[2013] UKFTT 481 (TC)

TC02864

Appeal number: TC/2012/9579

VAT – pre-registration input tax – whether invoice for a single supply – yes – whether the supply was of goods or services – services – whether other input tax reclaims allowable – appeal dismissed save in respect of petrol

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANN KHOSHABA **Appellant**
T/A CINNAMON CAFE

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
MICHAEL SHARP

Sitting in public at Bedford Square, London on 5 September 2013

Mr I Hoon for the Appellant

Ms A Sinclair, HMRC officer, for the Respondents

DECISION

Background

1. The appellant obtained a lease of premises which had previously been used as a hairdressers. She had the premises converted in order to operate a café, which commenced trading on 4 June 2007. Initially it was not VAT registered.

2. HMRC investigated her business in July 2010 and decided that it ought to have been registered with effect from 1 October 2008. There has been no appeal against that decision.

3. The first VAT return covered the period from 1 October 2008 to 31 May 2011. In this return some £46,757 worth of input tax was reclaimed (against a declared liability to output tax of some £48,000). HMRC required the taxpayer to breakdown and justify this input tax reclaim.

4. This led to a decision by the HMRC officer that some £32,073 of this claim was not allowable and she issued an assessment in that amount. The appellant asked for a review of that assessment.

5. The review officer was Ms K Jenkins. She issued her decision on 18 September 2012 in which she upheld the officer's decision in respect of £25,900 but otherwise accepted that the assessment should be reduced by £6,173. In total, therefore, HMRC's position was that of the original £46,757 claimed, some £20,857 was allowable but the rest was not.

6. Although the notice of appeal stated that it entirely disagreed with Ms Jenkins' review decision, at the hearing Mr Hoon said that he did not challenge the assessment as reviewed in so far as it related to the matters set out in Ms Jenkins' letter of 19 September other than:

- An invoice which included £22,050 in VAT from Lindfield Building Contractors Ltd;
- Various petrol receipts which included in total some £197.58 in VAT; and
- Four separately scheduled claims for supplies of food with the VAT rate shown as being at 8%.

We will deal with these three claims individually as follows:

Lindfield invoice

7. The invoice was dated 30 July 2007. This was more than six months before the effective date of registration but less than 3 years before that date. Mr Hoon did not challenge that the effect of the Value Added Tax Regulations 1995 Regulation 111(2) was to permit a taxpayer to recover pre-registration input tax incurred on supplies to

the business in the four years prior to registration in so far as they were supplies of goods but only six months in so far as they were supplies of services.

8. There were two questions before the Tribunal. The first was whether the invoice was for a supply of goods or a supply services or both. The second was whether it was a supply for business purposes as the invoice related not only to the refurbishment of the shop but of the first floor flat too.

The facts

9. Evidence was given by Mr Khoshaba, the husband of the appellant. The appellant did not attend. Based on Mr Khoshaba's evidence, which we accept, we find as follows:

10. The company, Lindfield Building Contractors Ltd, was owned and controlled by Mr Khoshaba. He was a qualified structural engineer who undertook (via his company) small and medium sized refurbishments, particularly those involving structural works. His wife contracted with his company for the refurbishment of her planned café so that the work would be finished as quickly and as cheaply as possible.

11. His evidence was that the project took approximately 4 months to be completed after possession of the premises was given by the landlord. The first month was spent in planning, making estimates, doing surveys and appointing architects and surveyors. The physical work to the shop took about two and half months.

12. The work to the ground floor shop involved ripping out the hairdressing fixtures such as the sinks, removing load bearing walls and replacing them with structural beams, replacing and enlarging the existing toilet facilities (including the necessary drainage works), re-plumbing and re-wiring the entire premises.

13. Once this was work was done and made good, counters and units which were built to order by a joinery company were installed. Fridges were purchased and installed. New wood flooring was laid.

14. A new air conditioning system was sub-contracted, and the sub-contractors installed it. A canopy and shutters at the front were also commissioned by Lindfield and installed by the company which made them.

15. The work by Lindfield also included some general repair works to the premises which were required as a condition of the lease.

16. Outside, at the rear of the property, Lindfield laid concrete bases for a conservatory and shed on which a pre-fab conservatory and shed were then installed by the company. Flat packed garden furniture was put together, installed and fixed by brackets by Lindfield. The existing broken and irregular fencing was entirely removed and replaced by Lindfield with new fencing.

17. A new staircase to access the first floor flat was commissioned from the joiners, and installed by Lindfield.

18. The work to the upstairs flat was not structural. A new bathroom, kitchen and heating system were installed by Lindfield and the flat entirely redecorated.

19. Mr Khoshaba estimated that some £40,000-£45,000 of the entire invoice charge of £125,000 (net) related to payments Lindfield made to its labourers. Mr Khoshaba himself was only physically involved in the structural work of removing the internal walls and replacing them with beams: otherwise his involvement was limited to planning, and supervision of the workers employed. He estimated that 50% of the labourers' time was spent on installing pre-fab units such as the counters and stairs.

20. Mr Hoon's case is that the invoice largely represented supplies of pre-fab items. We accept Mr Khoshaba's evidence that a quotation from Y & S Joinery Ltd was in approximately the same amounts as the final invoice from them and this showed that Lindfield had paid approximately £8,300 for the flooring, £22,000 for the conservatory, £5,200 for the staircase and £23,000 for the counters and units. This totalled £58,500. The quotation does not state if the price was inclusive or exclusive of VAT.

21. We find that the balance of Lindfield's invoice (after deducting the cost of labour and the cost of the goods from the joiners) was about £25,000 We were given no detail on the breakdown of the balance, and while we accept that some of it would have represented the re-charge of goods to the appellant (eg the fridges, the structural beams at £300, and the canopy and shutters) the appellant did not demonstrate that it did not also include a re-charge of services. Without knowing the exact split, we conclude that a significant part of Lindfield' invoice represented the cost of goods and a significant part represented the cost of services.

22. Mr Hoon's view of this was that at the very least his client was entitled to recover the VAT on the invoice in so far as he had demonstrated that it related to goods. But the law is not as simple as that.

The law - Multiple supplies?

23. Such a split would only be possible if the invoice represented multiple supplies. So the first question is whether Lindfield made a single supply to the appellant or a number of supplies. In other words, did it supply the prefab goods separately to the works of refurbishment of the premises?

24. If we conclude that Lindfield made only a single supply, then there would be question whether that single supply was one of goods or of services.

25. So far as the question of single composite supply versus multiple supplies is concerned, this is largely a matter of our impression of the facts. The Court of Justice of the European Union ("CJEU") has been asked to lay down general principles in how the courts should approach this question and in the recent case of *Field Fisher Waterhouse C-392/11* said as follows:

> [15] Where, however, a transaction comprises several elements, the question arises whether it is to be regarded as consisting of a single

> supply or of several distinct and independent supplies which must be assessed separately from the point of view of VAT. According to the Court's case-law, in certain circumstances several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent (Case C-425/06 Part Service [2008] ECR I-897, paragraph 51).
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> [16] In that regard, the Court has held that a supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see, to that effect, Case C-41/04 Levob Verzekeringen and OV Bank [2005] ECR I-9433, paragraph 22, and Everything Everywhere, paragraphs 24 and 25).
>
> [17] Moreover, that is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied (see, to that effect, Case C-349/96 CPP [1999] ECR I-973, paragraph 30; Part Service, paragraph 52; and Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 Bog and Others [2011] ECR I-0000, paragraph 54).

26. In this case it certainly would have been possible for at least some of the supplies made by Lindfield to have been made as separate supplies: for instance, the joiners could have supplied the pre-fab units direct to the appellant, and the appellant merely employed Lindfield to have installed them.

27. Nevertheless, as the CJEU says in §15, the mere fact that some elements could have been supplied separately does not prevent the supply of them being a single composite supply if they are not "independent". Supplies are interdependent, it seems, in at least two circumstances. The first, as explained in *Card Protection Plan (or "CPP") C-349/96,* and in §17 above, is where there is a principle supply with satellite or ancillary supplies.

28. We do not find that that is the case here. We do not consider that there was any one single element that predominated over all the rest. While it was Mr Hoon's case that the supply by Lindfield was no more than a supply of pre-fab units and their incidental installation, the facts do not bear this out. What Lindfield did was far more extensive than supply and fit pre-fab units. It gutted an old shop and refurbished it as a café. This involved works to the whole of the property, such as structural works, re-wiring and re-plumbing, re-decoration.

29. The second circumstance in which supplies are interdependent, as explained in *Levob C-41/04* and §16 of *Field Fisher Waterhouse* above are where the elements are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

30. We find Mr Khoshaba regarded the works as a single project. From his evidence it is clear that he project managed the conversion of the premises from a hairdressers to an operating café. We find that the single invoice covering the entire conversion, while not of itself conclusive of issue, does reflect the reality that the company was engaged to convert a dilapidated hairdressers to a smart new café, and carry out all the necessary renovation, repair, renewing and installation works outside and inside that that required. We also take into account that neither the labour nor goods element was significantly larger than the other.

31. In conclusion we consider that there was a single supply in the sense that the elements which comprised the supply were so closely linked that they objectively formed a single indivisible economic supply.

Supply of goods or of services?

32. Having determined the first question we then have to decide whether it was a single supply of goods or a single supply of goods.

33. We find that the appellant took a lease of an empty hairdressers shop in a poor state of repair and employed her husband's company to convert it into premises suitable for the operation of a café. While the charge of the company to the appellant reflected a significant proportion of the cost of goods used in the refurbishment, it also comprised a significant amount of labour. And the project was much more than merely installing pre-fabricated items. It was doing everything necessary to convert the premises including structural alterations, repairs, re-wiring, new drainage, re-plumbing and decoration. The labour element was only 50% referable to the installation of pre-fab units (see §19 above) and this reflects the fact that the works were considerably more extensive than merely installing pre-fab units.

34. The law is that the supply of goods is "any transfer of the whole property in goods" (see Schedule 4 paragraph 1(1) of the Value Added Tax Act 1994). The supply of services is a supply which is not a supply of goods: see s 5(2)(b) of the same Act).

35. If the supply was of the pre-fab units then this would be a supply of goods as ownership (ie the "whole property") was transferred by Lindfield to the appellant; but if the supply was of refurbishment works then the supply would be of services (albeit services which included within it the transfer of ownership of the pre-fab units).

36. We find that, for the reasons given in §33, that the supply was the service of providing a refurbished shop; it was not a supply of goods (the pre-fab units) with incidental installation works.

37. HMRC referred us to a number of Tribunal decisions on this issue. Tribunal decisions are of course not binding authorities and we obtained only limited assistance from them:

38. In the case of *Perranporth RFC* VTD 17422 the appellant commissioned a club house to be built. It was held that the supply was one of services; while the supply included the supply of goods such as the bricks out of which the clubhouse was built, nevertheless it was not a supply of a building (as it was not the supply of the land) but of the construction of a building and by definition that is a supply of services.

39. In the case of *G, J & B Miller* VTD 18630, the appellants acquired shop premises and wanted them fitted out. It entered into a single contract with its supplier for the fit out of the shop which inevitably included a significant proportion of goods. The Tribunal found that there was a single supply, and that single supply was of goods. The basis of the decision seems to be that it was a contract to provided listed items and that the fitting of these was incidental to the supply of them.

40. In the case of *Keven & Mary Lai T/A The Rice Bowl* VTD 20531 the appellants employed surveyors to oversee the refurbishment and fitting out of its premises as a restaurant. The Tribunal found it was a single supply of services but largely it seems because the appellant produced scant evidence about the nature of the supply and therefore the appellant could not displace HMRC's assessment.

41. The *Rice Bowl* was decided on the basis of the appellant's failure to discharge the burden of proof which rests on it and is not therefore helpful; the *Miller* case offers a relevant contrast. In that case the fitting out contract was found to be a provision of goods with incidental installation works but that distinguishes it from this case as none of the major refurbishment work involved in *this* case (such as structural alterations and re-wring etc) were involved in the *Miller* case. *Perranporth* is perhaps at the other extreme as it involved the construction of a building and not merely its refurbishment. This case rests somewhere in between *Miller* and *Perranporth* but nevertheless we are decided that it was (for the reasons given) a single supply of services and therefore on the *Perranporth* side of the line.

42. So our conclusion is that the appellant did not fulfil the requirements of Regulation 111(4) because the invoice was for services which were provided more than six months before the registration date and therefore HMRC were correct to refuse to exercise their discretion to allow the recovery of the pre-registration input tax on the Lindfield invoice.

43. As our conclusion is that none of the VAT on the Lindfield invoice is recoverable because it was for services more than six months before the registration date, we do not have to consider whether it should (if allowable) have been disallowed in part because of alleged private use of the flat.

44. We recognise that the appellant could have arranged for the goods to be supplied direct to her by the suppliers which supplied Lindfield and thus have recovered at least some of the VAT; or she could have applied for early voluntary registration and recovered all of it. But she did neither of these things. In fact she did not apply for registration until some years after she was due to register and then only it seems during the course of an HMRC investigation.

45. We move on to consider the financially smaller sums which were also in dispute:

The petrol receipts

46. These receipts were not for pre-registration supplies but for supplies which covered the two and half years of the first VAT return. HMRC disallowed the input tax on the petrol receipts because the officer was not given evidence that the petrol was used by the business.

47. From the oral evidence at the hearing we find that Mr Khoshaba owned a van. It was his evidence that he used this for his wife's business on average three times a week in making journeys to Tesco's to purchase supplies for the café. He said the claim was for less petrol than he had actually used.

48. HMRC did not dispute that the appellant had reimbursed her husband for the petrol nor did they challenge this evidence.

49. Mr Khoshaba appeared to us to be a reliable witness and therefore we accept his evidence that the petrol was purchased on behalf of the appellant's business and used for its business purposes. This reduces the assessment by £197.58.

The 8% vat rate purchases

50. When HMRC asked the appellant to justify its input tax reclaim Mr Hoon supplied schedules which showed the totals of invoices paid to suppliers. He did not schedule the actual invoices nor include the invoices.

51. One schedule covered the period 1 October 2008 to 3 June 2009 and included two items at 8%: one was labelled "drury" and was for gross of £2,573.23 and one was "oth: food" and for gross of £4,445.53.

52. The second schedule was for the period 4 June 2009 to 3 June 2010. It also included two items at 8%: as before one was labelled "drury" and was for £1,557.95 and the other was "other foo" (sic) and was for £1,839.33.

53. None of this was therefore for pre-registration supplies. It was accepted that supplies from Drury related to tea and coffee and the other two items related to "other food" supplies.

54. The HMRC officer refused the reclaim on the basis that there was no 8% VAT rate for food. Mr Hoon explained that the numerous invoices (which he had not produced) had a mix of standard and zero-rated items so he had just totalled them and claimed VAT at 8% rather than add up the individual standard rated items.

55. Because the claim was refused, in July 2012 Mr Hoon provided to HMRC a long schedule of a large number of invoices, including ones described as "drury" and "other food". The sums involved were much larger than the ones on the original schedule and covered a much longer period.

56. Ms Jenkins carried out her review in September 2012 and considered this schedule. She upheld the decision to refuse the claim on the four items as it was not clear to her whether the items on the July 2012 schedule were part of the four items on the original schedule or were part of the approximately £20,000 input VAT which HMRC had allowed. We agree that it was not possible to work this out. Her review letter suggested that Mr Hoon should undertake an exercise to identify any particular invoices he considered did not comprise part of the VAT already allowed to the company.

57. Mr Hoon did not undertake this exercise.

58. At the hearing he said that clearly none of the VAT on these schedules had been allowed by HMRC as HMRC had refused all food reclaims on the grounds that they were zero rated. We find that this is not the case. Ms Jenkins' review decision specifically allowed a claim for VAT on food in the sum of £2,780.36 and in any event it is also possible that the amount originally allowed to the appellant included some VAT on food.

59. Mr Hoon then suggested that HMRC were being lazy because they had not tried to work out from the July 2012 schedule which items had already been allowed and which items had not been allowed. But we agree with HMRC that it was the Mr Hoon's responsibility to justify the claim he makes on behalf of the appellant and, as the original claim was based on schedules produced by Mr Hoon which did not itemise the individual invoices, we do not think HMRC had the necessary information to carry out this exercise.

60. We find that the appellant has failed to satisfy us that any of the invoices scheduled on the long document provided in July 2012 by Mr Hoon were not already included in its input tax claim for its first period and allowed by HMRC. There can be no double recovery and so we agree HMRC were right to disallow the four amounts claimed for VAT at 8% and right not to allow a further recovery of any items on the schedule provided in July 2012.

61. That concludes this appeal. It is allowed to the extent of £197.58 which means that the appellant is liable to pay £20,702.42 to HMRC.

62. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE
RELEASE DATE: 10 September 2013