Neutral Citation: [2024] UKFTT 001104 (TC)

Case Number: TC09378

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2016/01219

Procedure – Business Premises Renovation Allowance – Apportionment of 'Residual Amount' remitted to First-tier Tribunal by Court of Appeal – Whether First-tier Tribunal determined methodology of apportionment – If so, whether it should revisit methodology after hearing further argument by the parties

Heard on: 28 November 2024
Judgment date: 6 December 2024

Before

TRIBUNAL JUDGE BROOKS

Between

LONDON LUTON HOTEL BPRA FUND LLP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Malcolm Gammie KC instructed by DWF Law LLP

For the Respondents: John Brinsmead-Stockham KC, Nicholas Macklam and Sam Chandler instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 28 March 2016, following a 16 day hearing and after taking time for consideration, the Tribunal (the "FTT") released its decision (reported at [2019] UKFTT 212 (TC), allowing in part, the appeal of the Appellant, London Luton Hotel BPRA Fund LLP (the "LLP") against the decision of HM Revenue and Customs ("HMRC") to restrict the LLP's claim for business renovation premises allowance ("BPRA") that it had made in respect of the conversion of a flight training centre near London Luton Airport into a 124-room hotel (the "Property").

2. Following appeals to the Upper Tribunal ([2021] UKUT 147 (TCC)) and Court of Appeal ([2023] EWCA Civ 362), it has been established that, save for Fixtures, Fittings and Equipment and other non-qualifying amounts (£587,556.35), none of the disputed expenditure, as set out at [2(1)] – [2(7)], of the FTT decision, qualifies for BPRA (see table in the Appendix which summarises various conclusions in relation to the disputed expenditure).

3. The Court of Appeal, at [175(c)] of its decision and paragraph 8 of its order, remitted the issue of the correct apportionment of the Residual Amount (see at [2(8)] of the FTT decision) "to the FTT (if not otherwise agreed), to be addressed in the manner referred to at [231] of the FTT's decision."

4. In relation to the "Residual Amount", the FTT's decision stated:

> "228. HMRC contend that the part of the Development Sum paid to provide remuneration to Cannock in the form of profit cannot be qualifying expenditure as defined in the legislation. This is on the basis of an apportionment between non-allowable and allowable items.
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> 229. The LLP is critical of such an approach. Mr Gammie contends that the fact that Cannock made a profit on the Development Agreement does not call into question the quantum of expenditure upon which BPRA is available. Mr Gammie also attacks HMRC's approach to the profit figure as "misconceived" for the following reasons:
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> > (1) HMRC have taken into account the initial acquisition cost of the Property at £2.85 million despite the vendor of the land being an unconnected third party;
> >
> > (2) It is wrong in principle to apportion the profit over the total price paid by investors in addition to the cost of conversion as this could produce a different BPRA figure depending on whether it was a freehold or leasehold property on a ground rent;
> >
> > (3) If profit is to be apportioned it should be over the Development Sum and not sums in respect of land purchase which would not have proceeded if all other elements had not been in place; and
> >
> > (4) If we were to uphold HMRC's arguments, the apportionment is still incorrect as the LLP would have directly paid the IFA fees, the promoter's fee, the licence fee/interest and other costs reducing the Development Sum which should be used as the basis for any apportionment.
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> 230. In response Mr Davey says that "quite plainly" if we hold, as we have, that elements of the Development Sum are not allowable and profit by the developer should be apportioned across qualifying and non-qualifying elements. This, he contends should include the acquisition cost of the freehold, because:

(1) Cannock assembled a package for the LLP;

(2) That package was "cradle to grave" and included securing the freehold of the Property from which the hotel business would operate;

(3) The profit paid to Cannock was attributable to all elements of the package, including the freehold premises; and

(4) The profit was calculated by reference to a stabilised valuation predicated on the assumption of freehold ownership.

Accordingly, Mr Davey submits that it necessarily follows that profit should be apportioned by reference to the total price of that package. He also dismisses the argument of the LLP that such an approach would lead to different BPRA figures in depending whether the property concerned was freehold or leasehold as it would be necessary for a case-by-case apportionment to be undertaken. This, he says, would also answer the further criticisms levelled at the apportionment by the LLP.

231.We agree with Mr Davey, for the reasons he has outlined, that there should be an apportionment in this case. However, the apportionment sought by HMRC will have to be varied to take account of our conclusions in relation to the various "elements" of the Development Sum. As with the issue of legal costs (see paragraph, 205, above) we would hope that this is something that can be left to the parties to undertake and agree in the light of our conclusions. But, in the event that it is not possible for the parties to reach agreement either may apply to the Tribunal to resolve this matter."

5. At [232] – [234] of its decision the FTT summarised its conclusions, noting at [234] that an apportionment of the Residual Amount was necessary and that, as this required "further analysis" in the light of the FTT's conclusions, it was hoped that the parties would be able to resolve this "between themselves with the option of returning to the Tribunal if they [were] unable to do so."

6. However, the parties have not only been unable to resolve the apportionment of the Residual Amount but cannot agree the extent or scope of the issue remitted to the FTT by the Court of Appeal. The purpose of this hearing was to determine the scope of that issue. The actual apportionment will, if necessary and if the parties cannot agree, be the subject of a subsequent hearing for which further directions will be necessary (see below).

7. HMRC was represented by John Brinsmead-Stockham KC, Nicholas Macklam and Sam Chandler. Malcolm Gammie KC appeared for the LLP. Although I was very much assisted by their submissions, both written and oral, I have not found it necessary to make specific reference in the decision to all of the submissions, materials or authorities to which I was referred, but I have taken all of them into account.

DISCUSSION AND CONCLUSION

8. Before the FTT there were three issues in relation to the Residual Amount:

(1) Whether it should be apportioned;

(2) The method of apportionment to be applied; and

(3) Its calculation.

9. It is common ground that, contrary to the LLP's argument before the FTT, Upper Tribunal and Court of Appeal but as confirmed by the Court of Appeal, the Residual Amount should be apportioned. It is also agreed that the FTT left the apportionment calculation to be agreed between the parties or, in the absence of agreement, the FTT. However, the parties part company as to whether the FTT actually determined the method of apportionment.

10. Mr Brinsmead-Stockham, for HMRC, contends that the FTT has already determined the method of that apportionment and that this cannot now be re-opened by the LLP. The scope of the matter remitted by the Court of Appeal, he says, is therefore very narrow with the only outstanding matter being the calculation of the apportionment which is a mechanical exercise that should require no more than a (very) short, if any, hearing.

11. For the LLP, Mr Gammie contends that the FTT did not determine the method of apportionment. However, he says that even if it did it is necessary to revisit that methodology to take into account the Court of Appeal's analysis of the law and its reasons for concluding as it did, having adopted its own reasoning rather than endorsing that of the FTT. He contends that as the FTT did not reach a final determination in relation to the LLP's appeal in respect of the apportionment, not only does it remain open for it to do so, but the FTT is bound to revisit its decision on the issue as another decision, that of the Court of Appeal, has intervened between the FTT reaching a decision in principle and the time it is asked to reach a final decision (see *Larner v Warrington (HMIT)* [1985] STC 442).

12. It is therefore necessary to consider whether the FTT determined the methodology for the apportionment and, if so, whether it is open for the FTT to revisit or reconsider that methodology and hear further arguments from the parties in relation to it.

METHODOLOGY

13. The method advanced by HMRC for the apportionment of the Residual Amount by first determining the percentage of total expenditure held to be non-qualifying for BPRA (ie total non-qualifying expenditure/total expenditure x 100%) and applying that percentage to the Residual Amount to determine how much of the Residual Amount was non-qualifying for BPRA has remained constant. It was first set out in the closure notice issued to the LLP on 5 February 2016. Under the sub-heading 'Proportion of Unspecified Residual Amount', the closure notice stated:

> "The residual amount has been apportioned in accordance with the proportions of the known costs allowable and not allowable. This has been calculated as follows –
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> | | |
> |---|---|
> | Specific Non Allowable costs (including land costs) | £8,323,112 |
> | Specific Allowable costs | £4,892,041 |
> | Total Specific Costs | £13,235,153 |
> | Total Cost Inc Land | £15,500,000 |
> | Residual Amount (difference) | £2,264,846 |

14. The LLP's grounds of appeal made it clear that the Residual Amount was disputed. In its grounds the LLP questioned how the Residual Amount was calculated and stated that it, "believes that the Respondent's basis for its calculation is seriously flawed."

15. It is therefore clear that apportionment and the methodology for its calculation was in issue from the commencement of proceedings and remained so, as can be seen from the statement of case and the LLP's reply, up to and including the hearing before the FTT.

16. At that hearing there was evidence from both the LLP and HMRC in relation to the apportionment of Residual Amount, Mr Nicholas Lewis gave oral evidence for the LLP and the unchallenged witness statement of Mr Paul Wills of HMRC was admitted into evidence. The FTT also had the submissions of both parties, both written and oral, on the question of whether apportionment was necessary in principle, HMRC's submissions on the method of apportionment with the LLP's case being (as upheld by the Upper Tribunal) there should be no apportionment. It also criticised the apportionment undertaken by HMRC as, "on any view, still incorrect."

17. As is clear from [228] to [231] of the FTT's decision, which is set out above (in paragraph 4), these submissions, which centred on whether the cost of the acquisition of the freehold of the Property should be included in the apportionment, were considered by the FTT. Having referred to these submissions, the FTT recorded that it "agreed with Mr Davey" (leading counsel for HMRC before the FTT) that there should be an apportionment but that the apportionment sought by HMRC would have to be varied to take into account the FTT's conclusions. This was because HMRC had contended that none of the disputed expenditure qualified for BPRA whereas the FTT, as can be seen from the table in the Appendix, had accepted the LLP's case in relation to some, but not all of the elements in dispute.

18. As such, the FTT not only decided that an apportionment of the Residual Amount was necessary but also, subject to a variation to take into account the FTT's conclusion as to which of the constituent elements qualified for BPRA, that HMRC's proposed method of calculation was correct.

19. In reaching such a conclusion, I reject Mr Gammie's submission that, by stating, at [234], that "further analysis" was required, the FTT decision was not sufficiently clear or precise to conclude that the method of apportionment had been determined. However, insofar as "further analysis" is concerned, I agree with Mr Brinsmead-Stockham that this refers to the need to first resolve the issue of the proportion of the expenditure on Legal Fees that qualified for BPRA (see [204] and [234] of the FTT decision), a matter that had also been left to the parties to resolve with the option of returning to the FTT if they were unable to do so, before the subsequent application of that amount to the calculation of the apportionment of the Residual Amount.

20. Although the Upper Tribunal overturned the FTT's conclusion on the Residual Amount, Whipple and Falk LJJ (with whom Lewison LJ agreed) giving the judgment of the Court of Appeal said, under the sub-heading "decisions below":

> "161. HMRC's position before the FTT was that the "profit" represented by the Residual Amount should be apportioned between allowable and non-allowable items. This should include the land because OVL put the whole "package" together for the LLP on a "cradle to grave" basis (including securing the freehold), and its profit was attributable to all elements of the package and was calculated by reference to a valuation predicated on freehold ownership of the hotel. The FTT agreed with HMRC for the reasons given by them (see [228]-[231]).
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> 162. The UT held this approach was wrong ([350]-[358]). The Residual Amount did not represent OVL's actual profit and as a result HMRC's submissions were "built on sand". More importantly, HMRC's approach was misconceived. It was based on the fallacy that what mattered was what OVL did with the money received from the LLP. The Residual Amount did not reflect a right or asset acquired by the LLP at all."

They continued by summarising the parties' submissions:

> "163. HMRC submit that the FTT was right. The Residual Amount was not the mere "mathematical difference" that the UT characterised it as. It was OVL's "fee" and a fundamental element of the deal between the LLP and OVL. It was undisputed that OVL's return related to the entire package and that the total expenditure on its provision was £15.5m. For example, if OVL had explicitly charged a finder's fee for the Property that would clearly be excluded. It should make no difference that it was "bundled" with other elements.

> 164. The LLP submit that HMRC's apportionment exercise is wrong in principle. The object of scrutiny of the legislation is the LLP's expenditure. The Residual Amount is simply an arithmetical calculation which does not reflect any obligation owed to the LLP. In any event, if an apportionment is required the approach suggested by HMRC is inappropriate."

21. At [165] of its decision the Court of Appeal concluded that the Upper Tribunal "was wrong to reverse the FTT's decision on this issue", saying:

> "171. We have concluded that there is no warrant for distinguishing between different categories of non-qualifying expenditure. The nature of the individual elements and the reasons why those elements are determined not to be incurred on or in connection with the conversion, and whether by reason of the explicit exclusion in s.360B(3) or for some other reason, do not provide a principled basis for a distinction to be drawn. The "package" included all those elements.
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> 172. The precise apportionment was a matter for the FTT, as it recognised when leaving the matter to the parties to attempt to agree it with provision for either party to apply to the Tribunal if agreement was not reached (FTT decision at [231]). We therefore do not need to determine it. However, we would observe that we did not detect any real objection to HMRC's proposal that it can be done straightforwardly by identifying the percentage of the total expenditure (excluding the Residual Amount) that has been found to be non-qualifying and applying that percentage to the Residual Amount."

22. The effect of the Court of Appeal's decision therefore, was to reinstate the FTT's conclusion in relation to the Residual Amount which, as noted above (at paragraph 18) in addition to concluding that an apportionment of the Residual Amount was required, determined the methodology for that apportionment.

RECONSIDERATION/FURTHER ARGUMENT

23. Mr Gammie contends, relying on *Larner v Warrington*, that even if, as I have found, the FTT did determine the methodology for the apportionment, that methodology should nevertheless be reconsidered and the LLP, which until now has not advanced an argument on the method of apportionment (relying instead on its case opposing apportionment and criticism of HMRC's approach to it), is entitled to make submissions in the light of the Court of Appeal's decision and produce evidence in support of those submissions.

24. In *Larner v Warrington* the General Commissioners had determined an appeal in principle in favour of a taxpayer but adjourned the hearing for the valuation of shares to be agreed or, in the absence of agreement, be determined by the Special Commissioners. However, following a subsequent binding decision of the High Court on the same issue, the Inland Revenue sought and were granted permission to present further argument on the point of principle leading the Commissioners to conclude that regrettably they had "no alternative other than to refuse the taxpayer's appeal."

25. In the taxpayer's appeal against the General Commissioner's decision, which was on the basis that the Commissioners should not have reopened the decision in his favour which he had relied on and that he had been prejudiced by the delay, Nicholls J said, at 447-448:

> "… there had been no final decision on all matters raised by the parties, … it seems to me plain that when the appeal was thereafter restored before the commissioners in February 1984 the appeal had still not been finally determined by them, even though (but for the intervening decision in *Williams (Inspector of Taxes) v Bullivant*) the hearing in February 1984 might have been expected to be little more than a formality. The appeal not

> then having been concluded, in law it was then still within the commissioners jurisdiction to alter their decision, in the same way as a judge has jurisdiction to alter his decision before the order he makes has been formally drawn up and entered: see *R v Morleston and Litchurch IT General Comrs, ex p G R Turner* 32 TC at 336, 337 per Lord Goddard CJ.

Nicholls J continued, at 448, saying:

> … 'solid grounds' (to use the expression off Stephenson LJ in *R v General Commissioners for St Marylebone ex p Hay* [1983] 346 at 359) must exist before a party who has already fully presented his case to the commissioners should be permitted to have a second bite at the cherry but what had occurred in this case was that, since the previous hearing, the court had decided a relevant point of law in the sense contrary to that decided in principle by the commissioners in the instant matter in 1979. That decision of the court was binding on the commissioners. It would have been absurd for the commissioners to have refused to consider that decision but to have preceded formally to determine the taxpayers appeal on the basis of a construction of the statute which they had by than to their knowledge being held to be erroneous."

26. However, in the present case not only was the method of apportionment determined by the FTT but it is clear that the Court of Appeal, by ordering that it be "addressed in the manner referred to at [231] of the FTT's decision", also accepted the FTT's conclusion, reinstating it without any further addition or instruction. As such, there was no intervening decision (other than that of the Upper Tribunal which was overturned by the Court of Appeal and therefore not applicable) or observation of the Court of Appeal to be taken into account nor are there any "solid grounds" for the FTT's decision to be reopened or revisited.

27. It is therefore necessary to consider whether the LLP should nevertheless be permitted to make further submissions and adduce evidence in relation to the method of apportionment of the Residual Amount.

28. As the Supreme Court observed in *AIC Limited v Federal Airports Authority of Nigeria* [2022] 1 WLR 3223 at [29]:

> "… the higher courts have in a number of respects laid down important and binding principles regarding what justice requires in the context of litigation which are relevant to the application of the overriding objective in the CPR, and one of these is that there should be finality in litigation. This is a general principle with various aspects, including the rule in *Henderson v Henderson* (1843) 3 Hare 100 by which a party is precluded "from raising in subsequent proceedings matters which were not, but could and should have been raised in earlier ones" (see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160 para 17). This rule "is firmly underwritten by and inherent in the overriding objective [in the CPR]" (*Sainsbury's Supermarkets*, para 239). As Sir Thomas Bingham explained in *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, 260 in a passage quoted in *Sainsbury's Supermarkets*, para 239:
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> > 'The rule in *Henderson v Henderson* … requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided … once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise.'"

29. Lewison LJ made the same point in his oft-quoted remark in *FAGE UK Ltd v Chobani UK Ltd* [2104] EWCA Civ 5 at [114] when he said:

> "The trial is not a dress rehearsal. It is the first and last night of the show."

30. Although the decisions in *AIC* and *FAGE* were in relation to proceedings under the CPR which does not apply to the FTT, given the similarity of the overriding objective in both the CPR and Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the FTT will generally adopt a similar approach to proceedings under the Tribunal Procedure Rules as to those under the CPR (see eg *BPP Holdings Ltd & Ors v HMRC* [2017] 1 WLR 2945).

31. Adopting such an approach in this case, I consider it is now too late for the LLP to make further submissions and adduce evidence on the methodology of the apportionment, something it could, and in my judgment should, have done before the FTT when it had the opportunity to do so. The courts and tribunals are well used to hearing alternative, often contradictory, arguments and there was no reason why the LLP in this case could not have maintained its primary argument that there should be no apportionment but also advanced an alternative secondary argument in relation to the methodology for such an apportionment in the event that, as was the case, its primary argument did not succeed.

32. I have therefore, for the reasons above, come to the conclusion that the decision of the FTT should not be reopened or reconsidered.

DIRECTIONS

33. As noted above (at paragraph 6), a further hearing may be needed for the calculation of the apportionment. I have therefore issued case management directions at the same time as, but separately from, this decision for this purpose.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

Release date: 06th DECEMBER 2024

APPENDIX

Summary of conclusions in relation to the disputed expenditure

Element in Dispute		Qualifying (✓) or non-qualifying (×)		
		FTT	**UT**	**CA**
1	**Interest Amount (£350,000)**	✓	×	×
2	**Capital Amount (£2,000,000)**	×	✓	×
3	**IFA and Promoter Fees (£682,423)**	✓	✓	×
4	**Legal Fees (£153,409)**	× **(mostly non-qualifying)**	×	**LLP not granted PTA**
5	**Franchise Costs (Ramada) (£24,862)**	✓	✓	×
6	**Franchise Costs (Sanguine) (£248,000)**	×	✓	×
7	**FF&E and other non-qualifying amounts (£587,556.35)**	✓	✓	**HMRC did not appeal**
8	**Residual Amount (£2,264,846)**	× **(mostly non-qualifying – to be apportioned)**	✓	× **(mostly non-qualifying – to be apportioned)**