP; it was CDP who was obliged to provide the dental services to the NHS Trust. HMRC could not point to any specific evidence suggesting how that control was exercised, but relied on the fact that since it was CDP's legal obligation to provide dental services to the NHS Trust, they must be controlling City Fresh to ensure that those services were provided.

31. HMRC said that to treat this chain of supply as entirely exempt would open the floodgates for multiple supply chains all claiming to be exempt on the basis of one exemption.

10 *Decision*

Basic Approach

32. This is an exemption and so should be construed restrictively. The application of an exemption should not contravene the principal of fiscal neutrality.

Findings of Fact

15 33. On the basis of the evidence available to the Tribunal we have made these findings of fact:

(1) The contract between CDP and the NHS Trust envisaged that clinical matters could be sub-contracted to a third party.

20 (2) City Fresh and CDP had complied with the requirement of that contract when setting up the arrangement for CDP to sub-contract its obligations to City Fresh.

(3) The day to day activities carried out by the two registered dentists who were the partners of CDP and directors of City Fresh were the same before and after the introduction of City Fresh as a sub-contractor.

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The legal form of the provider and receiver of medical care

34. The concept of providing medical care most naturally suggests the giving of care from one natural person to another but neither the EU law based VAT legislation nor the commercial realities of twenty first century health care make that an essential component of the supply of medical services.

35. It is clear that it is possible to provide medical services by a non-natural person: Note 2 of Group 7. Equally there is no prohibition in either EU or UK VAT legislation on providing medical services to a non-natural person and this was accepted in the tribunal decision of *Gambro*: "*The provision of care or medical or surgical treatment will of course always be to a natural person but that does not mean that from the VAT point of view, the supply cannot be to a legal person*".

36. The legal form of the person providing medical care is not relevant, neither is the fact that the recipient is not the final patient; there is no need for supplies of medical care to be made direct to the final patient. On this point we agree with the Appellant that there is no basis for concluding, as HMRC seem to have done, that
5 dentist services must be provided directly to a patient. HMRC did not provide any clear explanation of why they believed that to be the correct interpretation of the legislation.

37. HMRC seemed happy to accept that there would not have been a problem if either one of CDP or City Fresh had directly provided dental services to the NHS
10 Trust but objected to a chain of supply with more than one entity behind the NHS Trust on the basis only one entity can provide the (same) service of the provision of medical care. This approach would make outsourcing of medical services of any nature difficult to manage from a VAT perspective and is not supported by the authorities or the EU Directive. HMRC's approach seemed to be based on the
15 premise that under a sub-contracting agreement with a single sub-contractor, that contractor is providing dental services directly to patients, whereas if there is a chain of sub-contractors, only one of them can be providing those dental services directly to patients.

38. HMRC failed to explain why they believed that the addition of a third entity in a
20 supply chain necessarily altered the nature of the supply being made. We do not accept their basic hypothesis that only one entity in a chain can be making an exempt supply of medical services to patients. As a sub-contractor CDP was not providing its services directly to patients, it was providing its services to the NHS Trust so that it could provide dental services to patients. In practice of course, the CDP dentists were
25 looking in the mouths of NHS patients, but the legal and VAT analysis of what has occurred is that there are two supplies; one from CDP to the NHS Trust and another from the NHS Trust to patients.

39. On the basis of the authorities and the legislation it is clear that there are some
30 circumstances in which the insertion of an intermediary in a chain will mean that a supply cannot be treated as a supply of medical services; if the supplier itself does not have a medical function as in *Glasgow University* or if it does, but cannot demonstrate that medical services will be carried out by the individuals who are actually providing the service as in *Sally Moher*. In these circumstances a contract via a third party will break the link between the supply of medical services and the recipient.

35 40. However, in this case it is clear that what the ultimate recipient received (the NHS Trust patient) was exactly the same whether that was provided directly from CDP or as a service sub-contracted via City Fresh. Ms Athwal's evidence was very clear that on a day to day basis she and her partner operated in exactly the same way before and after the incorporation of City Fresh.

40 41. The *Sally Moher* decision stressed the need to consider the essential nature of the supply being made, in our view it is very difficult to characterise the supply being made from City Fresh to CDP as anything other than a supply of dental services by City Fresh to CDP to allow CDP to fulfil its obligations under its contract with the

NHS Trust; exactly the same supply as had been made by CDP to the NHS Trust before City Fresh was set up.

The supply of staff

42. The difference between making a supply of services and making a supply of staff that provide those services can be a fine distinction for VAT purposes. On the basis of the authorities, a supply will be a supply of staff if the recipient, by controlling the persons supplied, can control their activities and in doing so change the nature of the supply made. This is made clear in the *Sally Moher* decision; the issue is that case was that it was not clear to what extent staff supplied would actually carry out the dental tasks for which they were qualified once under the supervision of the dentists to whom they were supplied. If it had been clear that they could only carry out dental work, the decision might have been different. Equally in the *Glasgow University* decision, the intervention of an intermediate entity with the ability and knowledge to direct the medically qualified individuals about how to utilise their clinical skills changed the nature of the supply. There will be a supply of staff if there has been a change of control from the supplier to the recipient over the activities of the individuals concerned.

43. In this case, although there is an intervening entity, CDP, between the providers of the dental services and the ultimate recipient, the NHS Trust, we were not given any evidence that CDP changed the nature of the supply or that there was a change of control from City Fresh to CDP over the dentists' activities. From the evidence which we were given, this was a complete back to back arrangement, with the dental services required by the NHS Trust being sub-contracted as a whole to City Fresh. We saw no written evidence of how the dental services provider City Fresh was managed on a day to day basis by CDP, but from the oral evidence of Ms Athwal, it was clear that the two dentists provided only dental services to CDP and their day to day activities when they were acting through City Fresh were exactly the same as they were when it was CDP who were providing the services themselves to the NHS Trust.

44. We do not accept the point made by the Appellant that because there is a coincidence of individuals between the partnership and the directors of City Fresh that means that there can be no control of City Fresh by CDP. It is the corporate entity, not the directors, who are providing the service here. However we do accept in practice that there was no need for control of City Fresh by CDP because of the shared knowledge between the two entities of the dental services which were required and the exact identity of the services being provided.

The essential economic character of the supply.

45. In circumstances where there is no suggestion that a chain of entities has been set up for abusive purposes and where there is a complete coincidence between the services provided by each entity in the chain to the end user NHS trust, we do not think that nature of the service should be treated any differently between the parties in the chain; all are making exempt supplies of medical care. While legally an

intermediary has been introduced as a sub-contractor, that has no impact on the substance of the supplies made.

46. Nor do we consider that it is a better description of the activities undertaken by City Fresh to describe them as an “employment business” whose function was to provide a supply of staff to CDP. That does not reflect the expertise of the only two directors and employees of the company, the description of its business in its accounts or on its invoices or the essential character of the activities undertaken.

The documentary evidence.

47. The documentary evidence which we saw was not extensive, but what we did see was consistent with the characterisation of the supplies between City Fresh and CDP as supplies of dental services. That is how they were described in the invoices provided by City Fresh and how City Fresh described its activities in its financial statements. It is also how CDP’s obligations, which were sub-contracted to City Fresh were described in its contract with the NHS Trust.

48. It is clear that for VAT purposes the way in which a supply is described will not automatically be determinative of its character for VAT purposes if there a clear mismatch between the way in which a supply is described and what is actually done. There was an unfortunate lack of documentation to support the agreement between CDP and City Fresh, but the documents which did exist were consistent in describing the activities of City Fresh as the provision of dental services.

Floodgate Arguments

49. We take HMRC’s point about a potential floodgate of chains of exempt supplies being set up, but do not consider it likely that these facts will be common and if HMRC’s concern is with arrangements which are set up for tax planning purposes, they do have arguments based on the *Halifax* concept of abuse to protect against schemes of that nature.

Conclusion.

50. The difference between a supply of staff and a supply of services can be a fine one. HMRC made a number of arguments as to why this supply should be treated as a supply of staff but failed to properly explain the legal basis for their approach or provide evidence of the activities of CDP which would have supported their interpretation. On that basis we have concluded that the Appellant’s approach comes closest to identifying the essential character of this supply, as a supply of exempt medical services. For that reason this appeal is allowed.

51. 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.

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**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 21 JULY 2015

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