[2016] UKFTT 0472 (TC)

TC05224

Appeal number: TC/2010/00782

VAT – input tax on supply of motor car by sole trader – whether deduction of input tax precluded by Article 7 of the Value Added Tax (Input Tax) Order 1992 – car insured solely for business use – CCE v Upton considered – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JANE BORTON (trading as Contract Build) **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
SIMON BIRD

Sitting in public in Birmingham on 19 May 2016

Nigel Tremaine for the Appellant

David Wilson, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision is concerned with the recoverability of input tax of £4,913 incurred on the acquisition of a motor vehicle for the purposes of the appellant's business, and a related misdeclaration penalty of £736.

2. This appeal has a long history, and originally had a much wider scope (the sums originally in issue totalled some £66,727 plus interest, in respect of VAT accounting periods 07/06 to 10/08 inclusive). Following the partial hearing of the appellant's original appeal in September 2011, various further hearings occurred and directions were issued, and ultimately the appeal was struck out on 17 July 2012 on account of the appellant's failure to comply with some directions issued following the initial hearing. In June 2013 the appellant applied belatedly for the appeal to be reinstated. The First-tier Tribunal refused to do so, but ultimately the Upper Tribunal ordered her application to be reconsidered at an oral hearing by the First-tier Tribunal. Following that hearing, which took place on 11 August 2015, the original appeal was reinstated.

3. Following that reinstatement, HMRC reduced the assessments it had previously made to nil, except for an amount of £4,913 in respect of period 04/08 in respect of the input tax claimed on the purchase of a Land Rover Freelander. This assessment (and a related misdeclaration penalty of £736) were the subject of the hearing before us.

The facts

4. The appellant carries on business as sole trader in a specialised sector of the building trade.

5. The original assessments arose out of a visit on 3 February 2009. At that visit, HMRC's visiting officer noted that a claim for input tax of £4,913.40 had been made in respect of the purchase of a Land Rover Freelander from Guy Salmon Land Rover, which he considered should not be deductible. A follow up visit was arranged for 31 March 2009, due to the absence of some business records. In a letter dated 9 February 2009, the officer confirmed what records he wished to see, which included VAT invoices to support input tax claims in respect of supplies by Warm Glaze Limited and Hereford Windows (in the amounts of £1,340.53 and £957.65 respectively). The officer had concerns about the accuracy and completeness of the appellant's returns because her business was making profits and made only standard rated supplies, whereas most of her VAT returns were repayment claims.

6. The appellant cancelled the first return visit due to a family bereavement, and the officer wrote to arrange a further visit on 2 June 2009. That visit also proved abortive and the officer wrote to the appellant to request her to bring the records that he wished to see to HMRC's office in Wolverhampton. By letter dated 22 June 2009, the appellant said she would send the records.

7. The detail of what happened next is not clear. According to HMRC (though the officer concerned has not given evidence and Mr Tremaine cast doubt on that officer's bona fides and reliability) no records were received; according to Mr Tremaine, the records were supplied to HMRC but they lost them. In any event, on 27 August 2009 the officer issued an assessment totalling £66,727 in respect of VAT accounting periods 07/06 to 10/08 inclusive. His methodology in doing so was to calculate that the input tax he was disallowing for period 04/08 totalled £7,211.58, some 76% of the total input tax claimed. He disallowed a similar percentage of the input tax in respect of all the other periods under review. He had supposedly been told on his visit that the appellant regularly bought and sold vehicles, which was why he took the view that the disallowed Land Rover input tax should be included when making his calculations, rather than being treated as a one off matter.

8. The assessment was confirmed on review and appealed to the Tribunal on 30 December 2009.

9. Mr Tremaine's evidence (supported by the appellant) was as follows. She had bought the Freelander in April 2008 (the invoice is dated 24 April 2008) intending to use it exclusively for the purposes of her business, to transport tools, materials, etc to and from building sites. Both she and Mr Tremaine had their own private Rover cars for their personal use and the Freelander was so dirty from business use that it was entirely unsuitable for private use. It was from the outset always intended to be (and actually always was) kept at the appellant's business address (which also happened also to be her home address) when it was not in actual use for the purposes of the business. It was registered with DVLA at that address and it was insured solely for business use. It was available for use on emergency call outs (to deal with floods, gas problems and so on) as well as for normal building work and was used to tow business equipment such as a portable office and mobile generators to and from site. We accept this evidence.

10. The appellant had previously encountered VAT problems with a motor vehicle, the fallout from which had informed her intentions in relation to the vehicle now under consideration. At the hearing before us, Mr Tremaine explained the background to those previous problems as follows. In 2004 the appellant had bought a Land Rover Discovery van (a specialised version produced by Land Rover, with no rear seats or windows) as a commercial vehicle for use on site. She had reclaimed the VAT as input VAT. In a VAT assurance visit shortly afterwards, it had been explained that because the vehicle did not have a one tonne carrying capacity, the "commercial vehicle" exception, allowing recovery of input VAT on its purchase, did not apply. The appellant immediately repaid the VAT reclaimed on the purchase of the van without argument. She and Mr Tremaine did however ask for an explanation of the rules governing recovery of input VAT on non-commercial vehicles; those rules were explained as requiring that for purchase VAT to be recoverable, the vehicle should be used exclusively for business purposes, should be registered and kept at the business address when not being so used, and should be insured solely for business use. We accept the account of Mr Tremaine in relation to this historical background.

11. The appellant was not able to produce any documentary evidence that the insurance cover had been limited to business use, Mr Tremaine claiming that the insurance documentation was included in the business records which had been lost by HMRC after they had been sent to them. In the absence of any evidence in rebuttal from the HMRC officer in question, we accept his claim to this effect. The events in question now having occurred over 8 years ago, we did not consider it appropriate to defer the determination of the appeal to request the appellant to obtain external confirmation of the insurance position, which may well not be available in any event after such a long delay. Whilst the somewhat aggressive and confrontational attitude of Mr Tremaine in particular did little to put the appellant's case in its best light, we have reached the view that his evidence on this point (supported by the appellant) should be accepted.

12. We therefore find that when the appellant purchased the Freelander, it was her intention to do so on the basis that it was to be used entirely for business purposes (and not for private use) and, in pursuance of that intention, she followed the advice previously given by HMRC, in that she insured it solely for business use, in fact used it entirely for the purposes of her business and kept it at the main business address (which happened also to be her own private address) when it was not in such use.

The law

13. It is common ground between the parties that the allowability of the disputed input tax depends upon Article 7 of the Value Added Tax (Input Tax) Order 1992, which provides, so far as relevant, as follows:

> "**7 –**
>
> (1) Subject to paragraph (2) to (2H) below tax charged on –
>
> (a) the supply (including a letting on hire) to a taxable person;
>
> …
>
> of a motor car shall be excluded from any credit under section 25 of the Act.
>
> (2) Paragraph (1) above does not apply where –
>
> (a) the motor car is –
>
> (i) a qualifying motor car[1];
>
> (ii) supplied (including on a letting or hire) to, or acquired from another member State or imported by, a taxable person; and

[1] It is common ground in the present appeal that the vehicle in question was a "qualifying motor car"

(iii) the relevant condition is satisfied;

…

(2E) For the purposes of paragraph (2)(a) above the relevant condition is that the letting on hire, supply, acquisition or importation (as the case may be) is to a taxable person who intends to use the motor car either –

(a) exclusively for the purposes of a business carried on by him, but this is subject to paragraph (2G) below; or

…

…

(2G) A taxable person shall not be taken to intend to use a motor car exclusively for the purposes of a business carried on by him if he intends to –

(a) …

(b) make it available (otherwise than by letting it on hire) to any person (including, where the taxable person is an individual, himself, or, where the taxable person is a partnership, a partner) for private use, whether or not for a consideration."

Discussion and decision

14. In the present appeal, the issue between the parties revolves around whether, at the time the Freelander was supplied to the appellant, she intended to use it "exclusively for the purposes of" her business; that in turn depends in part on whether she intended, at that time, to "make it available" to herself or any other person for private use.

15. The phrase "make it available" in this context has been considered by the Court of Appeal in *The Commissioners for Customs & Excise v Upton* [2002] EWCA Civ 520. The difficulty which the Court of Appeal grappled with in particular was that, in the case of a sole trader, the very act of buying a motor car means that arguably the trader has made that car "available" for his or her own private use – even if the trader has a firm and settled intention never in fact to use the car in that way. As the case makes clear, the question is not whether the trader intends actually to put the car to private use, it is whether he or she intends to "make it available" for private use – a very different question. As Peter Gibson LJ put it (at [22]):

"In the case of an individual taxable person who acquires a car there is a particular difficulty in the way of that person if he is to escape from the disqualifying condition that he "intends to … make it available to… himself… for private use." The very fact of his deliberate acquisition of the car whereby he makes himself the owner of the car and controller of

> it means that at least ordinarily he must intend to make it available to himself for private use, even if he never intends to use it privately."

16. It seems clear however that the Court saw it as being at least possible for a sole trader to avoid the disqualifying condition. HMRC themselves apparently contended (see *Upton* at [49]) there were three possible ways to achieve this: that the car could be "physically unavailable, that is to say a car let to another"; or that it could be "realistically incapable of private use, for example marked police cars or ambulances"; and they also considered that cars might be "alternatively insulated from the possibility of private use", by virtue of being "pool cars issued to employees for business use only".

17. Neuberger J (as he then was) did not disagree with the first two of these possibilities, but in any event those possibilities are not relevant in the present case. He expressed himself unconvinced by the third possibility (i.e. pool cars) where the owner was a sole trader – on the basis that:

> "It was suggested … that, if a sole trader acquired a motor car for the sole use of his employees in his business, and arranged for the motor car to be housed some distance away from his home, and for the keys to be kept by an employee, with a view to its only being used for business purposes, the motor car would not thereby be made available for private use. I find that difficult to accept. The person in control of the motor car and of the keys would be an employee of the trader, and could be compelled to provide him with the motor car and the keys for whatever purpose the trader chose."

18. He did go on to say, however (at [49]), that:

> "I think it is also possible that a legal impediment to private use, so that such use would be unlawful, might also amount to unavailability for private use. An obvious example would be where a motor car was only insured for business use. However, it is unnecessary to decide whether that would be sufficient to enable a sole trader taxpayer to avoid the effect of paragraph 7(2G)(b)."

19. Given the facts as we have found them, this is a case in which it <u>is</u> necessary to decide whether such a step is sufficient. This possibility was also touched on (without being dismissed out of hand) by Peter Gibson JL at [24] in *Upton*.

20. Given the general thrust of the reasoning of the Court of Appeal, it is tempting to suggest that an intention (carried through into an action) to insure a motor car solely for business use ought to be no more effective from the sole trader taxpayer's point of view in circumventing the disqualifying condition than setting up "pool car" arrangements; the taxpayer still has the power, as owner of the car, to change his or her mind at any time and extend the insurance cover to private use. If that possibility remains open from the outset, can it properly be said that the taxpayer had no intention at the outset to "make [the car] available… to… himself… for private use"?

21. We have grappled at length with this argument, but in the end we have decided the better view is that if a taxpayer has, with the intention of satisfying the relevant condition, specifically arranged and maintained insurance cover which extends only to business use of the car (and has a settled intention to maintain that state of affairs throughout his or her period of ownership), then (following the suggestion to that effect made by Neuberger J in *Upton*), it is permissible for a tribunal to make a finding of fact that the taxpayer had no intention, when acquiring the car, to make it available to any person, including himself (or herself), for personal use. Such a finding can, of course, only actually be made if it is justified by reference to the evidence as a whole in the particular case.

22. In the present case, we are satisfied on the basis of the evidence as a whole that the appellant had no intention, at the time she acquired the Freelander, to make it available to herself or any other person for private use.

23. It follows that we do not consider Article 7 of the 1992 Order applies to exclude the right of deduction of input VAT on the purchase of the Freelander; accordingly the input tax of £4,913 must be allowed.

24. It also follows that the related misdeclaration penalty should be set aside.

25. The appeal is therefore ALLOWED.

26. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 4 July 2016