FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/02481

BETWEEN

FENIX INTERNATIONAL LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

ORDER

Before the First-tier Tribunal (Tax Chamber)

UPON the Appellant's applications by Notice of Application dated 30 July 2020;

AND UPON hearing Leading and Junior Counsel for the Appellant and Counsel for the Respondents on 22/10/20;

AND UPON finding that in order to enable the First-tier Tribunal to give judgment in this case, it is necessary to resolve a question concerning the validity of an Instrument of European Union Legislation, it is appropriate to request the Court of Justice of the European Union ("CJEU") to give a preliminary ruling thereon;

IT IS ORDERED THAT:

1. The time for lodging the Appellant's appeal is extended;

2. The question set out in the attached Schedule, concerning the validity of European Union law, be referred to the Court of Justice of the European Union for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union and Article 86(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community;

3. All further proceedings in this appeal be stayed until after the Court of Justice of the European Union has given its ruling on the questions referred to it or until further Order;
4. The First-tier Tribunal (Tax Chamber) Registrar shall send a copy of this Order and the Schedule to the Registrar of the Court of Justice of the European Union forthwith.

ANNE SCOTT
JUDGE OF THE FIRST-TIER TAX TRIBUNAL

15 December 2020

SCHEDULE

REQUEST FOR A PRELIMINARY RULING UNDER ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION BY THE FIRST-TIER TRIBUNAL (TAX CHAMBER) OF THE UNITED KINGDOM

A. INTRODUCTION

1. By this reference for a preliminary ruling, the Tax Chamber of the First-tier Tribunal in the United Kingdom ("the UK Tax Tribunal") asks the Court of Justice to rule on the validity of Article 9a of Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011, as amended by Article 1(1)(c) of Council Implementing Regulation (EU) No. 1042/2013 of 7 October 2013, laying down implementing measures for Directive 2006/112/EC on the common system of value added tax ("Article 9a").

2. The question on validity concerns whether the scope of Article 9a goes beyond what is authorised by Article 397 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("the VAT Directive"), which provides "The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive."

3. The reference has been made in the context of an appeal brought by Fenix International Limited ("Fenix"), which is registered for the purposes of value added tax ("VAT") in the United Kingdom, against an assessment to VAT made by the Commissioners for Her Majesty's Revenue and Customs ("HMRC").

B. THE APPELLANT

4. The Appellant ("Fenix") operates a social media website known as OnlyFans at www.onlyfans.com ("the Platform") and has sole and exclusive control of the Platform.

C. THE RESPONDENTS

The Respondents ("HMRC") are responsible for the collection and management of VAT in the United Kingdom.

D. SUMMARY OF THE FACTS IN THE CASE

6. The Platform is offered to "Users" from around the world. These Users are divided into "Creators" and "Fans". Creators have profiles and upload and post content such as photographs and videos to their respective profiles. They can also stream live video webcam and send private messages to Fans who subscribe to them. The Creator determines the monthly subscription fee, although Fenix sets the minimum amount both for subscriptions and for tips.

7. Fans can access uploaded content by making *ad hoc* payments or paying a monthly subscription in respect of each Creator whose content they wish to view and/or with whom they wish to interact. Fans can also pay tips or donations known as "Fundraising" for which no content is supplied in return.

8. Therefore, Creators charge and earn money from content and Fans pay money for content.

9. Fenix provides not only the Platform but also the facility whereby Fans make payments and Creators receive payment. Fenix is responsible for collecting and distributing the payments, utilising a third-party payment service provider. Fenix charges the Creator 20% for services by way of a deduction ("the Charge") from the consideration paid by the Fan; if a Creator charges a notional £100 for a subscription, Fenix receives £100 from the Fan, retains £20 and pays the Creator £80.

10. Both payments from a Fan and payments to a Creator will appear on the relevant User's bank statement as a payment made to or from Fenix.

11. At all material times, Fenix charged and accounted for VAT at a rate of 20% on the Charge.

12. Use of the Platform has at all material times been governed by Fenix's Terms of Service ("T&Cs"). There are various versions of the T&Cs over the period covered by the assessment. There are also various versions of the Privacy Policy.

13. On 22 April 2020, HMRC sent Fenix assessments for VAT due for the periods from 07/17 to 01/20 in the sum of £8,222,566. On 15 July 2020, HMRC issued a further assessment for VAT due for the period 04/20 in the sum of £3,015,912.

14. HMRC's view was, and is, that the legal basis for the assessments was that Fenix should be deemed to be acting in its own name by virtue of Article 9a.

15. On 27 July 2020, Fenix filed an appeal disputing the legal basis for the assessment and also the quantum.

16. The argument on the legal basis was that Article 9a is invalid and does not apply; further, or alternatively, Fenix falls outside of and/or rebuts the presumption in Article 9a.

HMRC have not made any decision as to, as a matter of English law, the capacity in which Fenix acted in respect of the Platform (ie whether as agent or as principal). Their decision to assess Fenix to VAT was taken by reference to Article 9a alone. HMRC have not considered the application of Article 28 of the VAT Directive ("Article 28") *per se*, without reference to Article 9a (including, specifically, the final paragraph of Article 9a(1)).

E. THE LEGAL FRAMEWORK

EU Legislation

Article 113 of the Treaty on the Functioning of the European Union ("TFEU"), formerly Article 93 of the Treaty Establishing the European Community ("TEC "), provides:

> "The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition."

Article 291 TFEU provides:

> "1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
>
> 2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
>
> 3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
>
> 4. The word 'implementing' shall be inserted in the title of implementing acts."

20. Pursuant to Article 113 TFEU and its predecessors, the Council has adopted the various VAT Directives, including the VAT Directive (OJ L 347, 11.12.2006, p. 1).

21. Article 28 of the VAT Directive provides:

> "Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself."

22. Article 397 of the VAT Directive provides:

> "The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive."

23. Article 397 of the VAT Directive is the successor to Article 29a of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p.1) (the "Sixth Directive"). Article 29a of the Sixth Directive was inserted by Article 1(2) of Council Directive 2004/7/EC of 20 January 2004 amending Directive 77/388/EEC concerning the common system of value added tax, as regards conferment of implementing powers and the procedure for adopting derogations (OJ L 27, 30.1.2004).

24. Pursuant to Article 397, the Council adopted Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) (OJ L 77, 23.3.2011, p. 1).

25. Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 was amended by Article 1(1)(c) of Council Implementing Regulation (EU) No. 1042/2013 of 7 October 2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services (OJ L 284, 26.10.2013, p. 1), which inserted Article 9a, which provides:

"1. For the application of Article 28 of Directive 2006/112/EC, where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties.

In order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person, the following conditions shall be met:

(a) the invoice issued or made available by each taxable person taking part in the supply of the electronically supplied services must identify such services and the supplier thereof;

(b) the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier thereof.

For the purposes of this paragraph, a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services.

2. Paragraph 1 shall also apply where telephone services provided through the internet, including voice over internet Protocol (VoIP), are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications and are supplied under the same conditions as set out in that paragraph.

3. This Article shall not apply to a taxable person who only provides for processing of payments in respect of electronically supplied services or of telephone services provided through the internet, including voice over internet Protocol (VoIP), and who does not take part in the supply of those electronically supplied services or telephone services."

United Kingdom legislation

26. At all times, Implementing Regulation 282/2011/EU was directly applicable in the United Kingdom (and throughout the Union). The questions referred by the UK Tax Tribunal concern only the validity of Article 9a.

F. THE DISPUTE IN THE MAIN PROCEEDINGS

Summary of Fenix's arguments

27. Article 9a changes the application of Article 28 in two fundamental respects, namely:

    Firstly, it introduces a presumption that a platform which takes part in a supply of certain electronic services is acting in its own name and on behalf of the provider. In other words, it is deemed to have purchased and onward-supplied those services itself, and consequently has to account for VAT. That presumption is rebuttable only if certain conditions are fulfilled, such as where the agent's principal is explicitly indicated as the supplier by the agent and that is reflected in the contractual arrangements between the parties.

    Secondly, even if the identity of an agent's principal is disclosed it prevents the presumption from being rebutted where the digital platform:

    authorises the charge to the customer, or

    authorises the delivery of the services, or

    sets the general terms and conditions of the supply.

28. In summary, even where the fact of agency is clear and the identity of the principal is known, Article 9a provides a new fiction that the agent is treated as making and receiving a supply. That fundamentally changes the approach to the liability of agents for their actions in the realm of VAT. It deprives parties of contractual autonomy and goes far further than Article 28.

29. This significant change to the liability of agents amounts to amending and/or supplementing Article 28 by adding new rules. Article 9a goes far further than the implementation of Article 28 as permitted by Article 397. It is not simply clarification of Article 28.

30. Article 9a amounts to a policy decision to shift both the liability and the burden of taxation to any internet platform since, whilst the presumption is technically rebuttable it is, in practice, almost impossible to rebut given the width of the provisions.

Summary of HMRC's arguments

31. Article 28 is in wide and general terms. Self-evidently, it has, and must be given, an independent meaning in EU law. Article 9a clarifies and/or provides "further detail" of that independent EU law meaning in the specific context of the application of Article 28 and provides further detail of - when a taxable person "*is acting in his own name but on behalf of another person*", when in that capacity the taxable person "*takes part in a supply of [the specified] services*" and, consequently, when the taxable person "*shall be deemed to have received and supplied those services himself*".
32. Article 9a simply clarifies Article 28. It is not an amendment. It does not derogate from Article 28.
33. If Article 9a is valid it is obvious that it applies to the appellant and its activities and the appellant cannot rebut the presumption introduced by Article 9a, regardless of any question of agency.
34. Article 9a

(i) complies with the essential general aims pursued by Article 28 and the VAT Directive as a whole; and

(ii) is necessary or appropriate for the implementation of Article 28 and the VAT Directive as a whole, without supplementing or amending it.

The Council must thus be deemed to have provided, by Article 9a, further detail in relation to Article 28 and the VAT Directive as a whole.

G. THE UK TAX TRIBUNAL'S REASONS FOR REFERRING A QUESTION TO THE COURT OF JUSTICE

35. The UK Tax Tribunal considers that a decision of the Court of Justice on the question below concerning the validity of Article 9a is necessary to enable it to give judgment. The UK Tax Tribunal has doubts about the validity of Article 9a and must therefore refer the matter to the Court of Justice. The UK Tax Tribunal's reasons why it has such doubts are set out in the following paragraphs.[1]

36. Article 9a is meant to implement Article 28 of the VAT Directive but it is strongly arguable that it goes beyond implementation.

37. As the Advocate General explained in C-427/12 *European Commission v European Parliament and the Council*, 19 December 2013, ECLI:EU:C:2013:871, ("CPC") implementing measures are very limited in scope, in contrast to the wider discretionary remit of delegated legislation.[2]

38. The CJEU considered the limits on implementing legislation in terms of Article 291 TFEU in C-65/13 *European Parliament v European Commission*, 15 October 2014, ECLI:EU:C:2014:2289, ("EURES"). In summary, a provision purporting to implement a legislative act is lawful only if it meets the following three criteria:

(1) The contested provision must "comply with the essential general aims pursued by the legislative act" that it purports to implement;

(2) The contested provision must be "necessary or appropriate for the implementation" of the legislative act that it purports to implement;

(3) The contested provision "may neither amend nor supplement the legislative act, even as to its non-essential elements."

39. The Commission's Communication from the Commission to the European Parliament and the Council on the Implementation of Article 290 TFEU stated:

> "….Secondly, it should be noted that the authors of the new Treaty did not conceive the scope of the two articles in the same way. The concept of the delegated act is defined in terms of its scope and consequences – as a general measure that supplements or amends non-essential elements – whereas that of the implementing act, although never spelled out, is determined by its rationale - the need for uniform

[1] The UK Tax Tribunal has handed down a reasoned decision on Fenix's application, a copy of which is annexed to this Schedule and which is available at http://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07971V.html

[2] Paragraphs 62 and 63

conditions for implementation. This discrepancy is due to the very different nature and scope of the powers conferred on the Commission by the two provisions….

The Commission believes that in order to determine whether a measure 'supplements' the basic instrument, the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to 'supplement' the basic instrument. Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures."[3]

40. That makes it clear that delegated acts permitted under Article 290 TFEU change the legal framework and there is a margin of discretion but implementing acts under Article 291 TFEU do not change the legal framework. That accords with the Advocate General's Opinion in *CPC* (see paragraph 37 above).

41. The Commission's Proposal for Article 9a stated that it was "…a purely technical measure… merely setting out the application of provisions already adopted…" and for that reason no impact assessment was completed.[4] The original version of Article 9a set out in the Proposal did introduce a presumption, however, that presumption applied "…unless, in relation to the final consumer, the service provider is explicitly indicated as the supplier".[5] That is consistent with the explanation in the Proposal that the presumption would apply "unless stated otherwise".[6]

42. The text of Article 9a, as enacted, is radically different and far more extensive than the text of the proposal. Article 28 refers to a taxpayer acting in his own name but as the Value Added Tax Committee Working Paper No. 885 makes explicit: the introduction of the presumption in Article 9a meant that the presumption should as a rule "...be valid for all taxable persons…".[7]

43. The 2016 Deloitte Report, on which the Commission relied for the 2016 Commission Proposal to amend the VAT Directive[8] makes it clear that "The objective of article 9a to shift the liability for VAT to the intermediary appears to be desirable…there is a need for further clarification and a common and binding interpretation by Member States".[9]

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[3] Communication from the Commission to the European Parliament and the Council on the Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, Brussels 9 December 2009, pages 3 & 4, (available here: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0673:FIN:EN:PDF)

[4] Proposal for a Council Regulation amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services, COM(2012) 763 final, p3 (available here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0763&from=EN)

[5] Ibid. p12

[6] Ibid. p5

[7] European Commission, Value Added Tax Committee Working Paper No. 885, Brussels, 9 October 2015, p.4/5 (available here: https://circabc.europa.eu/sd/a/ab683366-67b5-4fee-b0a8-9c3eab0e713d/885%20-%20VAT%202015%20-%20Harmonised%20application%20of%20the%20presumption.pdf)

[8] [8] European Commission, Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, COM(2016) 757 final, 1 December 2016, (available here: https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_757_en.pdf)

[9] European Commission, VAT Aspects of cross-border e-commerce – Options for modernisation, Final Report – Lot 3, Deloitte, November 2016, p.203-204 (available here: https://ec.europa.eu/taxation_customs/sites/taxation/files/vat_aspects_cross-border_e-commerce_final_report_lot3.pdf)

44. There is a good argument that shifting liability is not merely a technical measure. It was also a change to the *status quo* which suggests that it is strongly arguable that it was amendment rather than simple clarification

45. Furthermore, although, the 2016 Commission Proposal did not ultimately lead to an amendment of Article 28, as proposed, nevertheless during the legislative consultation, the Committee on Economic and Monetary affairs of the European Parliament reported on the Proposal on 16 October 2017[10]:

"The rapporteur welcomes the amendment of article 28 proposed by the Commission which provides that online platforms are held liable for the collection of VAT in supplies of services …".[11] (emphasis added)

46. Although it is not known why the 2016 Commission Proposal was not implemented the very fact that the Proposal reached the stage that it did and that the rapporteur agreed that the amendment was necessary supports the argument that there was doubt about the validity of Article 9a.

47. Lastly, in Case C-464/10 *État Belge v Pierre Henfling*, 14 July 2011, ECLI:EU:C:2011:489, ("Henfling") the Court of Justice stated that Article 6(4) of the Sixth Directive, the predecessor provision for Article 28:

"…creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom its acts, who constitutes the principal, before providing, secondly, those services to the client himself. It follows that, as regards the legal relationship between the principal and the commission agent, their respective roles of service provider and payer are notionally inversed for the purpose of VAT."[12]

48. The Court went on to state that:

"As regards the activity of the "buralistes" at issue in the main proceedings, it must be noted that although the condition that the taxable person must act in his own name but on behalf of another, in Article 6(4) of the Sixth Directive, **must be interpreted on the basis of the contractual relationship at issue,** as follows from paragraph 40 of this judgment, the proper working of the common VAT system established by that directive none the less requires **the referring court to check specifically so as to establish whether, in the light of all the facts in the case**, those "buralistes" were in fact acting, when collecting bets, in their own name.".[13] (emphasis added)

49. The presumption in Article 9a removes the requirement to look at the economic and commercial realities with all that that entails.

50. It is very strongly arguable that:

the introduction of the presumption in Article 9a is not a technical measure, it is a radical change; and

the legal framework was changed, and significantly so, by the introduction of the presumption in the terms used in the final paragraph of Article 9a. By any standard that would be a manifest error in an implementing regulation.

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[10] A8-0307/2017
[11] Page 15/18
[12] Paragraph 35
[13] Paragraph 42

H. THE QUESTION REFERRED

51. The First-tier Tribunal accordingly refers the following question to the Court of Justice of the European Union for a preliminary ruling under Article 86(2) of the Withdrawal Agreement and Article 267 of the Treaty on the Functioning of the European Union:

1. Is Article 9a of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011, inserted by Article 1(1)(c) of Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013, invalid on the basis that it goes beyond the implementing power or duty on the Council established by Article 397 of Council Directive 2006/112/EC of 28 November 2006 insofar as it supplements and/or amends Article 28 of Directive 2006/112/EC?"

15 December 2020

ANNEXE

The Annexe to the Schedule contains the following:

The Decision of the First-tier Tribunal (Tax Chamber) 2020 UKFTT 0499 (TC), released on 15 December 2020: http://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07971V.html