[2019] UKFTT 0562 (TC)

TC07356

VAT – Input tax –Whether a business for VAT purposes- appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05257

BETWEEN

BABYLON FARM LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE PETER HINCHLIFFE
MS JANE SHILLAKER

Sitting in public at Taylor House, London EC1 on 8th July 2019

We heard Mr James Hurst of VATangles Consultancy Ltd for the Appellant and Ms Olivia Donovan, Litigator of HM Revenue and Customs' Solicitor's Office for the Respondents.

DECISION

1. The appeal is dismissed. The Tribunal decided that the Respondents were correct to disallow the input tax claimed by the Appellant as the Appellant was not operating as a business during the period from May 2014 to May 2017.

Late submission of documents and witness statements

2. The Appellant submitted a request to submit three witness statements and a large number of documents at the start of the hearing. Mr Hurst explained that he had only been appointed quite recently and prior to that Mr McLaughlin, the co-owner and director of the Appellant, had intended to represent the Appellant. Since his appointment Mr Hurst had produced a

bundle of documents and arranged for witness statements to be prepared. The Tribunal considered the request carefully. The Respondents did not object to the submission of the documents and witness statements. The Tribunal considered that it was consistent with its overriding objective for it to admit the additional documents and witness statements and to continue with the hearing.

SUBMISSIONS AND FINDINGS OF FACT

The appeal

3. The Appellant's appeal is against two decisions of the Respondents dated 11th May 2018 that denied input tax recovery for a total of £19,765 and reduced the amount of the Appellant's claim for input tax to nil for the period from May 2014 to May 2017 (the "relevant period"). The Respondents concluded that there was a negligible level of substance to the business activity of the Appellant on an annual basis and the business was not conducted on sound and recognisable business principles. The Appellant objected to these decisions and a review was carried out by the Respondents. The Respondents issued a review conclusion letter on 13th July 2018, which stated that they had concluded that there was nothing to suggest that the Appellant was actively or actually in business for the purpose of VAT during the relevant period. The review concluded that any business undertaken by the Appellant was not conducted on recognised business principles. This conclusion reflected the Respondents' view that:
   - The Appellant produces hay and maintains outbuildings on a farm owned by Mr McLaughlin.
   - The scale of the business was not of a kind that could be argued to be a business venture.
   - The Appellant's activity had insufficient substance to constitute a business activity
   - The only customer for the hay was Mr McLaughlin for his livery business.
   -No invoices had been issued by the Appellant to Mr McLaughlin, no payment had been received from him and no contract was in place for the supply of hay.
   - Invoices were submitted for the hay and payment was made only after an inspection by the Respondents that led to the decisions that are the subject of this appeal.
   - The haymaking activity was not being conducted according to sound and recognised business principles and was not predominantly concerned with making taxable supplies for consideration.

4. The Appellant submitted an appeal on 11th August 2018 in which it stated that it had made taxable supplies for most of its existence and it has always been the company's intention to make taxable supplies. The Appellant's farming activity had been carried on uninterrupted since 1989 and the hay making was the vestigial remains of the original farm business. The Appellant had a history of providing services to other businesses owned by Mr McLaughlin and the farming is a small part of the company's business. During the relevant period the Appellant had been involved in launching two new business ventures and provided accommodation and business services to these businesses, which were being developed by Mr McLaughlin. In addition over the years 2014 to 2016 the Appellant had worked to sell some of the farm buildings that it owned for a total of £495,000. Its activities had always been run on sound business principles and its activities as a whole were not negligible. As a consequence the Appellant stated that it was entitled to recover the amount of VAT it had incurred principally on building a new barn.

5. The onus of proof in the appeal is on the Appellant to establish that it is entitled to credit for input tax.

6. The Respondents submitted a statement of case in response to the appeal. The Respondents confirmed that they were denying input tax recovery on £19,720.50 of VAT claimed by the Appellant in the VAT returns they submitted during the relevant period. The Respondents acknowledged that the Appellant had carried out the VAT exempt sale of outbuildings during the relevant period. The Respondents stated that Mr McLaughlin was carrying out a livery business in his own right throughout the relevant period and not through the Appellant. Their position remained as set out in the review of the original decisions.

The law

7. The Respondents powers to allow or disallow claims for input tax are governed by the Value Added Tax Act 1994 (the "Act"). The sections of the Act that are referred to in this decision or that are otherwise particularly relevant to this appeal are set out below:

(1) Sections 24-26 of the Act set out the basic principles of VAT input tax.

"s.24 Input tax and output tax.
(1)Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say—
(a)VAT on the supply to him of any goods or services;
(b)VAT on the acquisition by him from another member State of any goods; and
(c)VAT paid or payable by him on the importation of any goods from a place outside the member States,
being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.
(2) Subject to the following provisions of this section, "output tax", in relation to a taxable person, means VAT on supplies which he makes or on the acquisition by him from another member State of goods (including VAT which is also to be counted as input tax by virtue of subsection (1) (b) above).

s.25 Payment by reference to accounting periods and credit for input tax against output tax.
(1) A taxable person shall—
(a) in respect of supplies made by him, and
(b) in respect of the acquisition by him from other member States of any goods,
account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.
(2)Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.
(3)If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a "VAT credit".

s.26 Input tax allowable under section 25.

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2)The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection."

(2) In assessing whether supplies have been made in the course or furtherance of a business, section 94 is of assistance:

"**s.94 Meaning of "business" etc.**

(1) In this Act "business" includes any trade, profession or vocation.

(2)Without prejudice to the generality of anything else in this Act, the following are deemed to be the carrying on of a business—

(a) the provision by a club, association or organisation (for a subscription or other consideration) of the facilities or advantages available to its members; and

(b) the admission, for a consideration, of persons to any premises.. . . . . .

(4) Where a person, in the course or furtherance of a trade, profession or vocation, accepts any office, services supplied by him as the holder of that office are treated as supplied in the course or furtherance of the trade, profession or vocation.

(5) Anything done in connection with the termination or intended termination of a business is treated as being done in the course or furtherance of that business.

(6) The disposition of a business, or part of a business, as a going concern, or of the assets or liabilities of the business or part of the business (whether or not in connection with its reorganisation or winding up), is a supply made in the course or furtherance of the business."

(3) The criteria for whether a business may be registered for VAT are set out in paragraph 9 of Schedule 1 of the Act.

"**SCHEDULE 1**

REGISTRATION IN RESPECT OF TAXABLE SUPPLIES: UK ESTABLISHMENT

Entitlement to be registered

9. Where a person who is not liable to be registered under this Act and is not already so registered satisfies the Commissioners that he—

(a) makes taxable supplies; or

(b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,

they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him."

Agreed facts

8. The Tribunal understood the following facts to be agreed between the parties at the time of the hearing and found them to be supported by the evidence:
   (1) The Appellant's only income during the relevant period arose from the sale of hay and amounted to £440 p.a.
   (2) The only customer for the hay was Mr McLaughlin, who required it for his livery business.
   (3) The Appellant had been registered for VAT since 1991 and had previously carried out more extensive farming activities whilst under the ownership of Mr McLaughlin and his wife.
   (4) The Appellant had previously received management fees from successful businesses that Mr McLaughlin had owned and run.
   (5) During the relevant period Mr McLaughlin was seeking to develop new businesses.
   (6) The Appellant's claims for input tax during the relevant period arose mainly from the cost of building a new barn in order to replace the outbuildings sold by the Appellant. This new barn was used to store the equipment and machinery required to carry out the haymaking activities of the Appellant.
   (7) The land on which the hay was grown belonged to Mr McLaughlin or to Mr and Mrs McLaughlin and not the Appellant.
   (8) The Appellant owned and had control over some outbuildings on the farm occupied by Mr and Mrs McLaughlin. Mr and Mrs McLaughlin owned land and other buildings on the farm.

9. In the appeal the Appellant had also sought to challenge the decisions by the Respondents to de-register the Appellant for VAT on the basis that its trading activities fall outside the scope of VAT on taxable supplies. The Respondents confirmed in a letter dated 29th March 2019 that until this appeal was settled the Appellant continues to be registered for VAT. The parties agreed at the hearing that the de-registration of the Appellant was not therefore in issue in this appeal and the Respondents will need to make a new decision with regard to the Appellant's registration for VAT after this appeal is determined.

Issues in dispute

10. The issue in dispute between the parties in this appeal is whether or not the Appellant was engaged in economic activity and operating as a business during the relevant period. At the hearing the parties set out their positions on whether the Appellant was operating as a business. The Respondents stated that there is no conclusive definition of what constitutes a business for VAT purposes and explained that they had based their conclusion on this issue on the principles set out in the decision of the High Court in the case of *Customs and Excise Commissioner v Lord Fisher (1981) STC 238*, which they regarded as setting out the six indicators that are to be used in assessing whether an activity is being carried on as a business.

11. The Appellant argued that it was not open to the Respondents to argue that a person properly registered for VAT was not carrying on a business; the Respondents would need to de-register the person before such a claim could be made. Furthermore, the Appellant stated that it was entitled to be VAT registered during the relevant period as it was carrying on business and making taxable supplies.

SUBMISSIONS OF THE PARTIES AND REASONS FOR DECISION

De-registration

12. The Tribunal considered the Appellant's submission that the Respondents needed to de-register a person from VAT before concluding that they were not carrying on a business. The Appellant argued that under paragraph 9 of Schedule 1 of the VAT Act 1994 a person making taxable supplies is entitled to be registered for VAT. The Appellant stated that it would be ultra vires for the Respondent to find that a person was not carrying out business activities whilst they were still registered for VAT. The Tribunal understood that the Appellant was asserting that the Respondents continued registration of the Appellant was clear evidence that they accepted that the Appellant was making taxable supplies.

13. The Tribunal considered the Appellant's submission and noted that paragraph 9 of Schedule 1 of the Act requires the Respondents to be satisfied that a person is either making taxable supplies or is carrying on a business and intends to make such supplies in the course or furtherance of a business before they are registered for VAT. The Tribunal accepts that the registration of the Appellant demonstrates that the Respondents were satisfied that it met these requirements. The Tribunal has not, however, been referred to any legal argument that supports the contention that the Respondents must de-register a person before they could conclude that they were not operating as a business. Paragraph 9 of Schedule 1 of the Act deals with the criteria for registration but it does not place restrictions on when deregistration may be permitted. The Respondents must be allowed some time to become aware of relevant information about the activities of a person who is VAT registered and, having done so, they would have to satisfy themselves that a registered person continues to meet the criteria for registration. If they do not the Respondents must follow the requirement of the Act with regard to the timing of a decision to de-register any person. The Tribunal did not accept the Appellant's submission that the Respondent needed to de-register a person from VAT before concluding that they were not carrying on a business. The Tribunal concluded that the question of whether or not the Appellant was carrying on business and making taxable supplies for the purposes of VAT needed to be determined on the facts and that the mere fact that the Appellant was registered for VAT did not constitute an acceptance by the Respondent that a person was, at all times whilst registered, operating as a business.

Business

14. The Tribunal concluded that in order to determine whether or not the Appellant was carrying on an economic activity through a business during the relevant period, it needs to consider s.94 of the Act and to assess and understand (i) what activities were being carried out by the Appellant in the relevant period and (ii) whether those activities were such as to constitute, as a matter of fact, a business.

15. It is agreed that the activities being carried out by the Appellant include the making of hay for re-sale to Mr McLaughlin and the sale of outbuildings. The Appellant argued that it was also undertaking preparatory acts for the new business activities that Mr McLaughlin was developing and that it would be able to levy management charges on these businesses once they were generating revenue. One new business activity was the creation of an investment and insurance product that would help to fund the care needs of older people. The other new business described by Mr McLaughlin was the provision of management and financing advice to small businesses. During the relevant period Mr McLaughlin was working on these two new business opportunities. It became clear from the evidence of Mr McLaughlin in the

hearing and the submissions on behalf of the Appellant, that neither of these activities had yet resulted in any chargeable services being provided and that both were to be carried on through companies that had been formed for these purposes. In relation to the care funding activities Mr McLaughlin corresponded in the name of Investment in Care Ltd and contracted in that name. Mr McLaughlin's evidence at the hearing was that he had formed a new company, Babylon Farm Consulting Ltd, in order to pursue the consultancy activities. Both businesses remained at a formative stage and neither company has generated any revenue.

16. The Appellant's activities during the relevant period in relation to these new business opportunities need to be assessed. The Tribunal was not made aware of any evidence that any service was provided at this time to either of the new companies or that preparatory acts were undertaken by the Appellant during the relevant period in order that it could provide such services in the future. The Tribunal understood from the evidence that the Appellant's involvement in these new businesses was to be limited to providing accommodation and unspecified support services for these new companies from the Appellant's buildings in return for payment of a management charge.

17. Mr McLaughlin did not seek to argue that he or the companies that he controlled were the recipient of services or goods from the Appellant during the relevant period and none were identified and invoiced. The new businesses through which Mr McLaughlin was intending to provide services remained at a preparatory stage during the relevant period. The Tribunal concludes that the Appellant did not itself carry out any activities during the relevant period in connection with the new businesses that Mr McLaughlin was pursuing.

18. The Tribunal went on to consider the evidence and submissions in relation to the activity of haymaking and the sale of outbuildings for development. S.24 of the Act provides that input tax can be recovered on the supply of goods or services used or to be used for the purpose of any business carried on or to be carried on by a taxable person. S.94 of the Act offers some guidance on what constitutes a "business" but does not seek to offer a comprehensive definition. In the case of *Customs and Excise Commissioners v Lord Fisher [1981] STC 238*, the High Court identified six factors that could be used to determine whether an activity constitutes a business. These factors require an examination of whether the activity;
- is a serious undertaking earnestly pursued;
- has a certain measure of substance;
- is an occupation or function actively pursued with reasonable or recognisable continuity;
- is conducted in a regular manner and on sound and recognised business principles;
- is predominantly concerned with the making of taxable supplies for consideration; and
- the supplies were of a kind that, subject to differences of detail, are commonly made by those who seek to profit from them.

19. The Tribunal reviewed all of the evidence and the submissions in this appeal against these six criteria and concluded that:
    (1) The hay making activity was being seriously and earnestly pursued by the Appellant. Mr McLaughlin organised this activity using the equipment and machinery that had been in use for many years when the Appellant had a larger active farming business. Mr McLaughlin explained that he and his wife had wanted a farm and had carried on farming for many years and remained committed to it. Hay making was the last part of that activity. The customers of Mr McLaughlin's livery business were the end-users for the hay and there was a clear purpose in producing the hay.

(2) For the same reasons the hay making activity had some substance. The supply of hay is zero rated but is not VAT exempt. However it was a very modest activity carried out on a casual basis.
(3) The hay making activity has been continuous even though it was seasonal. The Appellant undertook this activity regularly and had done so for many years.
(4) The Tribunal accepted that the supply of hay for consideration was a common activity that was frequently carried on for profit in agricultural businesses.
(5) The activity of haymaking was not being conducted in a regular manner and on sound and recognised principles. The hay was grown on land belonging to Mr and Mrs McLaughlin. There was no evidence of the commercial basis on which the Appellant was able to carry out the cutting of hay or any other activity on Mr and Mrs McLaughlin's land. The hay was cut and baled by the Appellant on the machinery it owned and operated. The bales were then sold to Mr McLaughlin for his livery business. He fixed the price that he paid for the hay and decided what costs were borne by the Appellant and which he or another of his businesses bore. The business activities of the Appellant do not appear to give rise to any staff or other costs. Mr McLaughlin appeared to carry out some or all of the activity himself without charge. It is only the Appellants' ownership of the baling equipment and machinery that was used in the hay making activity that justifies a conclusion that it had any involvement at all in this activity. The profitability of the Appellant's hay making activities was entirely dependent on Mr McLaughlin's subjective judgement as to where costs and revenue should be allocated between his various activities.
(6) The Tribunal were not persuaded that the hay making activity was predominantly concerned with making taxable supplies for consideration. The activity raises little revenue, under £500 per year and consists of Mr McLaughlin cutting and baling the hay on his and his wife's land in order to sell it back to the livery business that he owns for onward sale to the clients of the livery business. No invoices had been raised by the Appellant for payment by its only customer and no payment had been made for the bales of hay for a number of years until payment was identified as being relevant to the Respondents' view of the input tax claimed by the Appellant. The Appellant's activity was not predominantly concerned with making a profit.

20. The Tribunal considered the sale during the relevant period of the outbuildings owned by the Appellant for re-development and sought to assess whether this was relevant to its judgement on whether goods or services were being acquired or supplied for the purpose of any business carried on or to be carried on by the Appellant based on the criteria set out above. This activity was clearly a one-off capital transaction. It was a VAT exempt transaction. The Tribunal was not provided with any evidence that this activity formed a part of any continuous or regular business or was concerned with the making of taxable supplies or other trading activity.

Conclusion

21. The Tribunal concluded in all of the circumstances of this case that the evidence and submissions established that the Appellant's activities during the relevant period had been confined to haymaking and the sale of buildings and that these activities had not been conducted on a basis that followed sound and recognised business principles or on a basis that was predominantly concerned with the making of taxable supplies for consideration. As a consequence the Appellant was not operating as a business during the relevant period.

22. It follows from the finding that the Appellant was not operating as a business during the relevant period that the Respondents were correct to disallow the input tax claimed by the Appellant during that period.

23. Therefore the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

24. 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.

PETER HINCHLIFFE
TRIBUNAL JUDGE

RELEASE DATE: 03 SEPTEMBER 2019