[2019] UKFTT 517 (TC)

VAT – cars exclusively for business use – held no intention for private use – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07313

Appeal number: TC/2017/08180

BETWEEN

BARRY JOHN GRAHAM **Appellant**

-and-

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

TRIBUNAL: JUDGE SARAH ALLATT

Sitting in public at Taylor House on 13 June 2019

The Appellant in person

Mr Olamide, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The case concerns the refusal of VAT credit on the purchase of 3 cars. The VAT in question is £20,805. HMRC contend the appellant has not shown that the cars were not made available for private use. The appellant contends they were not made available for private use for private use.

BACKGROUND

2. Mr Graham set out the background to his business. He is a specialist in mainframe computers and both publishes a quarterly and monthly update on prices, and assists clients to negotiate terms with IBM and occasionally with other providers. He charges clients between £3,000 and £5,000 a day for his services. He has contracts with his children who he pays £1,000 a day for any work they do in his business. The nature of the business involves a considerable number of business trips to see clients.

3. He explained that given his significant fees he felt it important for his business that he drove cars that signified his success. He explained that he, his wife and his daughter each owned cars which they used for their private use. He explained that for the thirty years he had been in business (twenty-seven of which he had been registered for VAT) he had understood that he should not use the work cars for private use. His personal car was also insured for business purposes and it was possible that he would use his personal car for the very occasional business trip when all 3 of the business cars were being used, but he would never use the business cars for personal use.

4. On 6 May 2017 HMRC received the Appellants VAT return for the 12 months ending 31 March 2017, which showed a repayment due to the appellant of £28,818.06.

5. The repayment was released but then halted due to selection for verification. Verification took place in the form of a compliance visit undertaken by Mr Ali of HMRC. During this visit, it was established that the repayment arose in the main as a result of the Appellant claiming the VAT incurred on the purchase of three cars as input tax on the basis alt three were used exclusively for business purposes.

6. I found Mr Graham to be an honest and credible witness.

FACTS

7. The following facts are agreed:

8. The 3 cars in question are an Audi A8, a Mini Cooper S and a Porsche Cayenne. During the same period a VW Golf was sold and VAT accounted for correctly on the sale.

9. The cars were, at the point of purchase, insured for both business and social use for Mr Graham, his wife, and his daughter. At the time of the VAT inspection, the cars were insured for social use only.

10. The cars were kept at the home address of Mr Graham and his wife. They work from home. They have the use of two parking spaces in their development but Mr Graham explained the car park (which is gated) is never full so there was not an issue with keeping the cars there.

11. Mr Graham spends a considerable period of each year abroad, and during that time the Porsche may be parked at his daughter's house. She has her own personal Porsche for her private use.

12. The keys for the cars were kept in a locked safe and only Mr Graham had the code. As and when he allowed his children, who are both contractors in his business, use of the cars for

business purposes, he gave them the code to allow them to use the cars, and then changed the code afterwards.

13. Mr Graham had contracts with each of his children that expressly forbid the private use of the cars. The contracts were dated 2011.

14. At the end of the year Mr Graham checks the mileage of the cars against the (major) trips that he and others have made. The analysis accounted for 93% of the miles of the cars.

15. Mr Graham had made similarly large claims for the reclaim of VAT input tax on other cars in 2007, and had a VAT inspection where this claim was agreed.

DISPUTED FACTS

16. HMRC do not agree that there is no possibility that the cars are used privately. During an ADR process they reached agreement not to charge a motor scale charge, but this does not amount to agreement that there are no private miles. However, HMRC have nothing to directly suggest that the cars were used privately.

17. It is Mr Graham's evidence that the cars were never used privately, and that he could, with some effort, account for business use for all (rather than the 93% he has done) of the miles that the cars have driven.

THE LAW

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

> "7 –
>
> (1) Subject to paragraph (2) to (2H) below tax charged on –
>
> (a) the supply (including a letting on hire) to a taxable person; … of a motor car shall be excluded from any credit under section 25 of the Act.
>
> (2) Paragraph (1) above does not apply where –
>
> (a) the motor car is –
>
> (i) a qualifying motor car ;
>
> (ii) supplied (including on a letting or hire) to, or acquired from another member State or imported by, a taxable person; and
>
> (iii) the relevant condition is satisfied;
>
> (2E) For the purposes of paragraph (2)(a) above the relevant condition is that the letting on hire, supply, acquisition or importation (as the case 5 may be) is to a taxable person who intends to use the motor car either –
>
> (a) exclusively for the purposes of a business carried on by him, but this is subject to paragraph (2G) below; or … …
>
> (2G) A taxable person shall not be taken to intend to use a motor car exclusively for the purposes of a business carried on by him if he intends to –
>
> (a) …
>
> (b) make it available (otherwise than by letting it on hire) to any person (including, where the taxable person is an individual, himself, or, where the taxable person is a partnership, a partner) for private use, whether or not for a consideration."

19. There are a number of cases on similar issues to which we were taken. These all turn on whether the particular facts of the case mean that the relevant vehicle was 'made available...for private use'.

20. The leading case where the phrase "make it available" in this context has been considered is by the Court of Appeal in The Commissioners for Customs & Excise v Upton [2002] EWCA Civ 520. The difficulty which the Court of Appeal grappled with in particular was that, in the case of a sole trader, the very act of buying a motor car means that arguably the trader has made that car "available" for his or her own private use – even if the trader has a firm and settled intention never in fact to use the car in that way. As the case makes clear, the question is not whether the trader intends actually to put the car to private use, it is whether he or she intends to "make it available" for private use. As Peter Gibson LJ put it (at [22]): "In the case of an individual taxable person who acquires a car there is a particular difficulty in the way of that person if he is to escape from the disqualifying condition that he "intends to … make it available to… himself… for private use." The very fact of his deliberate acquisition of the car whereby he makes himself the owner of the car and controller of it means that at least ordinarily he must intend to make it available to himself for private use, even if he never intends to use it privately." It seems clear however that the Court saw it as being at least possible for a sole trader to avoid the disqualifying condition. HMRC themselves apparently contended (see Upton at [49]) there were three possible ways to achieve this: that the car could be "physically unavailable, that is to say a car let to another"; or that it could be "realistically incapable of private use, for example marked police cars or ambulances"; and they also considered that cars might be "alternatively insulated from the possibility of private use", by virtue of being "pool cars issued to employees for business use only.

21. I note that the case of Upton was in 2002, well before the VAT inspection of Mr Graham in 2007 when a previous input claim was agreed.

22. The Court of Appeal also considered, in Elm Milk [2006] EWCA 164 a case where a company bought a car, and a board resolution was passed forbidding the (sole) director from using the car for private use. It was considered that this created a legal impediment to using the car that prevent the car being 'made available'.

23. The case of Elm Milk has been admirably summarised in a subsequent case (Zone Contractors) in this Tribunal:

> The Tribunal considers that Elm Milk provides a comprehensive overview of the approach taken by the courts in relation to cases concerning the recovery of VAT on cars intended to be used for business purposes.
>
> It serves to rehearse the case at some length.
>
> 36. In short the salient facts of the case were:
>
> (1) The taxpayer was a private single family owned company of which there was one director. The company had three business areas: landlord of farm properties, consultant to the dairy industry and consultant to the leisure industry. Immediately prior to the purchase of a car for the use of the director the company passed a resolution noting the intention to purchase the car, that it was intended to be used solely for business purposes and that any private use would be a breach of the employee's terms of employment. The tribunal in that case had accepted the evidence of the witness that he intended to be bound by the resolution.
>
> (2) The insurance policy was for social, domestic, pleasure and business use and had been issued in the name of the director, his wife and other members of the family.

(3) The car was kept overnight near the company's premises but these were situated only 50 yards from the directors home. The keys were however kept in the office. The director had access to the keys at all times.

37. Arden LJ gave the leading judgment. She prefaces her judgement with three observations on the provisions of Article 7 of the Order:

(1) The provision is convoluted with Parliament's starting point being an exclusion from the general rule of deductibility followed by an exception to the exclusion and then a further exception to the exception.

(2) The exception in Article 7(2E) is based around intention to use the car and not the use itself. It was noted that the relationship between actual use and intended use may lie in the corroboration of the stated intention.

(3) The exception to the exception in Article 7(2G) is also based on intention but differentiating it from 7(2E) this intention is that of making the car available for use.

38. On the facts the tribunal had found in the taxpayer's favour and that judgment was upheld by the High Court. The Judge had determined that the physical circumstances of where the car was kept did not mean that the company intended to make it available for private use. The tribunal had considered that the board resolution was genuine and the judge considered it had been properly taken into account. The Court considered that there was a clear difference between a sole trader and an employee/employer situation with employment restrictions regarding the use of the car being relevant. The Court had framed the test as "The important point was not whether it was possible to imagine any exceptional circumstances in which the car might be used for private purposes. The question was whether when the employer purchased the car he intended to make it available for private use".

39. HMRC's appeal to the Court of Appeal in that case was heavily focused on the Court of Appeal judgment in Upton (as was the present appeal). Arden LJ recited 5 excerpts of the Upton judgment. At para 21 Peter Gibson LJ had stated "The fact that a car is available or is made available to a person for private use subsequent to the acquisition is not determinative. However, that fact may be highly relevant to an inference that the taxable person has the intention to make the car available to himself for private use."

40. Arden LJ also referred to the distinction drawn by Buxton LJ between intention to use and intention to make available; an intention to use for business purposes was not considered to be the same as an intention not to make the car available for private use. Both intentions must be separately established in order for the VAT to be recoverable as input tax.

41. Paragraphs 35 – 41 set out Arden LJ's principal reasons for rejecting HMRC's appeal:

[35] A purposive approach was to be adopted to the interpretation of Article 7 to ensure that the provision achieved what the legislature intended.

[36] The scheme of Article 7 is to exclude the right to deduct VAT on cars, 20 subject to the exception in 7(2E) and the exception to the exception in 7(2G). In this regard "The taxpayer has a high threshold to cross if he wishes to bring himself within the first exception and then within the exception to the exception". The taxpayer must show "not that he does not intend to use the car for private use but it is not his intention even to make it available for private use". By reference to the structure of the legislation Arden LJ regarded Parliamentary intention as the exception rather than the rule and something "subject to rigorous scrutiny and the satisfaction of tough conditions."

> [37] Careful scrutiny is required of cases of deduction where there is a close connection between the user of the car and the taxpayer, and relief is to be restricted where it can be demonstrated to be wholly justified. However, on consideration of "availability" Arden LJ noted: "… if 'available' meant only 'physically available' there would undoubtedly be fewer cases where VAT paid on the purchase of a car could be deducted, that itself is not the object of the provision. The object is to prevent claims to deduct tax on cars purchased for business use save where the possibility of private use is excluded. That purpose can equally well be achieved if the concept of availability is not restricted to physical availability but includes also cases of unavailability due to the imposition of legal restraints".
>
> [38] Unavailability for private use could be achieved by appropriate contractual restrictions.
>
> [39] "Parliament has not in art 7(2G) said that to show there is no intention to make a car available for private use the taxpayer has to show that it is not physically so available. Parliament has neither said that any particular circumstance constitutes making "available", nor has it excluded any evidence from the determination of whether a car is or is not made available. It is therefore, a question of fact for the tribunal as to whether in all the circumstances the taxpayer intended not to make the car available for private use by whatever means. There is no thus reason why a car cannot be made unavailable for private use by suitable contractual restraints, that is effective restraints".
>
> [40] Based on the facts of the case as found by the tribunal the prohibition contained in the resolution together with the arrangements for the location of the keys were sufficient to meet the requirements of Article 7. This was so despite the ability of the director to alter the resolution.
>
> [41] The terms of the insurance "did not mean that an intention not to make the car available for private use could not be shown".

24. There have been a number of other cases in this Tribunal, notably Zone Contractors Ltd [2016] UKFTT 0594, and Borton [2016] UKFTT 0472, both of which found in favour of the taxpayer. However as these cases do not set a precedent, and as each case is very fact specific, I do not set them out at length here.

25. In summary, the taxpayer has a very high bar to prove. He must prove both that he did not intend to use the car for private use, and that it was not made available for private use. It is however clear that whether any steps taken by the taxpayer a sufficient to orevent the car from being 'made available' is for the Tribunal to decide.

SUBMISSIONS AND DISCUSSION

26. HMRC contend that the insurance policies show that firstly, the fact that during the period in question the cars were insured for private use as well as social use show that they could be used privately. They also contend that the fact that subsequently the cars were insured for social use only is a significant fact that shows that both in intention and in fact the cars were used privately.

27. HMRC also contend that as the cars are parked normally at the Appellants address, there is no physical barrier to their private use and therefore they are 'made available'.

28. HMRC contend that the contracts with the Appellants son and daughter, which forbid the use of the cars privately, in practice do not prevent the private use of the cars by the Appellant's children.

29. The Appellant contends firstly that the cars were not made available. Secondly, he contends that if he has not proved this, then he is also relying on advice given by HMRC at his previous inspection in 2007 that the VAT reclaim was permissible, and that the law has not changed since that date.

30. In respect of the insurance documents, the Appellant explained that the insurance policies for social use only had been arranged by his wife. At the time, although they did not know this, she was suffering from brain cancer and this was the start of many uncharacteristic mistakes she made. Mr Graham provided his wife's death certificate, showing metastatic cancer as a cause of death.

31. Mr Graham also stated he did not believe it was possible to take out insurance for business use only.

32. I accept the lack of business use on some insurance documents was by reason of the illness of the Appellant's wife and I attach no weight to those documents as rationale for the intention of the use of the cars.

33. When considering the test of intention of use of the cars, I consider that Mr Graham has amply made out the case that they were not intended for private use. I bear in mind the fact that Mr Graham has had a number of conversations with HMRC, both in respect of VAT and direct tax, over a considerable number of years. Mr Graham provided the visit report for the VAT inspection in 2007 which showed this topic being discussed. I bear in mind the contracts drawn up for his son and daughter in 2011 prohibiting the private use of the cars. I bear in mind the fact that the keys are kept in a safe. I bear in mind the mileage records of the cars show that significant business trips account of the overwhelming majority of the use, and that Mr Graham has offered to do a more detailed analysis to cover the remaining 7% mileage, which would be much shorter business trips. I bear in mind that every person insured on the cars had their own vehicle, of equivalent value, for their own private use.

34. I find therefore that there was no intention to use the cars for anything other than a business purpose.

35. HMRC have produced no evidence that the cars were used privately. Mr Graham, who I found to be an honest witness, stated that the cars were never used for private purposes as all potential drivers had their own cars that they would use. I find that the cars were not used for private purposes.

36. The second test is whether the cars were intended to be made available for private use. I note that again the test is 'intended to be made available'.

37. Mr Graham was well aware that the car should not be used for private purposes. He was aware of the fact that claiming VAT input tax meant that VAT output tax needed to be charged when the cars were sold, and this was in fact done when he sold previous cars.

38. Mr Graham, and his wife and his daughter, who were the only people insured to use the cars, all had other cars of their own, of an equivalent value and status, the keys of which were not kept in a locked safe.

39. At the time these cars were purchased, Mr Graham was very used to the fact that they should not be used privately as he had discussed this issue surrounding other cars with HMRC previously.

40. Mr Graham's daughter had a contract prohibiting her from using any of the cars privately.

41. I note the decision of the Court of Appeal in Upton, but that differs from this case in two important respects.

42. Firstly, the taxpayer in Upton had no other car available to him. Secondly, the Court of Appeal found that Mr Upton had made no arrangements to prevent the car being available for private use.

43. In this case, as Mr Graham and all other family members had cars available for their use, and as I have found that the cars for which input tax has been reclaimed were not used privately, I consider it possible, in this case, that at the point of purchase there was no intention to make the cars available for private use.

44. I then note that the steps that Mr Graham took to ensure this were as follows:

45. He put a legal impediment (in the way of a contract) to prevent their private use by his children.

46. He put a physical impediment (by way of securing the keys in a safe to which only Mr Graham had the code) to prevent their use by his children and his wife.

47. It remains the case that despite these precautions Mr Graham himself had no legal impediment to using the vehicle, and had access to the cars from his home.

48. However, he had put a barrier, however slight, in the form of keeping the keys in the safe. Having shown that he did not intend to use the car privately, and that he had at least two other cars (the private cars of him and his wife) available to him, it appears to me that this barrier, whilst minimal physically, is nevertheless present to a greater degree mentally to prevent Mr Graham using the cars.

49. The Court of Appeal in Upton clearly envisaged that there were circumstances where a sole trader could fall within the exception to the exception in 7(2G). If Parliament had meant the legislation not to apply to sole traders then sole traders would not be specifically mentioned in 7(2G).

DECISION

50. I consider that Mr Graham did not intend to use the cars privately, nor did he intend to make the cars available for private use.

51. Therefore I allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. 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.

SARAH ALLATT
TRIBUNAL JUDGE

Release date: 7 August 2019