[2016] UKFTT 0779 (TC)

TC05506

Tribunal refs: TC/2014/06474
TC/2015/01855

VALUE ADDED TAX — disposal of first appellant's business to third party using second appellant as Jersey-resident SPV — first appellant providing outsourcing services — whether second appellant had fixed UK establishment — VATA ss 4, 7A, 9 — fixed UK establishment demonstrated — appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MULTIMEDIA COMPUTING LIMITED
DEED POLL SERVICES LIMITED **Appellants**

- and -

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

Tribunal: Judge Colin Bishopp

Sitting in public in London on 8 and 9 August 2016

Ms Rebecca Murray, counsel, instructed by The VAT Consultancy, for the appellants

Ms Natasha Barnes, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

Introduction

1. The first appellant, Multimedia Computing Limited ("MCL"), is a UK-incorporated and resident company whose activities were conducted from an office in Witham, Essex. The second appellant, Deed Poll Services Limited ("DPSL"), is or was a Jersey-incorporated and resident company whose activities took place in St Helier. At the time with which this appeal is concerned, that is from January 2011 to October 2013, the two appellants, taking their activities together, were in the business of providing deed poll services to individuals wishing to change their or their children's names.

2. The appellants' case is that DPSL made the supplies of deed poll services to the customers and that, as it was based outside the United Kingdom, its supplies were outside the scope of UK VAT. It outsourced much of the work to MCL, whose supplies of clerical and administrative services to DPSL were also, the appellants say, outside the scope of UK VAT because the recipient's place of business was in Jersey. Thus neither company accounted for any UK VAT during the relevant period. The respondents, HMRC, disagree with that analysis of the arrangements: although DPSL, as they accept, made the supplies to the customers it had a fixed establishment within the United Kingdom, with the consequence that it should have been registered for VAT in the UK, and both of the appellants should have accounted for UK VAT. They have assessed the appellants for the output VAT for which, if HMRC are right, they should have accounted: in MCL's case about £560,000, and in DPSL's case about £514,000. They have also imposed a "careless inaccuracy" penalty of £142,805 on MCL.

3. MCL has appealed to this tribunal against both the assessment addressed to it and the penalty. DPSL has appealed against the assessment, and it challenges also the underlying decisions that it had a fixed UK establishment and was liable to register for VAT in the UK. As all the assessments and decisions stand or fall by the correctness of HMRC's conclusion that DPSL had a fixed UK establishment that is, in substance, the only issue before me. The penalty appeal has been stayed pending the outcome of the appeals against the assessments, and I shall say no more about it. I am also not required to consider the amounts of the assessments or the extent, if at all, to which DPSL might be entitled to input tax credit. As the same facts are relevant to and will be determinative of the two appeals it was directed that they should be heard together.

4. MCL and DPSL were represented before me by Ms Rebecca Murray, and HMRC by Ms Natasha Barnes.

The facts

5. The principal facts were not in dispute, but there was disagreement or, in some respects, no clear agreement about a number of matters of detail, on which I had the written and oral evidence of three witnesses, Mr Michael Barratt, Mrs Deborah Castle and Mrs Louise Bowers. In addition I was provided with a substantial number of documents. What follows is drawn from that evidence, and may be taken as my findings of fact. I have identified, where relevant, the few matters of controversy.

6. MCL was incorporated in England and Wales in August 1992. Its directors and shareholders were, until June 2010, Mr Barratt and his wife, but I understand that Mrs

Barratt did not take an active part in running the company. Mr Barratt has remained a director of MCL from its formation to the present time. It was dormant until it began trading in 2001. It registered for VAT from 1 February 2002 and in its application for registration it described its main business activity as "deed polls". Its sole place of business has at all times been the office at Witham.

7. MCL made its supplies of deed poll services directly to individuals most, though not all, of whom were resident in the UK. Its services consisted of the provision of deeds poll with appropriate wording to UK nationals wishing to change their own or their children's names, and also to foreign nationals living in the UK. Customers' applications were made predominantly online, but MCL also offered its services by post, by telephone, and to personal callers. Most of its customers were content to receive their deeds poll a few days after making their application (MCL's "standard service") but MCL also offered quicker services, mainly by the use of express mail, but also by means of a one-hour service to those of its customers who were able to visit its Essex office.

8. The evidence showed that the great majority—90% or so—of the applications were straightforward, requiring little more than the transcription of the applicant's details, as supplied in their applications, into the appropriate form. The remainder presented some kind of complication, but most of the complications could be resolved by MCL's staff by reference to the guidance with which they were provided, most of which was also available on MCL's websites. Some, more complicated, applications, or those which for other reasons gave rise to some doubt the staff could not resolve, had to be referred to Mr Barratt who, as his evidence showed, has acquired considerable knowledge of the legal requirements relating to UK deeds poll. Nominally, he approved all applications before the deeds poll were sent out to the customers but the evidence showed that in many cases, because they were so straightforward, the time he expended on each application was less than two minutes and might have been measured in seconds. When he was on holiday or otherwise unavailable applications were dealt with by MCL's staff and checked by him only after they had been dispatched to the customer. I accept that Mr Barratt did his best to keep in touch by email or telephone even when he was on holiday.

9. The price charged for a deed poll varied depending upon the speed of service and other factors—for example those who ordered several deeds at the same time, such as for parent and children, paid a discounted rate for the second and subsequent deeds—and MCL also offered a reduced fee to customers who met certain income criteria. At this time MCL charged, and accounted for, VAT on its supplies to its customers.

10. In June 2010 Mr and Mrs Barratt sold their entire shareholding in MCL to a Liechtenstein purchaser, the Matschils Trust. Mr Barratt told me that it was an arm's length disposal and that he did not know who were the beneficiaries of the trust. It was not, however, a simple acquisition. The Trust retained MCL, of which Mr and Mrs Barratt remained directors, but the agreement for sale foreshadowed the transfer of MCL's intellectual property rights to a "Newco", meaning "a new company or other corporate vehicle to be incorporated in a jurisdiction within one hour's flying time from London". Mr Barratt was to become an employee of the Newco, and to remain its employee and undertake certain functions for a period of two years. The provision to the effect that the Newco should be located no more than an hour from London was inserted

at Mr Barratt's insistence since it was envisaged, as in fact happened, that he would retain his UK home where his family continued to live while he travelled to the Newco's place of business for the working week, returning to his UK home for the weekends.

11. The Newco, DPSL, was incorporated in Jersey in November 2010. It seems that the Trust held the legal and beneficial interest in its entire share capital. Its three directors, appointed by the Trust, were all partners in a Jersey-based firm of accountants; Mr Barratt did not become a director, but on 16 December 2010 became an employee as the acquisition agreement required. He was DPSL's only employee, and the evidence was that the directors played no part in the company's operations. Mr Barratt's employment took effect from 4 January 2011, the first working day of the year, and continued until 1 May 2012, when his employment contract was replaced by a consultancy agreement on materially the same terms, one of which was that Mr Barratt must work on the Island of Jersey. Another was that he could not engage in any competing business, or otherwise divert custom from DPSL. Mr Barratt took a flat on the island and (save when he was on holiday, or occasionally for other reasons) he travelled from the UK to Jersey each Monday morning and remained there until he returned to the UK on the following Friday afternoon. It is not in dispute that Mr Barratt respected the restriction on competition, as far as third party organisations are concerned, but as shall explain there was a "grey area" about work he did, or appeared to have done, for MCL rather than DPSL.

12. Also on 16 December 2010 MCL's intellectual property rights were transferred to DPSL, and MCL and DPSL entered into an "Agreement for the provision of outsourcing services" by which MCL agreed to provide various services to DPSL; that agreement also took effect from 4 January 2011. At that time MCL had eight full-time and four part-time members of staff, disregarding Mr Barratt, and he emphasised that the structure of the agreements between MCL and DPSL was driven, in part, by his insistence that none of the employees should be made redundant. While I accept his evidence on that point, motives do not seem to me to be a material factor in determining whether or not DPSL had a UK establishment.

13. The purpose of the outsourcing agreement was to enable DPSL, which would have no resources other than Mr Barratt's services, to make the same supplies to customers as MCL had hitherto been making. The intention was that the customers would in future contract with DPSL (and, as I have said, HMRC accept they did), but the contracts would continue to be fulfilled, in a practical sense, by MCL save that Mr Barratt's input, when necessary, would be provided by him pursuant to his employment or, later, consultancy contract with DPSL. In essence, as the evidence showed, MCL's employees carried on doing almost exactly the same as they had been doing before, by processing customers' applications for the preparation of deeds poll, answering their queries and collecting payment. The only material difference from their perspective was that when they needed to refer to Mr Barratt they had to contact him in Jersey rather than at the office in Witham at which they continued to be employed. He told me that his flat in Jersey had equipment installed in it which enabled him to connect to MCL's computer system in exactly the same way as he would have connected had he been in the Essex office and that he was able to communicate with MCL's staff as freely as before, albeit by email or telephone rather than face to face. I accept that evidence, with

the caveat that it is clear from his own evidence that the times when Mr Barratt was not available to the staff were increased by reason of his having to travel.

14. DPSL acquired, with the other intellectual property rights, the right to use MCL's two website addresses. The text used on the websites, and in other material produced to customers, made it clear to the attentive reader that it was DPSL which was providing the service the customer wished to receive. That was apparent from the statement under the heading "Who we are and our registration numbers" that:

> "UK Deed Poll Service is the trading name of Deed Poll Services Limited, incorporated in Jersey number 106971. Our registered office address is [address in St Helier given]."

15. The appellants add that references, in the website pages, in printed material and in the "script" read to telephone customers by MCL's staff describing the customer's rights pursuant to the Distance Selling (Jersey) Law 2007 would equally have made it clear to the customer that he was dealing with a Jersey company.

16. I should interpose at this point for clarity that HMRC do not dispute the appellants' case on this point; as I have said, they accept that during the relevant period the supplies to customers were made by DPSL and not by MCL. They also take no point on the fact that, as the evidence made quite clear, the only purpose of locating DPSL outside the UK was to take its supplies out of the scope of UK VAT, and expressly do not rely on abuse or artificiality. Their only contention is that the arrangements were ineffective because DPSL had a permanent UK establishment.

17. On 15 October 2013 the arrangements I have described came to an end when the businesses of both MCL and DPSL were transferred (on terms of whose detail I am unaware but which also seem to have been at arm's length) to another company, UK Deed Poll Service Limited, which was and I understand still is owned and controlled by Mr Barratt, his wife and other members of their family. The company was incorporated in the UK, and is registered in the UK for VAT. It trades from the Witham office and, in every material respect, is carrying on business exactly as MCL did before its shares were sold to the Trust.

18. Mr Barratt explained in his evidence how he had researched the law and practice relating to deeds poll, and how he had created and developed the websites which MCL used. Several examples of the webpages he had devised were made available to me at the hearing, and it is quite clear that a great deal of time and effort has gone into preparing them. Mr Barratt was obviously proud of what he had achieved, and of his having established MCL or, later, DPSL and his family's present company as one of the leading commercial suppliers of deeds poll within the UK.

19. Mr Barratt was keen to emphasise that he alone was responsible for what appeared on the websites; MCL's employees undertook the processing of applications, but had no ability to amend or add to the website pages. In addition, they knew they had ultimately to refer all queries with which they could not easily deal themselves to him. Indeed, they had to follow the guidelines which he had established and could not deviate from them. He did, however, later accept that despite his policy on occasion members of staff had dealt with complicated cases which ought to have been referred to him and, indeed, he conceded that significant numbers of applications were not referred to him at all before the deed was dispatched to the customer, although he tried to review

them later with a view to correcting any mistakes which might have been made. Occasionally he found mistakes and corrected them by sending a revised deed to the customer.

20. After he began working in Jersey Mr Barratt continued to maintain what were now DPSL's websites, and he remained the only person permitted to do so. He also said that he managed DPSL's advertising contracts with the internet search engines, Google and Bing, although as HMRC pointed out the contracts were not transferred from MCL to DPSL immediately. The reason, Mr Barratt said, was that the transfer would have entailed a considerable cost which DPSL was unwilling to bear, although, he explained, that obstacle was later overcome by a gradual process starting in 2011 and concluding in 2012. In the meantime, the formula by which MCL's charges to DPSL were calculated included an element designed to recover the cost to MCL of the advertising contracts. Mr Barratt said that an entry in MCL's accounts for the year to 30 September 2013 for website expenses incurred by MCL was a mistake, though he could not explain how it had occurred. Though Ms Barnes placed some reliance on them, I interpose that I do not regard the contractual arrangements with Google and Bing, or the error in the accounts, if that is what it was, as significant factors.

21. Mr Barratt's work also included the maintenance of the various forms which were used by MCL or DPSL, such as the customer's application form, and of the guidance issued to MCL's staff, so as to reflect changes in the law or of process; again, only he was authorised to undertake this work. As I have said, most customer enquiries could be dealt with by the staff by reference to the guidance but I accept that some enquiries could not be answered in that way so were referred to Mr Barratt. It was apparent too from the evidence, in particular the large numbers of emails he sent, that on frequent occasions Mr Barratt helped out by taking a share of the customers' enquiries, describing himself as "Mike, Deed Poll Officer". He accepted that when he was on holiday or travelling between the UK and Jersey he was unable to deal with all of these tasks in the same way as when he was in his office in Jersey, but emphasised that he took great care to take holidays in places where he could rely on an internet connection so that he could remain in touch.

22. Mr Barratt accepted that even after the transfer of the business to DPSL customers' orders continued to be received by MCL, processed by its staff, and dispatched to the customers from the Witham office. Indeed, the outsourcing agreement provided that this would be the case. Thus there was no material difference in the application procedure however the application was made. If it was made online the customer effectively entered all the necessary information himself; if it was received by post, by telephone or from a call in person MCL staff keyed the relevant information into MCL's computer system. Mr Barratt accepted that all of the emails sent to customers, whether by himself or by MCL staff, used a trading name (UK Deed Poll Service) and did not identify either DPSL or MCL as the sender. The only indication to the customer that he was dealing with DPSL was provided by the website and printed material statement to that effect and by the reference there and in the "script" to the Distance Selling (Jersey) Law 2007. The three websites which customers could access all ended ".co.uk" or ".org.uk" and none of them identified DPSL or MCL by name or initials.

23. Mr Barratt's policy, as he explained it to me, was that he should review and approve all orders which were received before they were processed. After the transfer of the business to DPSL, he did so by marking each application "Approved by DPSL". It was only after his approval that the staff could process the application. There were, however, some exceptions: these were mainly orders from personal callers who arrived at the Essex office in the mornings, whose orders were processed without Mr Barratt's intervention because it was his habit to start work in the afternoon and work until the early hours of the following day, and then sleep in the morning. Nevertheless, he said, in these cases he reviewed the applications after they had been dispatched and, as I have already noted, on occasion found an error which was corrected by the provision to the customer of a revised deed poll. Although it is a minor point which does not affect the outcome of the appeals, I should say that I was satisfied that rather more applications were dealt with by the staff and without Mr Barratt's input than he was willing to concede.

24. Mr Barratt also said that it had originally been the intention that he would remain in Jersey for two years, during the course of which he would train a successor who would carry on with the business when his period of employment expired. Unfortunately DPSL was unable to obtain a licence from the Jersey government to continue trading on the island and to employ staff; it was for that reason that Mr Barratt's own employment contract was changed to one of consultancy when it became apparent that DPSL would find it difficult to secure a licence. He had agreed to stay in Jersey for a further six months after his contract expired in order to provide DPSL or, perhaps more accurately, the Trust, with some continuity if a licence could after all be obtained and a successor trained, but he refused to remain any longer. He explained that the trustee recognised that DPSL could not continue trading and it was for that reason that a sale of the goodwill and intellectual property of the business to Mr Barratt and his family was agreed.

25. It was put to Mr Barratt as he gave his evidence that some of the work he had done at the relevant time could be shown to have been undertaken at times when he was in England. He accepted that some emails had been sent by him when he was at home at weekends but, he said, if he sent them on behalf DPSL he did so on a voluntary basis rather than because of his contract. He pointed out that some of what he had done at the weekends was properly regarded as work for the benefit of MCL, of which he remained a director. As he had only a single email account, it was not easy to distinguish fully between work done for MCL and work done for DPSL. Equally, he said, he may have undertaken work for the benefit of MCL while he was in Jersey, but it would have been of very limited scope. Mr Barratt sought to explain the emails he sent to customers and in which he identified himself as a "Deed Poll Officer" were sent in his capacity as a director of MCL, albeit the work was done while he was in Jersey. I do not accept that explanation; most of the examples I saw were of a routine nature, not requiring the attention of a director. However, I do not think this an important point; and I am sure from his own evidence that when he saw a task which needed to be done Mr Barratt simply did it without applying his mind to the question whether he was at that moment working, or nominally working, for DPSL or MCL.

26. Mr Barratt agreed that he could as easily have done the work he undertook in Jersey from Witham, and that the only occasions on which he needed, in a functional rather than contractual sense, to be in Jersey were when he had a meeting with DPSL's

directors; it was clear to me that meetings of this kind were infrequent. However, the intention had always been, he said, to run the entirety of DPSL's operation from Jersey, and to have it controlled by a locally-resident manager once one had been recruited and trained. That intention had been frustrated by DPSL's inability to secure authorisation to carry on business there. He added that DPSL could have outsourced the various services received from MCL to another company, but it was at his insistence that MCL was used in order to avoid making its staff redundant. If DPSL had extended its business to another jurisdiction, a possibility which had been considered although nothing came of it, a different outsourcing company in that jurisdiction would almost certainly have been required.

27. Mrs Castle was employed as the Witham office manager by MCL and, later, UK Deed Poll Service Ltd until she retired in July 2015. Her work required her to supervise the clerical officers and other members of staff, and she had also undertaken some of the work of processing customers' applications herself. She agreed with Mr Barratt that it was he who was responsible for what appeared on the websites, for all the forms which were used and for the guidance given to customers and staff. It was not possible for anyone else to access the websites or the templates from which the forms and guidance were drawn. She agreed too that the normal requirement was that Mr Barratt had to review and approve all applications before they were processed, but she accepted that on occasion, when he was not available, customers' orders would be satisfied without any intervention on his part. Nevertheless, she said, such occasions were rare (as I have said, in my judgment not as rare as I was asked to believe, though again I do not think the point is of great importance) and even if he had not approved an application in advance, he would always review it afterwards and, if necessary, correct what had been done. Mrs Castle added that Mr Barratt always dealt with the particularly complicated applications himself.

28. MCL's participation, she said, was limited to the mechanical process of receiving and processing the customers' applications, preparing and issuing the deed poll, collecting payments, dealing with refunds when appropriate, answering customers' telephone and email enquiries and dealing with complaints. All that was done at Mr Barratt's direction and, Mrs Castle added, it was he alone who was responsible for the development of the business and setting the prices charged to customers. She agreed however that the only real differences after the business was sold to DPSL were that there were some changes to the wording of the material seen by customers, and that Mr Barratt spent most of his time in Jersey rather than in Witham, though he was doing materially the same tasks.

29. Mrs Bowers worked at the relevant time for MCL, and now works for UK Deed Poll Service Ltd, as a clerical officer. Her tasks included answering telephone calls from customers and potential customers, processing their applications and collecting payment. She agreed that every application had in principle to be approved by Mr Barratt in advance, except for priority applications which had to be processed quickly; they were checked by Mr Barratt and if necessary corrected later. There were, she said, many applications which neither she nor any other member of staff could have processed without Mr Barratt's assistance since only he had the detailed knowledge which was required. In case of doubt she escalated enquiries or problems to Mr Barratt by email. She confirmed that neither she nor any other member of staff was authorised or able to change anything on the websites or in the printed material produced to

customers or available to the staff. She recalled that the wording of the material produced to customers changed when DPSL took over the business but, with that exception, and the fact that Mr Barratt was in Jersey, there was no material difference from her perspective from what had been the position beforehand. However, she said, MCL would not have been able to provide a service to customers without DPSL's input. That can only mean Mr Barratt's input, since DPSL contributed nothing else.

The law

30. The starting point is section 4(1) of the Value Added Tax Act 1994 ("VATA"), which provides that "VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him." It is therefore that provision which, in the context of this appeal, gives rise to the essential question, namely whether the supply was made by DPSL in the United Kingdom, that is from a fixed UK establishment, as HMRC maintain, or in Jersey as the appellants argue. In order to answer that question one must first turn to provisions of the Principal VAT Directive (Council Directive 2006/112/EC) ("the PVD"). Article 44, so far as relevant, is as follows:

> "The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located.…"

31. Thus the general rule is that the place of supply of services to a business customer is deemed to be the place where the customer is established. HMRC accept that DPSL was established, as a corporate entity, and had a presence, in Jersey, and for their argument that DPSL had a fixed establishment at MCL's own offices at Witham they must rely on the proviso to the general rule in the second sentence of art 44.

32. Article 45 deals with supplies to customers who are not taxable persons:

> "The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located.…"

33. It is common ground that none of the customers could have been relevantly taxable because of the nature of the supplies. Accordingly, if HMRC are right, and DPSL did have a fixed establishment in the UK, all of its supplies, too, were made within the UK even in those cases in which the customer was located overseas.

34. The provisions of the PVD are supplemented by some articles of EU Council Implementing Regulation 282/2011. That Regulation came into force only on 1 July 2011, but HMRC maintain that it informs the interpretation of arts 44 and 45 both before and after that date, a proposition from which Ms Murray did not demur. Article 21(1) is as follows:

> "Where a supply of services to a taxable person, or non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of [the PVD],

and the taxable person is established in more than one country, that supply shall be taxable in the country where that taxable person has established his business.

However, where the service is provided to a fixed establishment of the taxable person located in a place other than that where the customer has established his business, that supply shall be taxable at the place of the fixed establishment receiving that service and using it for its own needs."

35. Article 10(1) adds that:

"For the application of Articles 44 and 45 of [the PVD], the place where the business of the taxable person is established shall be the place where the functions of the business's central administration are carried out."

36. Article 11 provides a definition of "fixed establishment":

"(1) For the application of Article 44 of [the PVD], a 'fixed establishment' shall be any establishment, other than the place of establishment of the business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

(2) For the application of [Article 45 of the PVD], 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies."

37. Those articles are transposed into UK domestic law by further provisions of VATA. Section 7A(2), which it is not necessary to set out, implements arts 44 and 45 of the PVD by providing that a supply of services to a "relevant business person", meaning a taxable person as so defined by art 9 of the PVD, is made in the country of the recipient, while supplies to other recipients are made in the country of the supplier. Section 9 provides the rules for determining the place in which a supplier or recipient belongs. In the form in which it was in force at the relevant time, and so far as material, it provided:

"(1) This section has effect for determining for the purposes of section 7A …, in relation to any supply of services, whether a person who is the supplier or recipient belongs in one country or another.

(2) A person who is a relevant business person is to be treated as belonging in the relevant country.

(3) In subsection (2) 'the relevant country' means—

(a) if the person has a business establishment, or some other fixed establishment, in a country (and none in any other country), that country,

(b) if the person has a business establishment, or some other fixed establishment or establishments, in more than one country, the country in which the relevant establishment is, and

(c) otherwise, the country in which the person's usual place of residence is.

> (4) In subsection (3)(b) 'relevant establishment' means whichever of the person's business establishment, or other fixed establishments, is most directly concerned with the supply.
>
> (5) A person who is not a relevant business person is to be treated as belonging in the country in which the person's usual place of residence is.
>
> (6) In this section 'usual place of residence', in relation to a body corporate, means the place where it is legally constituted."

38. The Act does not offer any definition of the terms "business establishment" or "fixed establishment", and it is common ground that one must look to the definition provided by art 11 of Regulation 282/2011 and to a relatively limited amount of case law, to which I shall come as I describe the parties' arguments.

The appellants' submissions

39. Ms Murray's starting point was the proposition that it is the contractual position which must dictate the VAT treatment of the supplies. For that argument she relied on what Lord Neuberger said in *Secret Hotels2 Ltd v Revenue and Customs Commissioners* [2014] UKSC 16, [2014] STC 937. In that case what was in issue was whether the tour operators' margin scheme applied to the taxpayer's supply of a booking agency service, a rather different question from that raised by this appeal, but what he said is, she argued, nevertheless pertinent:

> "[23] … that issue must be determined by reference to the proper law of the contract or contracts concerned, and, in so far as the subsequent conduct of the parties is said to affect that nature and character, the effect must also be assessed by reference to the proper law of the contract or contracts.
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> [24] In that connection, it is worth referring to the observation of the CJEU in *Revenue and Customs Comrs v RBS Deutschland Holdings GmbH* (Case C-277/09) [2011] STC 345, [2010] ECR I-13805, para 53, that 'taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities …'
>
> …
>
> [31] Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham."

40. In *Revenue and Customs Commissioners v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] STC 1509 at [31] to [33] Lord Neuberger added that in the absence of sham or pretence (which is not suggested here) the contractual arrangements must prevail over the commercial position if that differs.

41. The contractual position in this case throughout the relevant period, she submitted, was that DPSL, which had, and maintained, its fixed establishment in Jersey, carried on in Jersey its own business of providing deeds poll to its customers, with whom it alone contracted, with the consequence that it was DPSL, and only DPSL, which was capable of making those supplies. MCL, on the other hand, had no contractual relationship with any customer but merely provided clerical and support services to DPSL pursuant to the outsourcing agreement; it had no right to enter into

contracts with customers, and did not do so, either as principal or as agent for DPSL. That contractual analysis was supported by the facts that DPSL owned and maintained the intellectual property rights in the website names and the software by which customers were able to make their online applications and which automated the preparation of the deeds poll, however the application was initiated; which attracted custom by advertising; which prepared the literature made available to customers and potential customers; and, in the person of Mr Barratt, possessed the technical skills necessary to ensure that the process worked correctly. MCL, by contrast, merely provided its services at DPSL's direction and under its control, and was incapable of making a complete supply to the customers itself. MCL dealt with customers' payments, but the payments were made to DPSL, as customers would be able to see from their bank or credit card statements.

42. The conclusion to be drawn, Ms Murray continued, was that DPSL had its fixed establishment in Jersey; its office there had a sufficient degree of permanence and the human and technical resources necessary to enable it to receive the services supplied to it for its own needs. By contrast, although MCL had a sufficient degree of permanence, it did not have the human and technical resources which would enable it to make supplies to the customers. Mr Barratt's contractual arrangement with DPSL required him to supply his services exclusively to it and prevented him from providing similar services to MCL, and it was his services which were critical: without his input MCL could not have carried on making supplies of deeds poll.

43. HMRC's reliance, in their statement of case, on what was said by the European Court of Justice in Case C-260/95 *Customs and Excise Commissioners v DFDS A/S* [1997] STC 384 was misplaced. There, the UK company was a subsidiary of, and acted as UK agent for, its Danish parent in making supplies of package holidays to retail customers in the UK. The question identified by the Court, and which was to be answered on the facts by the national court, was whether the company—the subsidiary in that case—had "the human and technical resources characteristic of a fixed establishment". There was a significant factual difference between *DFDS* and this case: MCL was not a subsidiary of DPSL, and even HMRC did not assert that MCL was making supplies to the customers, either on its own account or as agent for DPSL. DPSL had all the human and technical resources necessary for the provision of the supplies to the customers, even if it had to rely on MCL for the provision of some services.

44. Similarly, HMRC were wrong to draw an analogy in their statement of case with Case C-452/03 *RAL (Channel Islands) Ltd and others v Revenue and Customs Commissioners* [2005] STC 1025. That case was irrelevant because it related to a provision of the Sixth VAT Directive which was not engaged in this case; but it could in any event be distinguished because the customers in this case were told that their contracts were with DPSL, whereas there no such indication was given. That factual difference made it impossible to draw any guidance from what the Court said.

45. It is true that there was little difference, from the perspective of MCL's staff and the customers, between the arrangements before and after MCL's acquisition by the Trust, but that was immaterial: it was dismissed by Warren J as a relevant factor in the similar case of *Newey (trading as Ocean Finance) v Revenue and Customs Commissioners* [2015] UKUT 300 (TCC), [2015] STC 2419 at [215]. Warren J went on

to observe at [216] that in the absence of abuse (which was not suggested here) the contracts could not be disregarded: "there can … be no redefinition of the contractual arrangements since such redefinition is the consequence of abuse: if no abuse exists, the findings of fact made by the Tribunal lead inevitably to the conclusion that the relevant supplies were made to and by Alabaster" (Alabaster was in a similar position to DPSL in this case).

HMRC's submissions

46. Ms Barnes' first argument was that although the legislation focused on the place where the supplier (in the case of supplies to non-taxable persons) or the recipient (in the case of supplies to taxable persons) "belongs", meaning the place where his business is established, that was merely the starting point. As the European Court of Justice said in Case C-605/12 *Welmory sp z oo v Dyrektor Izby Skarbowej w Gdańsku* [2015] STC 515 at [53], it is not determinative:

> "According to the settled case law of the court on art 9 of the Sixth Directive [the forerunner of arts 44 and 45 of the PVD], the most appropriate, and thus the primary, point of reference for determining the place of supply of services for tax purposes is the place where the taxable person has established his business. It is only if that place of business does not lead to a rational result or creates a conflict with another member state that another establishment may come into consideration …."

47. Thus although HMRC accept that the customers were contracting, at the relevant time, with DPSL, they argue that it was making its supplies, not from Jersey, but from Witham. It would be irrational, Ms Barnes said, to regard Jersey as the place of supply when all the evidence showed that the only part of the process which could be associated with Jersey—and even then not exclusively—was Mr Barratt's supervisory input; every other part of it was undertaken in Witham.

48. MCL and DPSL could not be regarded as independent operators when they were in common ownership and when the activities of both companies were controlled by Mr Barratt who was the only person involved in DPSL's activities and who remained the active managing director of MCL. Moreover, the two companies had no other business than the supply of deeds poll, and their relationship was exclusive—MCL was prohibited by the outsourcing agreement from providing similar services to any other company but DPSL, which did not seek any outsourcing services from a company other than MCL. It was, in fact, wholly reliant upon MCL for all the routine tasks necessary if it was to make supplies of deeds poll to its customers. It was, Ms Barnes added, a point of some significance that customers would not realise that they were dealing with two separate companies. The attentive, who had taken the trouble to read and absorb the statements to that effect on the website or the printed material with which they were presented, would realise that they were contracting with a Jersey-based organisation; but they would have no means of discovering that their application was being processed by a separate company. Everything else on the websites and in the literature suggested that the supplier, that is DPSL, had a base in the United Kingdom: personal and postal applications had to be made to the Witham office, and the various delivery options offered to those who did not call in person all referred to delivery by Royal Mail. In addition, the trading name used was "UK Deed Poll Service". The perception of customers was regarded as an important factor by the Advocate General in *RAL*

(Channel Islands) Ltd; at para 45 of his opinion he said that "I agree with the observation made by the Irish Government in its written submissions according to which the external perception of customers must play a decisive role".

49. It was quite clear from the evidence, Ms Barnes continued, that MCL was sufficiently permanent and that it had the human and technical resources necessary for the making of supplies of deed poll services. The great majority—90% or thereabouts—of applications were not complicated, and the customers could have prepared them, if they wished, without assistance by following the guidance obtainable from, for example, the gov.uk website, or even the appellants' websites. In the simple cases all MCL did, in substance, was transfer the relevant details provided by the customer into a template, print it and post it. It was quite clear that MCL could do that without any input from Mr Barratt because, as his own evidence showed, it did so when he was not available for some reason or when customers availed themselves of the one-hour service. Indeed, the same staff worked for MCL before and after the sale to the Trust, carrying on doing exactly as they had before save that contact with Mr Barratt was less direct. MCL had been supplying deeds poll for several years before it was acquired by the Trust, and it carried on doing so after that acquisition. All the customers had contact with MCL; it was only exceptionally that Mr Barratt contacted a customer, and when he did it was at best questionable whether he did so as an employee or consultant of DPSL or as director of MCL.

50. It was immaterial, Ms Barnes argued, that Mr Barratt started working for DPSL, and provided his expertise as an employee of DPSL rather than, as hitherto, a director of MCL: he remained a director of MCL, and it was apparent from his own evidence that he did not clearly distinguish between what he did for one company rather than the other. Similarly it was immaterial that the software, the templates and the intellectual property rights belonged to DPSL, since what mattered was whether MCL had the use of the necessary resources, not how it acquired them. The actual work of providing the service to the customer was quite clearly undertaken by MCL and not DPSL. The guidance MCL's staff followed was almost all available on the websites which the public could see; the proposition that MCL could not have supplied the service to the customers without DPSL was plainly wrong. By contrast, it was equally plain that DPSL could not have provided the service without MCL. It did not have any staff, apart from Mr Barratt, or the physical resources to prepare and dispatch the deeds. There was, moreover, no business need for Mr Barratt to be in Jersey at all; he could have provided his input from anywhere with an internet connection, and did so.

Discussion and conclusions

51. In my judgment Ms Barnes is right, and largely for the reasons she gave. I should however, first deal with Ms Murray's argument based on the contracts. In my view it is misplaced; the question is not whether the customers contracted with DPSL or MCL: as HMRC correctly accept, their contracts in the relevant period were with DPSL. The conclusion that the customers contracted with an entity registered in Jersey does not, however, answer the question whether that entity, DPSL, had a fixed establishment in the UK. That, as I see it, is essentially a question of fact, though the facts must be evaluated in the light of the legislation and, more helpfully, the authorities.

52. I begin with a summary of the findings of fact I have made. The only realistic conclusion, in my view, is that MCL continued doing exactly as it had before its shares

were sold, with the sole practical difference that Mr Barratt supervised and controlled its activities, for part of the working week, from Jersey; it is clear from his own evidence that he undertook some work which could properly be said to have been performed on behalf of DPSL while he was in England, and that he undertook some MCL work while he was in Jersey. It is impossible to conclude, as a matter of fact, that, although it was a Jersey company with an office in St Helier, DPSL had more than a nominal operational existence there. I agree with Ms Barnes that its operational base was at MCL's office in Witham, without the support of which DPSL could not have made any supplies to its customers at all.

53. For authority I do not think it necessary to look further than *DFDS*, on which the Advocate General drew extensively in his opinion in *RAL (Channel Islands) Ltd*. The Court set out the competing arguments:

> "[10] The Danish company proposes that the court rule that, in the circumstances described, the supplies are taxable in the member state in which the tour operator has his headquarters. It submits in particular that, according to the case law of the court, the member state in which the company has established its business is the primary fiscal point of reference for the levying of VAT on supplies of services and that any other point of reference might be misleading and give rise to conflicts between member states.
>
> [11] The United Kingdom government contends, on the other hand, that the tour operator has, in the member state in which the company acting on his behalf operates, a fixed establishment from which the services are supplied, so that they must be taxed in that state. In its opinion, that is the most rational course from the tax point of view since it is in that state that the services are made available to travellers.
>
> [12] The Italian government and the Commission consider that, if certain conditions are met, such supplies of services are taxable in the member state in which the company acting on behalf of the tour operator operates. For that to be the case, there must be in that state an organisation with the human and technical resources necessary for the provision of those services and that organisation must not be independent from the undertaking on whose behalf it acts."

54. At [20] the Court observed that "services cannot be deemed to be supplied at an establishment other than the place where the supplier has established his business unless that establishment is of a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present". It then recorded the argument advanced for DFDS that there was a clear advantage in taxing all of its activities in a single place, before reciting the UK's argument:

> "[22] However, as the United Kingdom government has pointed out, that treatment would not lead to a rational result for tax purposes in that it takes no account of the actual place where the tours are marketed which, whatever the customer's destination, the national authorities have good reason to take into consideration as the most appropriate point of reference."

55. It is clear from its conclusions that the Court preferred that argument, which is consistent with the principle that VAT is a tax on consumption and should therefore generally be levied where the consumption takes place. At [25] the Court turned to the question whether the two companies were independent of each other. Its answer was set out at [26]:

> "The fact, mentioned by the tribunal, that the premises of the English subsidiary, which has its own legal personality, belong to it and not to the Danish company is not sufficient in itself to establish that the subsidiary is in fact independent from the Danish company. On the contrary, information in the order for reference, in particular the fact that DFDS's subsidiary is wholly owned by it and as to the various contractual obligations imposed on the subsidiary by its parent, shows that the company established in the United Kingdom merely acts as an auxiliary organ of its parent."

56. The relationship between DPSL and MCL was not, of course, that of parent and subsidiary but in practical terms it was very similar and, despite the point, forcefully made by Ms Murray, that in this case the customers contracted with DPSL whereas in *DFDS* they contracted with the subsidiary, it is difficult to see any basis on which it could realistically be said that MCL, confined as it was to providing its services to DPSL alone, was not DPSL's "auxiliary organ".

57. At [27] the Court made it clear, as a second factor, that it is necessary to verify whether "the establishment in question is of the requisite minimum size in terms of necessary human and technical resources" to be considered a fixed establishment. It went on, at [28], to observe that the subsidiary had sufficient resources, especially of employees, to satisfy that requirement. In *DFDS* the parent, too, had resources in Denmark, but that fact did not deflect the Court from the conclusion that the subsidiary was its parent's fixed establishment in the UK. Here, the position is in my view even clearer: with the exception of Mr Barratt's input, which as Ms Barnes correctly said could have been provided from anywhere with an internet connection, *all* of the resources necessary for the making of supplies of deed poll services were located in the UK.

58. In my judgment it is plain, from the application of the criteria identified by the Court in *DFDS* to the facts as I have found them, that at all material times DPSL had a fixed establishment in the UK. The appeals are, therefore, dismissed.

59. 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.

COLIN BISHOPP
TRIBUNAL JUDGE

RELEASE DATE: 23 NOVEMBER 2016