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Our Ref: **AIR/5333298-1**

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6 March 2019

Dear Sirs

LETTER BEFORE CLAIM FOR JUDICIAL REVIEW
RESPONSE REQUIRED BY 4PM ON 20 MARCH 2019

1. We write pursuant to the judicial review pre-action protocol to give formal notification of a proposed claim for judicial review. We are instructed to act on behalf of Mr Jolyon Maugham Q.C. and Good Law Project Limited.

2. We are writing to set out the basis of our client's proposed claim for judicial review of the ongoing failure by the Commissioners of Her Majesty's Revenue and Customs ("HMRC") to raise VAT assessments against Uber London Ltd.

3. Please note that we require a response to this letter by 4pm on 20 March 2019.

4. In the absence of a satisfactory response within this timeframe, we are instructed to take steps to issue judicial review proceedings. Should such steps be necessary, we also place you on notice of our intention to seek to recover our costs in accordance with the guidance in *M v London Borough of Croydon* [2012] EWCA Civ 595.

A. Claimants

5. The First Claimant is Mr Jolyon Maugham Q.C., a well-known expert in indirect taxation. Alongside his practice as a litigator in the tax field, Mr Maugham writes and campaigns on the intersection between law and public policy, with a particular focus on tax amongst other things. He is the founder and director of Good Law Project Limited ("**GLP**"), a not for profit organisation dedicated to bringing and supporting public interest litigation in the field, *inter alia*, of tax. The second Claimant is GLP.

B. Defendant

6. The Defendant is HMRC.

C. Interested party

7. Uber London Limited (Company No. 08014782) of Aldgate Tower, First Floor, 2 Leman Street, London E1 8FA ("**Uber**").

D. Summary of the matter being challenged

8. HMRC's ongoing failure to raise VAT assessments against Uber under the VAT Act 1994

E. Additional documents attached

9. We attach for reference the following documents:

    a. The witness statements served by Uber in continuing proceedings between Mr Maugham and Uber.

F. The Issues

Background

10. The background to this matter will be familiar to the Defendant.

11. Uber is a company incorporated in the UK and registered for VAT under VAT registration number 140668515.

12. Uber is a licensed private hire operator in London. Uber purports to accept private hire bookings as an intermediary between persons seeking transportation services and third party private hire vehicle drivers. The contract entered into between Uber and a person booking a vehicle through Uber expressly states that Uber does not itself provide transportation services.

13. It is trite law that VAT law looks beyond the terms on the face of the contractual relationship between the parties to the underlying economic reality. The economic reality is that Uber is a supplier of transportation services. Its drivers are, for these purposes, workers and therefore its agents.

14. By way of example, on 15 March 2017, the First Claimant booked through Uber's app and took a taxi service for a consideration of £6.34 in order to travel to a client. That journey was made in the course or furtherance of the First Claimant's business for the purposes of section 26(2) VATA 1994. The First Claimant asked for a VAT invoice under regulation 13 of the VAT Regulations 1995. Uber refused to supply a VAT invoice.

15. In separate proceedings, which are ongoing, the First Claimant seeks to challenge Uber's refusal to provide a VAT invoice.

16. The First Claimant observes that, in those proceedings, Uber asserts that it has been in regular discussions with HMRC in relation to its affairs, including in relation to VAT.

17. On 30 June 2017, the First Claimant wrote to HMRC noting that he had claimed an entitlement to set off the VAT on that journey, noting that he did not have a VAT invoice and inviting HMRC to exercise its discretion to allow him to do so. Further correspondence ensued, culminating in a letter dated 9 November 2017 by which HMRC refused to exercise its discretion. The First Claimant brought an appeal against that refusal, which was withdrawn by consent by order dated 9 July 2018 because the appeal would serve no purpose in light of the decision of the Court of Appeal in *Zipvit Ltd v HMRC* [2018] EWCA Civ 1515. That agreement to dismiss those proceedings had nothing to do with, and casts no doubt on, the claim that Uber in fact made a taxable supply to the First Claimant.

18. On 10 October 2017, the First Claimant took a further journey with Uber, this time with an UberPool. A journey using UberPool has relevantly different features from a normal Uber journey including, in particular, (a) that the Uber group accounts as principal for the entirety of those revenues and (b) that the sum passing to the driver is not or not simply a function of the fares paid

by the passengers. It is even less plausible for Uber to claim that it is a broker supplying business services to drivers, rather than supplying transportation services to consumers, where the payment received by the driver for any journey will depend not only on the time and distance to be travelled but also the number of passengers (such that the more passengers, the lower the percentage of the fare is paid to the driver).

19. For reasons that are explained further below, the First Claimant considers that Uber is responsible for a taxable supply where a journey is arranged through the Uber app.

G. Relevant law and grounds of challenge

The power to make an assessment

20. Paragraph 1.7 of the HMRC Charter[1] provides under the heading "*Your rights - what you can expect from us*":

> ***1.7 Tackle those who bend or break the rules***
>
> *We'll identify those who are not paying what they owe or are claiming more than they should and recover the money. We'll charge interest and penalties where appropriate and be reasonable in how we use our powers*

21. The first of HMRC's three strategic objectives[2] is described as follows:

> *"We have 3 strategic objectives:*
>
> - *maximise revenues due and bear down on avoidance and evasion…"*

22. Section 73 of the VAT Act 1994 provides:

> *"(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.*
>
> …
>
> *(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—*
>
> *(a) 2 years after the end of the prescribed accounting period; or*
>
> *(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,*
>
> *but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above,*

[1] https://www.gov.uk/government/publications/your-charter/your-charter (accessed 4 March 2019).

[2] https://www.gov.uk/government/organisations/hm-revenue-customs/about (accessed 4 March 2019).

another assessment may be made under that subsection, in addition to any earlier assessment."

23. Section 76 provides a similar power to raise an assessment in respect of amounts due by way of penalty, surcharge or interest.

24. Section 77 imposes the following time limits:

> *"(1) Subject to the following provisions of this section, an assessment under section 73 , 75 or 76, shall not be made—*
>
> > *(a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, or*
> >
> > *(b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, 4 years after the event giving rise to the penalty.*
>
> *(2) Subject to subsection (5) below, an assessment under section 76 of an amount due by way of any penalty, interest or surcharge referred to in subsection (3) or (3A) of that section may be made at any time before the expiry of the period of 2 years beginning with the time when the amount of VAT due for the prescribed accounting period concerned has been finally determined.*
>
> *(2A) Subject to subsection (5) below, an assessment under section 76 of a penalty under section 65 or 66 may be made at any time before the expiry of the period of 2 years beginning with the time when facts sufficient in the opinion of the Commissioners to indicate, as the case may be—*
>
> > *(a) that the statement in question contained a material inaccuracy, or*
> >
> > *(b) that there had been a default within the meaning of section 66(1),*
>
> *came to the Commissioners' knowledge.*
>
> ...
>
> *(4) In any case falling within subsection (4A), an assessment of a person ("P"), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period or the importation, acquisition or event giving rise to the penalty, as appropriate (subject to subsection (5)).*
>
> *(4A) Those cases are–*
>
> > *(a) a case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf),*
> >
> > *(b) a case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of VAT,*
> >
> > *(c) a case involving a loss of VAT attributable to a failure by P to comply with a notification obligation, and*

(d) a case involving a loss of VAT attributable to a scheme in respect of which P has failed to comply with an obligation under paragraph 6 of Schedule 11A [or an obligation under paragraph 17(2) or 18(2) of Schedule 17 to FA 2017."

25. We note that HMRC has published guidance in relation to Vat Assessment and Error Correction ("**VAEC**").

26. The guidance at VAEC 1111[3] states that:

> *"...Whilst the norm must be to assess for tax as envisaged by the legislation, we must be prepared to recognise the exceptional circumstances where it would be unreasonable to do so.*
>
> *Where we consider that there are grounds for exercising this discretion you should remember that as a matter of policy, the exercise of this discretion is always dealt with as if it were extra statutory either as a class or individual concession with appropriate management authority required." (emphasis added)*

27. VAEC 1120[4] states:

> *"...Therefore, HMRC as a matter of published policy, rely on the date of notification of an assessment as the material date for time limit purposes.*
>
> *It is therefore essential that assessments are notified within the statutory time limits prescribed in the VAT Act for the making of assessments." (emphasis added)*

28. VAEC 1143[5] states:

> *"Four years is the maximum time limit available to the Commissioners for assessments under Section 73 VATA except where the twenty year rule applies, see VAEC1140.*
>
> *The clock for capping purposes does not stop running between, the time you have information sufficiently identifying an under-declaration, to the time when you have sufficient information to make the assessment.*
>
> *It is therefore important to remember that the earliest accounting periods may be vulnerable to falling outside the assessing period, during the enquiry time and if in doubt you should consider making an assessment to best judgement, see VAEC1400." (emphasis added)*

29. There is no doubt that an assessment can be made on a "protective" basis. In *Courts plc v Customs and Excise Commissioners* [2004] EWCA Civ 1527, the Court of Appeal accepted that HMRC can raise an assessment in order to protect the position of HMRC in respect of a future contingency (in that case, an appeal): see paragraphs 102 – 103:

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[3] https://www.gov.uk/hmrc-internal-manuals/vat-assessments-and-error-correction/vaec1111 (accessed 4 March 2019).

[4] https://www.gov.uk/hmrc-internal-manuals/vat-assessments-and-error-correction/vaec1120 (accessed 4 March 2019).

[5] https://www.gov.uk/hmrc-internal-manuals/vat-assessments-and-error-correction/vaec1143 (accessed 4 March 2019).

"102. In the third place, I agree with the judge that a `protective' assessment, in the sense of an assessment which is made in order to protect the Commissioners' position in the event of a subsequent appeal being decided in their favour (see the internal guidance quoted in paragraph 14 above), is nonetheless an assessment. As such it will, when notified, create a debt (see s.73(9)). The fact that no steps will be taken to recover the debt so created pending the occurrence of a future contingency cannot, in my judgment, affect the fact that an assessment has been made.

103. Nor, in my judgment, does the `protective' nature of an assessment render it void or unenforceable on grounds of uncertainty. The epithet `protective' is directed not to the content of the assessment but to the reason for making it."

Why Uber is the supplier of transportation services and therefore obliged to collect VAT on the provision of those services

30. The Claimants consider it clear that where someone books a vehicle for a journey through Uber's app, Uber is making a taxable supply of transportation services for the purposes of the VAT Act 1994.

31. It is clear that for VAT purposes what matters the underlying economic reality of the transaction: see e.g. *HMRC v Newey* C-653/11; [2013] STC 2432 at paragraph 42, applying *Revenue and Customs Comrs v Loyalty Management UK Ltd* C-53/09 and C-55/09; [2010] STC 2651.

32. The economic reality of Uber's operation has been considered in analogous legal contexts, and Uber's claim to function merely as an intermediary has been comprehensively rejected.

33. In *Uber v Aslam and others* [2018] EWCA Civ 2748, the Court of Appeal had to determine whether the EAT was entitled to hold that Uber drivers were workers for the purposes of the Employment Rights Act 1996 read with the National Minimum Wage Act 1998 and the Working Time Regulations 1998. A majority of the Court of Appeal determined that the EAT was not only entitled, but correct, in its finding (paragraph 71). The Court of Appeal noted that there was a "high degree of fiction" in the wording of the standard form agreement between UBV [the company holding the intellectual property in the app] and drivers (paragraph 90). The Court found that ULL "enforces a high degree of control over the drivers" (paragraph 91). The Court expressly agreed with the ET's finding that "it is not real to regard Uber as working "for" the drivers and that the only sensible interpretation is that the relationship is the other way round. Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits" (paragraph 95, emphasis added). The ET decision was released in October 2016. Accordingly, HMRC has been on notice of this issue for over 2 years.

34. Similarly, in *Asociacion Profesional Elite Taxi v Uber Systems Spain SL* [2018] Q.B. 854, the CJEU concluded that while Uber's Spanish operation met the criteria for an "information society service" in principle, that service formed an integral part of a transportation service. At paragraph 39, the Court noted:

"39 In that regard, it follows from the information before the court that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion."

35. You will also be aware that there are a number of further decisions around the world in which the Uber group has been supplying transportation services as principal and engaging drivers to supply services to it.

36. Uber's liability to VAT will be substantial. Based on a 2016 conversation with Uber's Head of Communications in the UK, Ireland and Benelux, the Claimants estimate Uber's turnover at £1.25 billion, which would give rise to a liability to output tax in excess of £200 million per annum. That estimate is relied on by the Claimants, and has not been challenged, in the proceedings against Uber. On that footing, together with interest (and possible penalties if applicable), the Claimants estimate Uber's historic liability could be £1 billion. Those figures have not been disputed by Uber in the *Maugham v Uber* litigation and may well, given Uber's ongoing expansion, considerably underestimate Uber's prospectively VATable turnover.

Why the Claimants have a sufficient interest to bring a claim

37. As explained above, the First Claimant is a prominent tax silk who has taken an active interest in the intersection between law and public policy in the context of tax. It is a matter of serious public concern that HMRC has not taken steps to protect the taxpayer from potentially very substantial losses of tax arising in the context of novel business practices in the so-called "gig economy". It is a matter of record that this is a concern to the Public Accounts Committee and was raised with HMRC on 6 December 2017 by that Committee. The ongoing failure to raise assessments, even on a protective basis, is all the more inexplicable given the decisions in *Aslam* and *Elite Taxi v Uber Systems Spain* referred to above. It is plain from the decision in *R (UK Uncut Legal Action Ltd) v Commissioners of Her Majesty's Revenue and Customs* [2012] EWHC 2017 (Admin) at paragraph 9 and [2013] EWHC 1283 (Admin) at paragraph 41 that the First and/or the Second Claimant has a sufficient interest to bring this challenge – if is the Claimants are right that inaction by HMRC jeopardises hundreds of millions of pounds of public revenue, it is plainly legitimate for them to bring a challenge to that inaction (see also *Maugham v Uber* [2019] EWHC 391 (Ch) at [66]).

Proposed grounds of challenge

38. It is trite law that where statute confers a discretionary power on a decision maker, the decision maker must give lawful consideration to the exercise of that power: see e.g. see e.g. *Stovin v Wise* [1996] 3 W.L.R. 388; [1996] A.C. 923 at 950 per Lord Hoffmann.

39. In the present case, there is no meaningful cost to HMRC in raising an assessment of Uber's liability to pay VAT, even if that assessment is raised on a protective basis. By contrast, there is a vast and irrecoverable loss to the public purse if it transpires that Uber is in fact liable to pay VAT and no assessments have been raised.

40. It is plain from information that is in the public domain that there are, at the very least, reasonable grounds to believe that Uber is the supplier of transportation services such that it is liable to account for VAT on the supply of those services.

41. We note that, giving evidence before the Public Accounts Committee on 6 November 2017, the Chief Executive and Permanent Secretary of HMRC, Mr Jon Thompson, alluded to the fact that HMRC had pursued, and lost, on principal/agency arguments on 5 occasions since 2014. Given that such issues are case and fact sensitive, that cannot possibly justify a failure to raise an assessment in circumstances where that failure will prevent the recovery of tax that should have been paid were HMRC to succeed in the event of litigation with Uber. As the Employment Appeal Tribunal observed in the *Aslam* case (at para 101):

> *"Which side of the divide an individual falls will inevitably be case- and fact-sensitive. That, indeed, is the message I take from the various "mini-cab" cases I was referred to in the VAT context. Most are first instance decisions and not binding on this Tribunal, but, in any*

event, what they show is an attempt to determine in each case whether the drivers were providing their services as such to or as part of another entity (the taxi firm) or directly to the passengers as their clients or customers."

42. There are also cases involving taxi drivers and nominal agents where HMRC has succeeded: see for example *Brynwilliams v HMRC* [2019] UKFTT 79 (TC).

43. HMRC is specifically requested to identify which 5 occasions Mr Thompson was referring to when he gave his evidence.

44. In the same evidence, Mr Thompson also referred to the case of *Secret Hotels2 v HMRC* [2014] UKSC 16, [2014] STC 937 which HMRC lost in 2014. However, *Secret Hotels2* concerned entirely different arrangements to those at issue here. Moreover, and critically, the Supreme Court determined *Secret Hotels2* on the basis that the economic reality had been found to be consistent with the written agreements, which made it clear that the taxpayer acted as agent. In contrast, the ET, the EAT and the Court of Appeal could not have been clearer in *Aslam* that the wording of the standard form agreements employed by Uber did not reflect the reality of its arrangements with its drivers. What the economic reality is in any given case is a question of fact (not law) (see *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, [2013] STC 784 per Lord Hope at [107]). Accordingly, it is unintelligible for HMRC to consider itself bound by the judgment in *Secret Hotels2*.

45. We further note that the Second Permanent Secretary, gave evidence to the Public Accounts Committee that the Employment Appeal Tribunal did not make any ruling on the question whether Uber drivers were the agents of Uber. But that is not correct: at paragraph 91 of its judgment, the EAT identified the question at the heart of the appeal before it as being "whether there was any contract between the drivers and ULL and, if so, whether that was a contract whereby the drivers provided services to ULL or whether ULL provided a service (as agent) to the drivers...". The Court of Appeal upheld the EAT's conclusion that it was the latter. The fact that that decision is on appeal to the Supreme Court is not a reason not to raise assessments, at least on a protective basis. Bearing in mind the clear findings of the ET, EAT and the Court of Appeal, HMRC should be raising assessments now and not, as Jim Harra inexplicably suggested at Question 92 of the Public Accounts Committee transcript, waiting for the outcome of the Supreme Court hearing.

46. Moreover, the Second Permanent Secretary, gave evidence to the Public Accounts Committee that HMRC does not have power to raise assessments in circumstances where it does not believe that the tax is due and that this explained or partly explained HMRC's failure to raise assessments here. However, this evidence is contradicted by (a) the *Courts* decision (referred to above), (b) by HMRC's practice of raising two assessments in the alternative in respect of a single transaction – it must by definition believe one of those assessments to be wrong (approved by the Court of Session in *University Court of the University of Glasgow v Customs and Excise Commissioners* [2003] ScotCS 38, a decision approved in *Courts*) and (c) by HMRC's published Litigation and Settlement Strategy[6] ("**LSS**") which envisages in the commentary to paragraph 18 (on pp.40-41) that HMRC can litigate (and by extension can raise or maintain an assessment) in circumstances where it believes it is unlikely to succeed.

47. In these circumstances, HMRC's ongoing failure to raise assessments in respect of Uber is unlawful on the basis that:

    a. HMRC has misdirected itself in law as to the nature of its powers; and/or

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6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655344/HMRC_Resolving_tax_disputes.pdf (accessed 4 March 2019).

b. HMRC appears to have had regard to irrelevant factors; and/or

c. HMRC has not applied its published priorities, Charter, LSS and/or guidance in relation to raising assessments, by failing to take steps to maximise revenues due and bear down on evasion and/or avoidance, identify those not paying what they owe and/or issue assessments on best judgment protectively if in doubt; and/or

d. the ongoing failure to raise assessments is *Wednesbury* unreasonable in circumstances whether there is no real cost to doing so and the risk of a very substantial loss of revenue by not doing so.

H. The details of the action that the Defendants are required to take:

48. The Defendant must provide a substantive response to this letter **by 20 March 2019** confirming that it has or forthwith will make an assessment of Uber's liability for VAT

I. Details of information sought

49. If the Defendants have not made an assessment, or do not agree to make an assessment of Uber's liability for VAT forthwith, the Defendants are asked to provide a full explanation as to why they have not and will not do so.

50. The Defendants are asked to identify the five cases referred to by Jon Thompson, Chief Executive and Permanent Secretary, of the Defendants to the Public Accounts Committee on 6 November 2017 at his answer to Question 89.

J. Alternative Dispute Resolution

51. Our client is willing to engage in Alternative Dispute Resolution if the Defendant makes a realistic proposal as to the form of ADR and what might be achieved.

K. Details of the Legal Adviser dealing with this claim and address for reply and service of court documents:

Alex Rook
Irwin Mitchell
40 Holborn Viaduct
London
EC1N 2PZ

Email: Alex.Rook@IrwinMitchell.com

L. Proposed reply date:

52. We require a substantive response by 4pm on 20 March 2019.

53. In the absence of a satisfactory substantive response within the above timescale we are instructed to take steps to issue judicial review proceedings without further recourse to you. Should such steps be necessary, we also place you on notice of our intention to seek to recover our costs in accordance with the guidance in *M v London Borough of Croydon* [2012] EWCA Civ 595.

54. We look forward to hearing from you by 20 March 2019.

Should further information be required please do not hesitate to contact us.

Yours faithfully

IRWIN MITCHELL LLP
Enc.