



TC05050

Appeal number: TC/2015/02731

VAT – Input tax – Sale of helicopter held in name of US entity on trust for civil aviation regulatory purposes to UK appellant – identity of supplier?– whether supply by UK company which provided invoice or by US legal owner trustee – supplier was the UK company which held beneficial interest – appeal allowed - whether invoice invalid in any case because it referred to previous company name – HMRC to consider exercise of discretion in relation to “other evidence” Regulation 29(2) VAT Regulations 1995

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Eastern Atlantic Helicopters Limited

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
 JANET WILKINS**

Sitting in public at the Royal Courts of Justice, London on 8 March 2016

Faisal Osman, counsel, for the Appellant

Rita Pavely, HMRC Officer, for the Respondents

DECISION

1. The appellant, Eastern Atlantic Helicopters (“EAH”) buys and sells mainly US
5 manufactured helicopters across the world and also carries out specialist repairs
servicing and chartering. It appeals against HMRC’s decision to disallow input tax
claimed of £50,310.56 in the VAT period 12/13 on an invoice from MP Helicopters
Limited (“MPH”) relating to the sale of a helicopter registered with US Federal
Aviation Administration under “N322MC”. HMRC argues:

10 (1) The helicopter was legally owned by a US trustee, AAA Flight Inc.
 (“AAA”), who was a non-taxable person and that as the purchase agreement
was made between AAA and the appellant, EAH, there was no supply to EAH
on which tax could be charged. MPH was not the legal owner.

15 (2) Even if it was the case that Marshal Parker (“MP”) (the director of MPH)
was the owner, then no VAT was chargeable on the transaction as MP was not a
taxable person.

20 (3) The VAT invoice was defective as the company name MPH was wrong
(the company having changed its name prior to the date of the invoice to
VGEXSYS Ltd. (for the purposes of this decision we shall, reflecting the form
of the submissions and documents before us, refer to the company by its
previous name MPH)).

2. The appellant disagrees; AAA held the registration of the helicopter on a special
purpose trust in order that the helicopter could be subject to the less onerous
regulatory regime of the US but the legal owner was the issuer of the invoice, MPH,
25 and the commercial reality was that there was a supply of goods from MPH to EAH.
It maintains that even if it were correct that the supplier was MP, then HMRC’s case
must implicitly include the suggestion that MPH’s invoice was fraudulent and no such
allegation has properly been pleaded to that effect and furthermore the supply would
still be taxable as MP was a person who was required to be VAT registered under the
30 legislation. As for the invoice being technically invalid the appellant argues that
according to recent relevant European case-law compliance with the VAT
Regulations is not strict and the deduction should not be refused.

Evidence

3. Witness statements were provided from Richard Faulds on behalf of the
35 appellant and Anita Watkins on behalf of HMRC, both of whom gave oral evidence
which was subject to cross-examination by the opposing party. Mr Faulds is the
Finance Director and Company Secretary of the appellant. His evidence covered the
business of the appellant, his involvement in the negotiation and execution of the
transaction in dispute and his witness statement exhibited various items of e-mail and
40 other correspondence relating to the helicopter, together with the invoice from MPH
and the purchase agreement. He also assisted the tribunal as best as he could with
answering our further questions on the operation of the US special purpose trust in
relation to helicopters. Ms Watkins was the HMRC officer who made the decision

under appeal. Her evidence covered the circumstances which led to her visit to the appellant and the reasons she came to her decision. Both Mr Faulds and Ms Watkins were helpful and credible witnesses. In addition we were also referred to some items of correspondence, forms and invoices relating to the prior import of the helicopter and activities undertaken in relation to it and responses that MP had provided in response to HMRC's requests for information.

Facts

4. The appellant trades in new and used helicopters. It represent two US brands, MD Helicopters (formerly McDonnell Douglas) and Enstrom Helicopters and also buys and sells from other international manufacturers. It is based in Shoreham, West Sussex and was incorporated by Simon Oliphant-Hope, the managing director of the appellant, who has been involved in the helicopter industry since the early 1990s.

5. Mr Oliphant-Hope had known Marshal Parker, who operated MPH, for around 15 years or so and MP had been in contact with the appellant since late 2006. It was the appellant's understanding that the helicopter which is the subject of this appeal had been in MPH's possession and control since that time. Mr Oliphant-Hope had been looking to buy the helicopter for a number of years and in late 2013 MP contacted the appellant to say he was finally prepared to sell.

6. MP told the appellant AAA Flight was his company and the helicopter was actually owned in that company. The appellant asked MP about the importation of the helicopter and its VAT status. MP told Mr Faulds he had imported the aircraft in 2000 using a Lennartz scheme (the term Lennartz is commonly understood to refer to the accounting mechanism set out by the ECJ in *Lennartz* (Case C-97/90) whereby a taxable person accounts for output tax on private use of an asset used part for business purposes and partly for private purposes) and that he would therefore have to charge VAT on the sale from the same company he used to undertake the import and VAT reclaim at the time.

7. Mr Faulds' evidence explained that N prefix registration numbers designate an entry on the United States of America Federal Aviation Authority's ("FAA") aircraft register and that it was common for small companies and private owners outside of the US to register their aircraft with the FAA because aircraft registered in the UK Civil Aviation Authority are subject to much higher licensing and operating costs due to the more onerous maintenance requirements (in part due to the binding regulations of the European controlling body, EASA). The FAA require registration to be held by a US entity which can be an individual, corporation or similar structure and also allow the aircraft to be registered to a specific purpose US trust held on behalf of the beneficial owner. There are several companies in the UK which offer the services of creating and maintaining US trusts specifically for non US domiciled owners. Mr Faulds' evidence was that generally upon sale the FAA registration was transferred into another US trust for the new registered owner.

8. A deposit of \$25,000 was sent to the appellant's favoured escrow agent in the US, a company called IATS (Insure Aircraft Title Services). Mr Faulds explained this

company was used to handle any US sale or purchase as not only did they provide escrow services but they could concurrently file the Bills of Sale and title registration changes with the FAA that needed to happen when a purchase or sale completed.

5 9. IATS Inc. confirmed the \$25,000 deposit was received on 31 October 2013. On or around 1 November 2013 Mr Faulds spoke to MP who confirmed that the helicopter was “subject to VAT” and that he would be charging it upon sale.

10 10. On 25 November 2013 at 11.15am MP emailed Mr Faulds asking him to add text to the disbursement instructions in the draft purchase agreement and then return it for him to sign and return. He also attached the VAT invoice (see [14]) asking for payment.

15 11. Mr Faulds replied at 12.34pm the same day with the revised version of the agreement. Regarding the VAT he proposed that on the day the helicopter was to be collected, he would “same-day” the funds to MP’s account and that once it could be seen that the funds had arrived the keys could be handed over. His e-mail also referred to a survey that had been carried out.

The Purchase Agreement

12. This was a two page agreement set out on the appellant’s headed paper with the buyer stated to be the appellant. It provided as follows where relevant:

PURCHASE AGREEMENT

20 ...

THE SELLER AAA Flight Inc. C/O Burkhardt & Larson, [PO Box Address in San Diego] represented by Mr. Marshal Parker, as legal beneficial owner of the aircraft.

25 AIRCRAFT MD 500E S/N 0224E REG Currently N322MC
To include all aircraft log books, flight manual, wheels, tie downs, and loose equipment per Appendix A attached. The Seller will be retaining the registration N322MC and is responsible for re-registering the helicopter as part of completion.

30 PRICE \$405,000.00 US Dollars. All funds paid to Escrow per Appendix B. Escrow fees to be split 50:50 with the exception of any re-registration cost which is to the Seller’s account.

35 TAXES This sale is subject to UK VAT as the aircraft has been subject to Lennartz transaction on import. There will be a separate VAT invoice provided by the Seller’s UK Company with which the Lennartz transaction was undertaken.

TERMS Deposit in the sum of \$25,000.00 USD paid into escrow due on signature of this agreement.

Balance of sale price in the sum of \$380,000.00 USD paid into escrow within 3 working days of a satisfactory survey. Sterling equivalent of

UK VAT amount of \$81,000.00 to be paid into Seller's UK bank on completion of escrow.

5 Buyer has the right to a pre-purchase Survey of the Aircraft and Log Books at Buyer's expense. Survey to be carried out at Seller's location on or before November 5th 2013. Buyer will advise Seller of results of the survey within 24 hours of its completion and of their decision whether to proceed with the purchase of the aircraft or otherwise termination of contract and refund of deposit. Upon written communication of acceptance of Survey by Buyer to Seller the deposit will become non-refundable.

10 Seller to send a signed and completed original Bill of Sale to Escrow within 3 working days of acceptance of the Survey.

15 DISBURSEMENT Upon confirmation from Escrow to Buyer and Seller that Escrow are in receipt of full cleared funds and the original Bill of Sale, Escrow shall accept the signatures of this Purchase Agreement, herewith as authorization from parties to complete this purchase by way of a concurrent disbursement of funds and filing of Bill of Sale as follows:

20 \$25,000.00 to pass through to Marshal Parker (Seller) Escrow ref Helicopter N322MC s/n 0224e as survey complete and acceptable

\$380,000.00 to pass through to Marshal Parker (seller) Escrow ref Helicopter N322MC s/n 0224e simultaneously with lien release.

DELIVERY Completion shall occur at Seller's location.

25 TITLE Good title to remain with Seller until Escrow communicates that escrow has completed, funds have been released and Bill of Sale filed with the FAA. Seller warrants that the aircraft will be free of all liens, mortgages and encumbrances at time of completion whereupon clear title shall pass to Buyer once above UK VAT amount paid to and received by Seller.

30 [Warranty and Jurisdiction clauses]

The Buyer agrees to buy and the Seller agrees to sell the goods at the price and according to the terms and conditions stated therein.

35 13. The agreement was signed "for and on behalf of Mr. Marshall Parker as AAA Flight Inc." and "for and on behalf of Eastern Atlantic Helicopters Ltd" on 25 November 2013. The signatures were dated 23 November 2013. Appendices A and B were also initialled and dated by both. Appendix A set out further details on the helicopter's specification and Appendix B was headed "Escrow details and Disbursement Instructions and Responsibilities". It referred to Escrow Insured Aircraft Title Service (IATS), [giving an address in Oklahoma City,] and an International Bank of Commerce account in Laredo Texas.

45 14. The MPH invoice 13/1994 was on MPH's form and addressed to the appellant. It was dated 25 November 2013 and stated MPH's VAT registration number. The description provided was: "Transfer VAT element for Helicopter N322MC VAT charged @ 20% on \$405,000 (£254,716.98 @ 1.61) Total due £50,310.56. The

invoice requested payment to a Coutts and Co, London bank account and the payment terms were “on receipt of invoice”.

15. A document on the headed paper of AAA Flight (which we understand to be the “Bill of Sale” referred to in the purchase agreement) stated:

5 “Agreement between Marshal Parker/AAA Flight Inc and Eastern Atlantic Helicopters Limited/Simon Oliphant-Hope

Dated 26 November 2013

10 It is hereby agreed between the two parties that upon change of registration of helicopter N322MC, s/n 0224E, Simon Oliphant-Hope and Eastern Atlantic Helicopters guarantees AAA Flight receive for retention the registration number N322 MC.

The registration number N322 MC is not part of the transaction, but is understood that transfer shall take place at the earliest point, subject to official change of the aircraft registration and FAA procedure.

15 Eastern Atlantic Helicopters and Simon Oliphant-Hope holds harmless Marshal Parker, AAA Flight Inc and all their respective entities, should the aircraft registration still be in place in the event the aircraft have cause to be damaged, cause damage or violate any aviation laws relative to the country in which it is operating in.”

20 16. The document was signed “for and on behalf of AAA Flight Inc. and “for and behalf of Eastern Atlantic Helicopters Ltd. The signatures were dated 26 November 2013.

25 17. On 27 November Mr Faulds gave payment instructions to the appellant’s bank to settle MPH’s invoice and made arrangements for the helicopter to be picked up from Marshal Parker’s address by a pilot and co-pilot. Due to a problem with the appellant’s bank electronic payment system the funds did not arrive sufficiently early in the day for the helicopter to be released to the appellant and flown away by the pilots. The funds arrived later in the afternoon and the helicopter was allowed to be transported to the appellant.

30 18. Mr Faulds’ evidence was that in his view he had dealt with MP and MPH as the legal and beneficial owner of the helicopter. He dealt with Mr Parker regarding all the practical arrangements and also in negotiating the price. He considered MP was acting on MPH’s behalf. The only other person involved was Andrea Brown who was MP’s secretary – he did not deal with anyone at AAA Flight Inc. and it was Marshal Parker
35 who had settled the description of the seller in the agreement.

19. Mr Faulds explained that the appellant held a number of US trusts but that he could not recall which one this helicopter had gone into. There were different types depending on lender requirements. He thought the helicopter was registered under what he termed an “owner trust”. When the helicopter came to be sold this was the
40 appellant’s decision, there was no need to consult with trustees, a standard form agreement was used and he thought EAH would be stated as the vendor on the agreement.

20. On 30 December 2013 the appellant sold the helicopter to an individual located in Texas, United States and it was exported from the UK on 20 February 2014.

21. On 9 February 2015 Mr Oliphant-Hope wrote to Marshal Parker at MP Helicopters Ltd setting out his conclusion that the £50,310.56 for UK VAT had not been paid over to HMRC and to demand that either the VAT was paid over to HMRC or returned to the appellant for it to return it to HMRC. As at the date of the hearing no response had been received by the appellant to that letter.

22. We also noted the following points from the evidence that was presented in relation to the import of the helicopter in the UK and subsequent dealings in relation to it.

23. Following Apache Aviation Ltd's request for VAT registration HMCE sent the company a request for information dated 14 July 2000. The questions and answers (which were given by Marshal Parker on 31 July 2000) were as follows:

“1. How many helicopters/aircraft will you be importing and from where?”

One helicopter imported from USA but there is the potential for several others. Keen interest already expressed by potential customers. There has already been the offer to purchase a ½ share in the helicopter.

2. Are these for immediate re-sale or hire?

The helicopter already imported is not for immediate resale, further helicopters will be for re-sale. The first helicopter is for hire and for demonstration.

3. If for hire, are you acting as an agent?

Whilst one of the main business objectives for the first helicopter is hire, Apache Aviation have acquired the helicopter under a longterm “wet lease”. As such they are acting as principle [sic], not agent.

4. What services do you offer and how do you advertise these services?

The main business services offered are:

- i) provision of the helicopter for hire, either with or without pilot.
- ii) As demonstrator to encourage and develop further sales of helicopters.
- iii) As a sponsorship tool for advertisers
- iv) The ultimate objective is to become an importer and dealer in new and used helicopters...”

24. Referring to “one helicopter imported” – one of the main business objectives was hire and Apache Aviation was stated to have acquired under a longterm “wet lease”.

25. On 30 November 2000, Apache Aviation Limited's accountants, Crossley & Davis, wrote to HMCE confirming that a company called Rotorspan Ltd had imported the helicopter into the UK and enclosed a form C79. The letter referred to a Rotorspan tax invoice issued to Apache. The C79 was dated 11 July 2000.

5 26. Although the Rotorspan invoice dated 13 July 2000 referred to helicopter N822MC not N322MC we find on the balance of probabilities given there was no evidence of other helicopters being imported around this time that the reference was a typographical error and the helicopter referred to was N322MC. We note the invoice was addressed to Mr Marshal Parker (Apache Aviation Ltd).

10 27. We were also referred to two invoices from Apache Aviation Ltd to A&E Fire Equipment Limited in respect of a lease agreement, both charging for "20 flying hours @£310.00 per hour".

15 28. On 14 February 2003, HMCE wrote to Crossley & Davis, setting out its view that the private use of the helicopter had been calculated incorrectly. The letter also reports that a discussion had taken place on the question of why input tax had been reclaimed on the importation of the helicopter when it was not registered as an asset of the business. The letter went on to enquire whether AAA Flight Inc subsequently reimbursed MP with the import VAT and to ask what the conditions of the long term "wet lease" were.

20 29. On 2 August 2012 Marshal Parker Helicopters Limited changed its name to VGEXSYS Limited.

Law

30. Section 3(1) VATA 1994 provides that:

25 "A person is a taxable person for the purposes of this Act while he is, or is required to be registered under this Act."

31. Section 4 VATA 1994 provides:

"4. Scope of VAT on taxable supplies.

30 (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply..."

32. Section 24(1) VATA 1994 defines input tax as the VAT in relation to a taxable person which is the "VAT on the supply to him of any goods or services" and s25 deals with the taxable person's entitlement to a credit and deduction from any output tax which is due from him.

33. Schedule 4 to the Act provides:

"...Matters to be treated as supply of goods or services

1(1) Any transfer of the whole property in goods is a supply of goods; but, subject to subparagraph (2) below, the transfer—

(a) of any undivided share of the property, or

(b) of the possession of goods,

5 is a supply of services.

(2) If the possession of goods is transferred—

(a) under an agreement for the sale of the goods, or

(b) under agreements which expressly contemplate that the property also will pass at some time in the future (determined by, or ascertainable from, the agreements but in any case not later than when the goods are fully paid for), it is then in either case a supply of the goods...”

34. Article 14(1) of Council Directive 2006/112/EC on the common system of VAT provides:

15 “...Supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner...”

Discussion

35. Although the appellant’s written submissions started by dealing with various issues as to the nature of what it was that was supplied there is no question, and we do not understand it to be in dispute, that the appellant received the right to dispose of tangible property as owner (as set out by Article 14(1) of Directive 2006/112). The key question in fact raised by this appeal is: Who, for the purposes of VAT, supplied the helicopter to the appellant? HMRC’s disallowance of input tax rests on the purchase agreement documentation which refers to AAA Flight Inc. as the seller whereas the appellant’s case that the supplier was MPH in essence relies on looking to the “commercial reality” which underpinned the transaction.

36. As we identified to the parties at the hearing the Supreme Court’s decision in *Secret Hotels2 Ltd v Revenue and Customs Commissioners* [2014] UKSC 16 is instructive on the legal approach to considering the identity of a supplier and the relevance and treatment of contractual documentation and the wider circumstances of a transaction. The Supreme Court (in a unanimous judgement given by Lord Neuberger) referred at [29] to the CJEU’s decision in *Newey* (Case C-653/11) where it had set out that given the contractual position normally reflects the economic and commercial reality of the transaction the contractual terms constituted a factor to be taken into consideration when the supplier and the recipient had to be identified in a supply of services transaction but then went on to say that sometimes “certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.” At [30] to [32] the Supreme Court noted:

40 “30. Where the question at issue involves more than one contractual arrangement between different parties, this Court has emphasised that, when assessing the issue of who supplies what services to whom for VAT purposes, "regard must be had to all the circumstances in which

5 the transaction or combination of transactions takes place" – per Lord Reed in *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] 2 All ER 719, para 38. As he went on to explain, this requires the whole of the relationships between the various parties being considered.

The correct approach in domestic law

10 31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.

15 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight....”

20 37. Following the approach the court took at [30] to [35] to the issues in that appeal (the appropriate characterisation of the relationship between a company which marketed and arranged holiday accommodation through an on-line website, the operators of the hotels, and the holiday-makers or their travel agents) we consider the task of the tribunal as follows:

25 (1) To characterise the relationship in the light of the contractual documentation.

(2) To consider whether the characterisation represents the economic reality of the relationship in the light of relevant facts.

30 38. According to the purchase agreement the seller of the helicopter was AAA Flight Inc. as “legal beneficial owner”.

35 39. We note however that it was not entirely clear that the term “seller” was used consistently through the agreement to refer to AAA Flight Inc. The section on “Taxes” refers to a separate VAT invoice to be provided by the “Seller’s UK Company with which the Lennartz transaction was undertaken”. There was no evidence before us to suggest that AAA Flight Inc. was involved in a UK company as opposed to Marshal Parker who was involved in Apache Aviation Ltd. Also the clause on delivery referred to completion occurring at the Seller’s location. There was we think no suggestion that this would occur at AAA’s location (the only address being given for AAA being that of a PO Box in San Diego). Having said that the agreement
40 was signed “for and on behalf of Marshal Parker as AAA Flight Inc.” On balance we think the agreement served to create a contractual obligation on the part of AAA Flight Inc. to sell the helicopter to the appellant in return for payment of the price.

40. What emerges from Mr Faulds’ evidence is that AAA Flight Inc. were the trustee of a special purpose trust designed for FAA regulatory purposes to satisfy

them that the helicopter was owned by an eligible US entity. Although the appellant argues that the trust related simply to the registration it seemed more likely to us that, if the trust was to achieve its intended purpose and satisfy the FAA that the helicopter was owned by a US entity that the legal title to the helicopter would need to be with such an entity. However although the legal title was accordingly with AAA Flight Inc. the arrangement would not make any sense and there would be no apparent reason to have a trust arrangement if the beneficial owner of the helicopter was also AAA Flight Inc. The beneficial owner of the helicopter was not AAA Flight Inc but MPH (for the reasons we explain below at [46] onwards it was not Marshal Parker in his personal capacity.)

41. Moving on to the legal characterisation of the transaction relating to the helicopter it seems quite clear that the terms of the transaction were that both the legal title held by AAA Flight Inc. and the beneficial interest held by MPH were transferred to the appellant. There is no indication from the circumstances of the transaction or the documentation that it was intended that beneficial ownership should remain with MPH. The seller's warranty that the title would pass free of encumbrances, MPH's role in negotiating and signing the agreement through its officer, Marshal Parker, the delivery of the helicopter from Mr Parker's location, MPH's non-objection to an onward sale to another purchaser, are all consistent with MPH's beneficial interest in the helicopter also being transferred from it to the appellant.

42. The specific provisions regarding the seller's retention of the registration in the purchase agreement and the bill of sale in the interim are consistent with the legal title and beneficial interest being transferred to the appellant (i.e. there would be no need for the provision for the registration to be retained in circumstances where the legal title remained with AAA Flight Inc. and the beneficial interest with MPH.)

43. Turning then to the second step in the suggested legal approach in our judgment, that characterisation (that the beneficial interest in the helicopter was with MPH and was transferred for consideration rather than retained) represented the economic reality in the light of the relevant facts.

44. The evidence indicates that the power to set the price for the transaction lay with Mr Parker. AAA Flight Inc appears to have played no part in the negotiations and there appears to have been no due diligence performed by AAA Flight Inc into the appellant's ability to pay. In terms of the person who bore the risk of non-payment this, as demonstrated by the refusal to hand over the helicopter when funds had not been transferred, lay with Mr Parker as officer of MPH. There was no indication that AAA Flight Inc were involved or consulted on whether to take the risk of non-payment. There was no indication MP was taking instructions from AAA Flight Inc.

45. It is also clear that even if there was not a written agreement between the appellant and MPH, the understanding between those parties was that the transfer of beneficial interest would take place in return for consideration which took the form of the price paid by the appellant pursuant to the terms of the purchase agreement. There was the requisite legal relationship between MPH and the appellant. The transfer of beneficial ownership in return for the price paid pursuant to the legal relationship was

therefore a supply for VAT purposes from MPH. HMRC's argument that the helicopter was legally owned by AAA Flight Inc. and therefore neither Mr Parker or MPH could make a supply (even if either of them had had beneficial ownership of the asset in question) is misconceived. If the argument were correct, its consequence would be most surprising, as Mr Osman, for the appellant points out, in that any high value asset in the UK might be held in an overseas trust, located, used and possessed in the UK and then transferred to a UK purchaser for consideration without attracting VAT.

Supplier was Marshal Parker in personal capacity rather than MPH

46. HMRC's view is that the sole beneficiary of the trust of which AAA Flight Inc. was the trustee was Mr Marshal Parker. The fact he was a director of MPH would not mean that beneficial rights held by him passed to the company. There was no indication from the purchase agreement of MPH's (as opposed to MP's) involvement. They say that HMRC raised queries in 2003 and 2007 regarding MPH's Lennartz accounting and ownership of the helicopter and maintain that they had not accepted the helicopter was an asset of MPH. They ask the tribunal to note that the value of the helicopter had not been included in the value of the tangible assets in the abbreviated accounts declared by MPH and suggest that this indicates that MPH did not consider itself to be the legal owner of the helicopter. HMRC's view now is that MPH was not entitled to use Lennartz accounting.

47. Having considered the available evidence we consider it is more likely than not that the beneficial ownership of the helicopter rested with MPH rather than Mr Parker. Such documentation that there is shows the helicopter was imported by Rotorspan Limited who paid import VAT on 11 July 2000 and who were, as explained by Ms Watkins' evidence, acting as import agents for Apache Aviation Ltd (the former name of MPH). HMRC's position is that there are no documents which satisfy them the helicopter was owned by Apache Aviation Ltd. While it is correct there is no documentary proof of ownership by MPH that is not an answer to the appellant's case because for present purposes the appellant needs to satisfy us that on the evidence it is more likely than not that MPH was the beneficial owner of the helicopter rather than Mr Parker. In our view the cumulative picture painted by the documents we do have is that we are so satisfied. As regards the Rotorspan invoice seeking reimbursement of import VAT in respect of the helicopter of 13 July 2000 from Apache Aviation Ltd. there is no evidence that this was not what it purported to be. It is more consistent with beneficial ownership of the helicopter resting with the company than not. This is also the case with the correspondence received from the company's accountants of 30 November 2000. Looking at the answers Mr Marshal gave to the questions HMRC asked of Apache Aviation Ltd (at [23] above) we note the references to an offer to purchase a half share, the helicopter not being for immediate re-sale, the objective of becoming a dealer in new and used helicopters. Although one of his answers states "Apache Aviation have acquired the helicopter under a long-term "wet lease" we note this is in answer to a question of whether if the company was hiring the helicopter on to others it was acting as an agent. We have no evidence on what Mr Marshal understood to be a "wet lease" and the reference to "having acquired" sits oddly with both the question it seeks to answer and the other answers that were given which

imply a half share could be bought in the helicopter, or that it could be subject to resale even if it was not immediate. Looking at the information he gave in the round these are more consistent with the company considering itself a beneficial owner of the helicopter than not.

5 48. Although the parties have drawn our attention to the application of Lennartz
accounting and the queries surrounding the applicability of that, there is little we can
reliably draw from HMRC's treatment of the appellant whether that was by
endorsement of a tax treatment which was premised on the appellant owning the asset
or its later questioning of the correctness of that premise. Either way it only tells us
10 what HMRC's view was at a given point in time and does not help us on whether it is
more likely than not that the appellant was the beneficial owner. As to HMRC's point
that the asset did not appear in the company's accounts we were not shown evidence
of the accounts and are therefore unable to make a finding that this was the case. In
any case a finding that the asset did not appear in the accounts would not necessarily
15 mean the asset was not that of the company. Also, while the appellant has pointed to
invoices which indicate the helicopter was chartered out to others by MPH they do not
necessarily assist as they are not inconsistent with MP being a beneficial owner but
allowing MPH to have an interest in the helicopter and a right to charter it out. We
therefore put this evidence to one side.

20 49. In the absence of any evidence which suggests beneficial ownership was
transferred from the company to MP personally our view is that it remained with the
company at the time of the transaction to which this appeal relates. Although the e-
mails that passed between the appellant and MP do not make it clear that MP was
acting on behalf of MPH we are reluctant to draw any inference that the beneficial
25 ownership at that point lay with MP personally. The e-mail correspondence was
written in a relatively informal style, MP was the director of MPH and it was not clear
that they were written with any eye to distinguishing between his two capacities. The
fact his e-mails did not carry the details of MPH is not inconsistent, given the context
of a small company with a director/shareholder, with the negotiations taking place
30 between the appellant and MPH. The fact the purchase agreement or for that matter
the bill of sale did not refer to MPH is not significant given the primary concern of
those documents was to transfer legal title of the helicopter from AAA Flight Inc. The
reference to Mr Marshal is better understood we think as being to him acting on
behalf of AAA Flight Inc. rather than as beneficial owner. The terms of those
35 documents are not inconsistent with MPH being the beneficial owner immediately
prior to the sale.

50. Although of course not determinative, the fact an invoice was issued by MPH to
the appellant in relation to VAT on the helicopter is also consistent with MPH being
the beneficial owner rather than MP.

40 51. Our conclusion therefore is that there was a taxable supply of the beneficial
interest in the helicopter between MPH and the appellant, the consideration being the
amount set out in the purchase agreement. We find that the consideration was paid by
the appellant to another person and while we were unable to make a finding of fact on
the identity of the person to whom the account belonged this does not stand in the way

of there being a taxable supply from MPH to the appellant upon which input VAT could be reclaimed. The appeal is allowed in relation to the issue of whether there was a taxable supply in relation to the helicopter between the company and the appellant.

Invalid invoice?

5 52. HMRC ask us to note that the invoice of 25 November 2013 was issued by
MPH but that according to Company House records, MPH changed its name from MP
Helicopters Ltd. to VGEXSYS Ltd on 2 August 2012. HMRC say the invoice is
invalid under Regulation 14(1) VAT Regulations 1995 because the company name in
10 which it was issued did not exist at the time of issue. Contrary to the appellant's
submission the list of details in Regulation 14(1) is mandatory because the law
requires that the invoice "shall" state the correct name. HMRC also says the discretion
to accept alternative evidence is not relevant where an invoice has been issued; it is
only relevant where an invoice is not held to support the purchase. Regulation 14
provides as follows:

15 "14 Contents of VAT invoice

(1) Subject to paragraph (2) below and regulation 16 and save as the
Commissioners may otherwise allow, a registered person providing a
VAT invoice in accordance with regulation 13 shall state thereon the
following particulars—

20 ...

(e) the name and address of the person to whom the goods or services
are supplied,

..."

25 53. The appellant relies on Regulation 29(2) for the proposition that HMRC can
allow a deduction even if there is not a valid VAT invoice on the basis of "other
evidence".

30 54. As to whether HMRC may raise this issue in their Statement of Case we note
that the decision against which the appellant appeals is that the VAT incurred on the
purchase of the helicopter could not be recovered by the appellant. It is open in our
view for HMRC to raise arguments as to why the input tax sought could not be
recovered which were not in the original decision letter in its statement of case and for
the appellant to accordingly amend its grounds of appeal so as to deal with any such
new points.

35 55. We agree the invoice was invalid because it did not state the name of the
supplier (which following our conclusion above was VGEXSYS Ltd.)

40 56. The question then arises as to the exercise of HMRC's discretion to allow the
input tax claim on the basis of "other evidence" under Regulation 29. Although we
did not receive any submissions from the parties on the point, the Tribunal's
jurisdiction is that as set out by Schiemann J in *Kohanzad v Revenue and Customs
Commissioners* [1994] STC 967 at 969.

5 'It is established that the tribunal, when it is considering a case where
the commissioners have a discretion, exercises a supervisory
jurisdiction over the exercise by the commissioners of that discretion.
It is not an original discretion of the tribunal, it is one where it sees
whether the commissioners have exercised their discretion in a
defensible manner. That is the accepted law in this branch of the
court's jurisdiction, and indeed it has recently been decided that the
supervisory jurisdiction is to be exercised in relation to materials which
were before the commissioners, rather than in relation to later material
10 ...”

15 57. In this appeal there is nothing to suggest that HMRC have actually exercised
any discretion in relation to “other evidence” in relation to which we can make a
determination as to whether the commissioners took into account all relevant matters,
did not take into account any irrelevant matter and whether the decision was not one
that could reasonably have been arrived at. There is nothing in the documents
showing a decision has been made and no indication in Ms Watkins’ witness
statement that a decision has been made on the exercise of the discretion or any
materials before us explaining what matters were taken account of and what were
disregarded such that the appellant might make its submissions accordingly and the
20 tribunal exercise its supervisory jurisdiction over the exercise of the discretion.

58. We invite HMRC to consider the exercise of their discretion in the light of the
following:

- 25 (1) The Tribunal has concluded that VGEXSYS Ltd did make a taxable
supply to the appellant upon which input tax has been claimed.
- (2) In the light of the lack of any response to the appellant’s letter to Mr
Marshal it is improbable that VGEXSYS Ltd will, if requested, provide an
amended invoice.

30 59. Although the decision is one for HMRC to consider we should record that our
view is that a decision which, in the above circumstances, denied input tax recovery
on the basis that the name of the supplier on the invoice was a former company name
rather than the current one would be unreasonable.

35 60. If HMRC refuse to exercise their discretion in the appellant’s favour this
generates a decision which is capable of being appealed to the tribunal to consider
under the supervisory jurisdiction outlined above. The parties are at liberty in the
event that the decision on exercise of discretion is unfavourable to revert to the
Tribunal for further directions.

40 61. Given the above conclusions it is not necessary to deal with the appellant’s
other arguments that in any case the recent case law of the CJEU confirms that even if
there was a flawed supply by MPH or MP, the appellant’s right to deduct cannot be
refused and also that if it were correct that VAT was not chargeable, then in the
absence of a reimbursement claim by the supplier, and the lack of response from the
supplier to the appellant’s demands, HMRC are obliged to provide the means for a
taxable person to recover unduly invoiced tax in order to respect the principle of
effectiveness.

Conclusion on identity of supplier

62. The helicopter was supplied by a taxable UK person, VGEXSYS Ltd, the company formerly known as MPA. There was a taxable supply upon which the appellant could in principle claim input tax and the appeal is allowed to that extent.

5 63. 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
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

15

**SWAMI RAGHAVAN
TRIBUNAL JUDGE**

RELEASE DATE: 22 APRIL 2016