

VAT AND PRIVATE HIRE

UBER BRITANNIA LTD AND SEFTON METROPOLITAN BOROUGH COUNCIL

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Jonathan Main is a VAT and indirect taxes partner at MHA and leads the practice across the North of England. He has a particular interest in the field of transport and has closely followed the developments regarding VAT and the private hire sector.

*The future VAT treatment of private hire revenue was brought into sharp relief by the recent judgment in *Uber Britannia Limited v Sefton Borough Council [2023] EWHC 1975 (KB)**

This article aims to give private hire operators the insight they need now in order to prepare for tomorrow's challenges.



STEADY AS SHE GOES...

There has been a lot of press about the VAT implications of the Uber and Sefton Council High Court decision published in late July.

Private hire operators (PHOs) need to know how this might affect their livelihoods.

It is unprecedented for a case that has nothing to do with VAT to cause this much uncertainty on the future VAT profile of this market.

For now at least, the key takeaway for readers of this article is, steady as she goes.

WHAT HAPPENS NOW?

The most efficient VAT outcome is for a PHO to act as an agent on behalf of the driver for private hire journeys.

- The PHO will charge a fee to the driver for the introduction of business.
- The self-employed driver will accept the journey at their discretion.
- The driver will agree a fare with the passenger.
- The driver will retain the fare and be liable for any taxes, including VAT.

The PHO's VAT liability will be limited to fees charged to drivers and fares collected from drivers employed by the PHO. The agency model is supported by published HMRC guidance. There have been several VAT cases over the years on whether particular arrangements were agency or principal, but none of these have disturbed HMRC guidance that a PHO can operate as a principal for account business and an agent in other cases.

THE LEGAL CHALLENGES

Uber succeeded in its argument that Sefton MBC incorrectly licensed PHOs in its borough and that a PHO should in fact be treated as a principal in the provision of the travel service provided to the passenger.

Uber is using Sefton MBC as a test case for other local councils in England and Wales. Uber lost an earlier decision involving Transport for London (TfL), which dealt with separate but similar licensing regulations applying to PHOs licensed by TfL.

In the TfL case, Uber wished to be treated as an agent. In losing this case, Uber is now a principal in the provision of private hire journeys in London. To level the playing field across most of England and all of Wales (there are different licensing regulations in Scotland, Northern Ireland and Plymouth), Uber is seeking the same outcome already suffered in London, namely that a PHO operates as a principal in the provision of a travel service to a passenger.

Subject to a successful appeal in the Sefton MBC decision, Uber has succeeded in its endeavours, at least to the extent of licensing.

WHERE IS THE VAT ISSUE?

The VAT issue is lurking in the interaction between HMRC guidance and licensing regulations.

To achieve the preferred VAT outcome for private journeys, a PHO will act as an agent, introducing business to a driver for a fee. The PHO charges VAT on fees charged to the driver. The driver is liable for any VAT but only if they breach the annual VAT threshold of £85,000.

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HM Revenue & Customs

Set against the agency treatment is Uber's success in the Sefton case in which it convinced the court that *"an operator who accepts a booking from a passenger enters as principal into a contractual obligation with the passenger to provide the journey which is the subject of the booking."*

At face value, there is a contradiction between a PHO being an agent for VAT and a principal for licencing regulations.

WHAT NOW?

In the short term, steady as she goes. So far, licensing regulations outside London have not changed, nor has HMRC changed its VAT guidance. If you have an operating model that works for you and provides a profitable outcome, this is not the time to change it.

HMRC cannot collect more VAT than you pay now unless:

- Your licensing requirements change, OR
- HMRC disagree with the way you pay VAT today, based on your current operating model.

This means HMRC will not collect any VAT for past VAT periods unless they disagree with the basis on which you are paying VAT today. This would be nothing to do with the Uber and Sefton case.

WHAT IS ON THE HORIZON?

I have been advising clients on VAT and other taxes since 1989 and the actions of HMRC can sometimes beggar belief. With that caveat, this is my considered view of the roadmap from this point.

Any change in VAT treatment of fares for private journeys will not require a change to VAT law or HMRC guidance. If a PHO is a principal in the provision of the service provided to a passenger, it is liable for VAT on the fare collected by the driver. This position is clearly set out in existing VAT guidance published by HMRC. It already applies for account business and employed drivers.

HM Treasury and HMRC have provided limited reassurances that they do not plan to change any existing guidance for the sector. Unfortunately, that reassurance is not worth a great deal. The key change will not come from HMRC, it will result from changes to licensing requirements. If local authorities require PHOs to act as principal, HMRC will look for VAT to be paid on that basis. In my experience, HMRC will be wholly inflexible in enforcing this position, will assess for unpaid VAT and have little sympathy for businesses unable to pay, beyond agreeing time to pay arrangements.

WHAT CAN I DO?

First, stress test your business for the worst-case outcome.

- Will you still be profitable if you are required to pay 20% on all private fares?
- If not, can you increase fares and remain competitive?
- From a practical perspective, how will you collect data on private fares, so you can pay the correct amount of VAT to HMRC?

Next, support any lobbying activities to preserve the status quo, namely no VAT on private hire journeys. Private hire would be the only form of passenger transport with VAT. There is no VAT if we travel by bus, coach, train, plane, or in a licensed hackney cab. Private hire is a lifeline for many communities who cannot afford a car, or find it difficult to access other forms of public transport due to personal circumstances, or simply because there's no available bus or train service.

It seems grossly unfair to single out this form of transportation purely because of unrelated licensing regulations.

Finally, this could also be presented as an unexpected Brexit dividend. The UK could not extend zero-rating to private hire pre Brexit, because we were bound by the restrictions of EU law. This is an opportunity to convince the Treasury and your local MP to support our local communities by providing targeted relief from VAT.

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