Neutral Citation: [2022] UKFTT 00169 (TC)

Case Number: TC08496

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2021/02175

VAT-Input Tax-whether two vehicles, a personalised number plate and items of clothing were business expenses and use was exclusively for business purposes-no-Appeal dismissed. Sections 25(3) and 73 of the Value Added Tax Act 1974 and Article 7 of the Value Added Tax (Input Tax) Order 1992.

Heard on: 29 April 2022
Judgment date: 26 May 2022

Before

TRIBUNAL JUDGE RUTHVEN GEMMELL WS
REBECCA NEWNS

Between

MADDISON and BEN FIRTH T/A CHURCH FARM

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Maddison Firth

For the Respondents: Pembe Ramadan, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video and was attended remotely by the representatives of the parties and HMRC's witness, and Officer, Robert Phillips ("RP"). The documents to which the Tribunal was referred are described in this decision and included in an Amended Bundle of documents.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. This was an appeal against HMRC's decision to amend Church Farm's ("CF") VAT return to remove input tax for an amount of £28,374.14 pursuant to Section 25 (3) of the Value Added Tax Act 1994 ("VATA 1994").

4. HMRC refused an input tax claim on CF's VAT return for October 2020 on the basis that some of the items claimed were not allowable business expenses. This included VAT for two vehicles ("the vehicles"), a personalised number plate ("the number plate") and clothing ("the clothing") to the value of £28,374.14.

5. The appeal was made late but HMRC did not object to this and the Tribunal treated the appeal as made in time.

6. CF have been registered for VAT from 8 December 2017 and the partners of the business are Mrs Maddison Firth ("MF") and Mr Ben Firth ("BF"). The declared trading activity on the VAT application form was "subcontracting glam/camping, weddings and events".

7. On 29th October 2020, MF wrote to HMRC/RP explaining that CF was preparing its October 2020 VAT return and wanted to advise that new cars were included in the return and referred to HMRC guidance.

8. This email also stated "You will note we now have an ERS licence from the council that allows us to use the cars for business purposes". The attachment was a Private Hire Operators Licence issued by Cotswold District Council dated 26 October 2020 and the licence holder was BF.

9. By email dated 30 October 2020, MF wrote to RP enclosing an email from CF's accountant dated 27 October 2020, which advised that it was usual that no VAT can be recovered on the purchase of a car due to private use restrictions. It said "however, you may be able to claim all the VAT on a new car if it's mainly used as a taxi, for driving instruction and for self-drive hire"

10. RP replied, on 30 October 2020, advising that claiming input tax on new cars is "generally blocked" but advising MF to consider the HMRC guidance and determine whether any car purchased met the criteria to allow input tax to be claimed.

11. On 17 November 2020, RP requested insurance documents for the vehicles and a list of invoices which needed to be checked.

12. On 1 December 2020, RP wrote to MF stating that the input tax on the purchase of both vehicles being an Audi Q8 and an Audi TT was disallowed. This was because the insurance documents stated that the vehicles were available for social, domestic and pleasure use ("SDP use"). The certificates added that they were not covered for commercial travelling including the carriage of passengers for hire or reward

13. In evidence MF explained that the Audi TT, although having 5 seats, was in effect a 2-seat car and that its business use was travelling to meet designers and others in relation to their building of 8 houses. The other Audi, a Q8 model, was an SUV/4x4.

14. RP explained that CH had taken out insurance on both vehicles allowing private use which clearly meant that they must have intended to make the vehicles available for private use.

15. On 01 December 2020, MF responded to RP stating that car insurance with NFU Mutual insurance always included SDP use as a standard or generic term and that CF had taken out insurance to fulfil their legal obligations. CF insured all their vehicles including agricultural vehicles such as diggers and tractors in this way and they all had SDP use.

16. MF explained that she had been diagnosed with rheumatoid arthritis and in view of this and the national lockdown there was no point in contacting insurance brokers in relation to the vehicles to obtain revised insurance since they would remain on the business premises because of the lockdown restrictions.

17. MF stated that their business was registered with the local council so the vehicles could be used for private hire or reward.

18. A locked compound for the vehicles was being erected as at 01 December 2020 and which the Tribunal was told cost £40,000 to erect. MF also submitted a photograph of the mileage logs which showed minimal use in line with the lack of use of the car due to the national lockdown.

19. MF explained that she was undertaking a teacher training course for Pilates and the clothing she had purchased was to support this and should qualify under the "perks of an accepted business expense".

20. The number plate on a business vehicle, BS70BEN, which was a motorbike, was utilised as a form of advertising for her husband and business partner who is generally and widely known as Ben.

21. The motorbike was used for moving between farms and was purchased by CF. The motorbike would have needed a number plate in any event but in evidence MF was unclear whether this would have been included in the original purchase price or purchased separately as had been the number plate.

22. On 7 December 2020, RP sent an email to MF explaining that the new insurance documents for registrations TT70HEN and RS70HEN, the Audi vehicles, respectively the TT and Q8, dated 18 November 2020 still included social domestic and pleasure and still excluded hire and reward. HMRC could not accept that either vehicle was intended for business use only. RP explained that the copy of the private hire operator's licence issued on 26 October 2020, which allowed CF to use the vehicles for private hire reward, made no impact on whether CF could claim input tax on these purchases.

23. On 8 December 2020, MF wrote advising that she had read up on the VAT issue and referred to HMRC losing a case against a company who had claimed VAT on 6 cars at the First-tier tax Tribunal, as it was accepted that it was extremely hard to find insurers that did not include social, domestic and pleasure insurance as a standard term in their policies. MF stated that she recalled the name of the case being *Zone Contractors Ltd* (*v. HMRC* [2016] UKFTT 0594 TC).

24. MF also stated that CF's insurance policy covered any person over the age of 25 to drive business vehicles and that they had in place a form that was agreed with all drivers that when the vehicles are used and which prohibited private use. A copy of this form was exhibited at

the Tribunal hearing and MF confirmed that there were no sanctions if the condition on the prohibition of private use was breached.

25. MF stated there was a gym at the farm and MF was training to be a Pilates instructor. She was unable to progress this because of the lockdown but still needed appropriate clothing for this and at the date of the hearing had not yet used any of the clothing.

26. On 10 December 2020, HMRC wrote a formal reduction notice for the VAT period ended 31 October 2020. The amount of input tax that had been refused was £28,374.14 and the reduction was made under Section 73 VATA.

27. On 17 February 2021, MF advised that NFU Mutual had voided CF's policy meaning the vehicles were never intended for private use. RP explained that whereas this may be the case he thought it was unlikely to remain the case for long. RP stated that the vehicles were clearly bought for general use which would remain despite the problems MF was having with rheumatoid arthritis which affected her arms.

28. MF explained that because of her problems with her arms she had been required to employ drivers to drive a vehicle although in evidence she advised this was a BMW and not the vehicles being the subject of the appeal.

29. RP stated that he did not accept that the Tribunal case, *Zone Contractors*, that MF referred to, set out the same circumstances as CF's as it related to a small fleet of cars that were clearly purchased with a very clear business use in mind. It was accordingly, not relevant to CF's claim.

30. The Tribunal reminded MF that decisions of a First-tier Tribunal are not binding on another First-tier Tribunal but may be persuasive, and that decisions of the Upper Tribunal and higher courts were binding on it.

31. RP stated that he did not regard the number plate as a legitimate business expense and proposed a 50-50 reduction in the claim for clothing.

32. RP also explained that the business of hiring was not included on the insurance document and that none of CF's other income streams would require the business use of the vehicles. At the hearing MF stated that there was no question of either of the vehicles being used for hire and questioned why this was relevant. RP explained that it related to the original correspondence which also included the private hire licence issued by the council.

33. On 17 February 2021, a request for a review was made by CF and on 6 May 2021 Officer Sutton of HMRC issued a review conclusion letter upholding HMRC's decision to allow the input tax.

34. On 6 May 2021, MF contacted Officer Sutton and provided a list of vehicles on CF's agricultural insurance policy which confirmed that all vehicles and plant machinery were covered for SDP use as well as for business purposes.

35. MF stated that as this included vehicles such as a digger and a paver, HMRC's assumption that a policy which included SDP use and which is not regarded as business use was incorrect. She stated she would not take a paver to travel to shops neither she would drive all the other farm vehicles/plant which had the same policy wording as the vehicles. She would take the vehicles to the dealer who sells plant so that someone could then take the plant home or attend meetings or pick up ad hoc items for business.

36. A business mileage log for TT70HEN showed journeys of meetings to/from SSE and solicitors, collecting the car and meeting with Cotswold construction between 24 October 2020 and 29 October 2020 in an amount of 290 miles.

37. On 14 June 2021, RP, after considering the further evidence provided, concluded that the purchase of the number plate was not a legitimate business expense, since it added no value to CF's business activities.

38. The agricultural policy, mileage clocks and car usage agreements did not detract from the fact that the vehicles' SDP use for insurance allowed for private use and that the intention of using the vehicles for private hire was not covered by the insurance documents. RP confirmed these findings of 14 June 2021 at the hearing.

CF's submissions

39. CF say that the vehicles were bought in October 2020 and insurance taken out in November 2020 when lockdown meant that they could not be used due to the restrictions in place.

40. The insurance policy taken out for the vehicles was the same as for all the other agricultural vehicles that they have and is a standard or generic policy issued by NFU Mutual which automatically includes SDP use. This was subsequently removed in respect of the Audi TT vehicle

41. Insurance for the Audi sport TT was changed to remove SDP use in January 2021 when lockdown restrictions had been removed but HMRC did not believe this made any difference to the VAT claim.

42. The lockdown meant that the vehicles could not be used in any event during the period of the lockdown.

43. CF put in place the construction of a locked compound so that the vehicles could meet the business use test set out in the VAT guidance.

44. CF had in place a formal agreement with drivers prohibiting them from using vehicles for private use.

45. CF say that the *Zone Contractors* case is relevant and applicable. This should be followed by this Tribunal.

46. CF say that there was no intention of using the vehicles for private hire use.

47. HMRC had accepted that the motorbike is a work vehicle for business use and accordingly the number plate should be also allowed for this purpose. The motorbike would require a number plate in any event.

48. CF say that the clothing was required for a Pilates training course and the only reason that matter did not progress was again due to the national lockdown. The clothing is required for this purpose in any event.

HMRC's submissions

49. HMRC say that they were correct to disallow CF's input tax claim for the vehicles, the number plate and the clothing.

50. HMRC say that the onus of proof is on CF to demonstrate that the items claimed for are allowable business expenses and once this has been discharged the onus shifts on HMRC to disprove the input tax claim. The standard of proof is the civil standard of the balance of probabilities.

51. HMRC say that the vehicles were not purchased exclusively for the purpose of business. They are not used exclusively for business purposes and accordingly failed to qualify under Article 7 (2) (E) 1992/3222 Value Added Tax (Input Tax) Order 1992.

52. The insurance documents provided on 11 November 2020 stated that both vehicles are covered for "social, domestic and pleasure use, voluntary use, commuting and business use by the policyholder and spouse if entitled to drive under the policy".

53. HMRC say that since the vehicles have been insured for social, domestic and pleasure purposes they have been made available for private use and have failed the test in Article 7 (2G) (B) and so the input tax cannot be claimed.

54. They furthermore rely on VAT Notice 700/64 which clearly states the criteria for recovering VAT on purchasing a vehicle is, as a general rule, not recoverable. A car may be accepted from this general rule if it will be used exclusively for the purposes of the taxpayer's business and would not be available for the private use of anyone.

55. HMRC referred to the Court of Appeal's decision in *Customs and Excise Commissioners v Upton* [2002] BVC 451 where it was held that the deliberate action of acquiring a vehicle, and obtaining insurance permitting private use, made the car available to him [the taxpayer] for private use and that he must be taken to have intended that result, in the absence of evidence to the contrary, even if he did not intend to use the car privately.

56. The Court of Appeal confirmed that the availability of a vehicle for private use, supported by legal documentation is a key indicator of a taxpayer's intention upon purchasing a vehicle and whether the vehicles were used in that way is not determinate of whether their use "exclusively for business purposes" test was met.

57. HMRC say that the documentary evidence which CF provided, to demonstrate the lack of mileage used for each vehicle, to demonstrates that the vehicles were only used for business purposes, carries no weight as this is not a determinate factor when considering the test of availability.

58. The Court of Appeal stated that the question for a Tribunal is whether the taxpayer had the option to use the cars privately and not whether they were or not so used. HMRC say that CF failed to provide evidence to demonstrate that there were clear restrictions in place at the time of the purchase to prevent the vehicles being used privately. As CF did not take out insurance to cover business use exclusively at the outset, HMRC do not accept CF's claim for input tax on the vehicles is valid.

59. HMRC say that although the social domestic and pleasure insurance on the vehicles was cancelled on 30 January 2021 and that CF are now able to take out business only insurance, this was not the position at the time the vehicles were purchased.

60. HMRC say that at the time of purchase there was a clear intention to allow the vehicles to be used privately and the later cancelling of insurance does not affect HMRC's decision.

61. They say that cancellation of a policy is not an indicator of CF's intention to use the vehicles when they were purchased and that such a policy could be reinstated to include SDP use at a later date.

62. Accordingly, HMRC reject that there is sufficient evidence to demonstrate that the vehicles were purchased "exclusively" for the business use.

63. HMRC say that CF failed to demonstrate any legal constraints or sanctions against its employees for any private use of vehicles and referred to *Venda Valet Limited* [2016] UKFTT 572 which confirmed, in the absence of such contractual constraints and despite the absence of actual private use, that the taxpayer must have intended at the time of purchase that the vehicle be available for private use and so could not claim input tax.

64. HMRC say that the agreements provided by CF show restrictions on the vehicles being used for private journeys but no sanctions if such use existed and accordingly add no weight to CF's submissions.

65. HMRC say that the relevant purpose test exemption does not apply in relation to the carriage of passengers for hire or reward and no insurance for this use was in place. MF also said at the hearing that this was never the intended use for the vehicles.

66. HMRC say that the number plate purchase has not been demonstrated as a legitimate business expense.

67. HMRC refer to *BJ Kershaw Transport Limited v The Commissioners of Customs and Excise* [1985] MAN/84/224 where the Tribunal found that the relationship between the company name and a personalised number plate which reflected the initials of its controlling director could not reasonably be expected to serve the business object of promoting the company. HMRC say that the company is Church Farm and not Ben Firth and so there is similarly no reasonable expectation.

68. HMRC also referred to the case of *Hooper* VTD No 19276 where the taxpayer had a claim for VAT for a personalised number plate accepted. In this case the number plate formed part of restaurant advertising and a local campaign to obtain publicity. In that case the personalised number plate and the name of the sole trader became the local name for the restaurant as opposed to its actual name. HMRC distinguish these circumstances from those under appeal.

69. HMRC say they were correct to refuse the claim for VAT on the number plate.

70. HMRC noted that the clothing required to run MF's Pilates class, which is run from a Gym on CF's farm, or as MF stated in evidence to be run from the Gym, would also be used as she would go to work on the farm without changing clothes once she had finished a Pilates class.

71. HMRC rely on Guidance VAT for 3800 which sets out that normally a person is responsible for the cost of their own clothing at work. "A claim that a high standard of dress is required for business reasons does not make the VAT incurred input tax".

72. HMRC do not accept CF's claim that the clothing came under "Perks" which is noted as a legitimate business expense.

73. HMRC say that CF have failed to establish that the articles of clothing used in the Pilates class and onto the farm were exclusively for the purpose of the business. Whilst these clothes would aid the comfort of performing tasks, they do not form part of a uniform or protective clothing which are allowable as input tax. HMRC contended that there were correct to reject the claim for input tax of £104. 83 but have accepted a 50-50 apportionment of the original amount of that claim to clothing and consider this reasonable. HMRC confirmed that that this offer remains place.

74. HMRC say that the appeal should be dismissed and HMRC's decision to exercise its powers under Section 25 (3) of VAT to reduce the amount of input tax claim for the VAT period 10/20 from £72,975.20 to £44,601.06 should be upheld.

Decision

75. The Tribunal noted that CF had taken considerable care to consider the VAT guidance and legislation in relation to the purchase of the vehicles and, as submitted to HMRC, had received advice from its accountant on the matter.

76. This advice stated that "the upshot is that if it is the car is new and used mainly as a taxi/private hire then VAT can be claimed". The email, dated 27 October 2020, also drew MF's attention to the private use restriction and stated "it is usual that no VAT can be recovered on the purchase of a car".

77. On 26 October 2020, BF had obtained a private hire operator's licence to operate private hire vehicles and which was submitted to HMRC.

78. As at the hearing, MF had stated that there was never any intention to use either of the vehicles for private hire and, consequently, it was unclear to the Tribunal why the licence had been obtained and submitted to HMRC in relation to the vehicles.

79. Case law in relation to the private use of cars is clear that this relates to the intention at the time of purchase. A car is used exclusively for business purposes if it is used only for business journeys and is not available for any private use. When it buys a car, a business must not have any intention to make the car available for the private use.

80. The test of whether a car is available for private use is a test of the intention of the business when the car was bought and in particular whether a car has the potential for private use rather than if such use is likely.

81. Relevant factors include: - who has access to the car and when; what is the likelihood that the car will never be used for mixed business and private journeys; what is the availability of the car; whether the user keeps a log of journeys; whether the car is insured for private use; and whether the vehicle has any peculiar feature or adaptations for a particular kind of business use?

82. The Tribunal considered that an insurance policy which included SDP use made the vehicles available for private use. CF states that SDP use is included for all their business vehicles many of which, as MF stated, are clearly unusual, if not unsuitable, for SDP use. The Tribunal noted that CF were, however, able to obtain insurance which removed SDP use cover so that it related only to business use.

83. The Tribunal noted that MF had stated that private hire use, which is one of the grounds on which VAT relief can be given, was not applicable as there was no intention to use the vehicles for this purpose. In addition, no insurance for "carrying passengers for hire or reward" was included in the insurance policy documents for the vehicles despite there being a licence from the local council which allowed BF to use vehicles for this purpose.

84. The Tribunal, therefore, did not consider that taxi/private hire was a ground on which VAT on the vehicles could be claimed.

85. The Tribunal, taking all the evidence into account was not persuaded that the vehicles were purchased "exclusively for the purposes of a business". The locked compound was not considered until 1 December 2020 and the undertaking which prohibited private use had no provision for any contractual restraints and sanctions should that prohibition be breached.

86. The actual use of the vehicles was restricted as a result of the national lockdown but in any event whether the vehicles were actually used exclusively for business purposes is not determinate of whether the exclusivity test was met as this goes beyond actual usage itself.

87. The Tribunal considered that CF and particularly MF and BF had the option to use the vehicles privately.

88. The Tribunal considered *Zone Contractors Ltd*, a First-tier Tribunal case, and agreed with HMRC that the circumstances were sufficiently different to those before this Tribunal and, accordingly, it was neither persuaded nor bound by that decision.

89. The Tribunal also considered Customs *and Excise Commissioners v Upton* where it was decided that intention at the time of acquisition was relevant in relation to the disqualifying condition to obtain VAT relief.

90. The Tribunal, on the evidence before it did not believe that there was sufficient evidence to prove that the intention at the time of acquisition was purely for business use, once CF had confirmed that there was never any intention to use the vehicles for private hire, the lack of insurance for this type of activity and the likely impracticability of using what was described as, in practical terms, a two-seat car for this purpose. Accordingly, the disqualifying condition was applicable.

91. The Tribunal considered the claim for input tax in relation to the number plate which would generally not be allowable. The number plate, however, did not refer to the name/business of CF and there was no evidence to prove that it was known as Ben's business or Ben's farm or Ben's anything, which might bring it within the ambit of the decision in *BJ Kershaw Transport Ltd* and within the classification of promoting CF.

92. The Tribunal, therefore, found that this was not a legitimate business expense and no genuine business purpose was demonstrated.

93. In relation to the claim for clothing for use as a Pilates instructor, it was also stated in evidence that this was used for work in the farm and HMRC proposed a 50-50 apportionment.

94. Judicial decisions have stated that if a high standard of dress is required for business reasons, it does not necessarily make the VAT incurred input tax. Normally a person is responsible for their own clothing at work

95. The Tribunal was not persuaded that the clothing under dispute was either protective clothing, in the normal use of the words, nor a uniform and, whilst accepting that these clothes would aid the comfort of performing tasks, the combination of these factors failed to prove that the cost was sufficiently for the purposes of a business.

96. The Tribunal considered that HMRC were correct to disallow CF's input tax claims relating to the purchase of the vehicles, the number plate and the clothing. CF failed to justify that the input tax claims were valid and that they had met the criteria for each item to be allowed.

97. The appeal is, accordingly, dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

98. 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.

W RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

Release date: 26 MAY 2022