TC02415

Appeal number: TC/2010/07197

VATA 1994 s24 – input tax – supplies not made to taxpayer – whether input tax reclaimable – whether supplies to agent on behalf of taxpayer – taxpayer ultimate beneficiary – absence of relationship between supplier and beneficiary - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HAWES & CURTIS LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR JOHN AGBOOLA FCCA

Sitting in public at 45 Bedford Square London on 30 November 2012

Mr Touker Suleyman, chairman of the appellant company, for the taxpayer

Ms Gloria Orimoloye of HMRC Solicitor's Office for the Crown

DECISION

1 This appeal concerns a claim by the taxpayer to be able to deduct as input tax £361,348, being the tax on the rent of properties it occupied but formally leased to another company called Low Profile Properties Limited. The periods in question go from 05/06 to 05.09.

2 When the case was first heard on 30 January 2012, it became apparent that the unrepresented appellant had not brought to the tribunal copies of the leases in question or the contested rent invoices, and we adjourned the matter for these to be produced. They were produced promptly and it is regrettable that it has taken so long to fix a resumed hearing of the appeal.

Facts

3 We thus received documentary evidence and heard oral evidence from Mr Suleyman, and from Mr M Dilonsky an in-house solicitor of the taxpayer. We find the following facts proved at least on the balance of probabilities.

4 The business of Hawes & Curtis as high class shirtmakers and shirtsellers, long established in Jermyn Street in London's west end, is now a hundred years old, but in 2001 Hawes & Curtis Limited was on the verge of bankruptcy when Mr Suleyman bought the company and its business, together with its then considerable financial liabilities. The company was, at that point, the lessee of 23 Jermyn Street but the landlords, the Crown Estate Commissioners, would only permit the business to be continued there if a new lease was granted to a lessee with a more reliable covenant. Low Profile Properties Limited (LPP), a company in Mr Suleymans' control, was therefore put forward for the purpose and a lease of the shop was granted to it on 15 February 2002, providing explicitly that the premises could be used as a shop 'trading under the name or style of Hawes & Curtis', enabling the goodwill and name of the business to be retained.

5 The minutes of a board meeting LPP on 24 January 2002 had recorded:-

> The chairman of the company reported to the meeting that having recently acquired the business of Hawes & Curtis Limited by acquiring the company it was necessary for some new retail shop units to be acquired and that some landlords would insist on a covenant of some strength. Hawes & Curtis Limited was a company with a very limited trading record over recent years and as such was not a covenant of any strength. In the circumstances, it was requested by Hawes & Curtis Limited that Low Profile Properties Limited enter into on its behalf leases of retail units, so as to ensure that Hawes & Curtis could open new units with a view to expanding its business.

> It was resolved that Low Profile Properties Limited enter into such leases and obligations on behalf of Hawes & Curtis Limited on the basis that it would do so only as trustee and that no liability would arise for the company and that indeed Hawes & Curtis Limited would indemnify Low Profile Properties Limited against any claim or claims that may arise. All relevant costs of obtaining the lease and maintenance of the lease will be the responsibility of Hawes & Curtis.

6 On the same date, the board minutes of Hawes & Curtis Limited had recorded:-

> It was reported to the meeting that the company of Hawes & Curtis Limited had recently been acquired by Low Profile Holdings Limited and that the intention was to expand the business as rapidly as possible. In order to enter into new retail leases the board recognised that landlords would require a stronger covenant than that which could be provided by Hawes & Curtis Limited. It was therefore resolved that an appropriate arrangement be entered into with Low Profile Properties Limited for that latter company to enter into leases on its behalf in a purely nominee capacity. It was resolved that Hawes & Curtis Limited give to Low Profile Properties Limited such indemnity or indemnities as Low Profile Properties Limited may require to enable the arrangement to proceed.

7 Leases of shop units were then granted to LPP as follows:

- 23 Jermyn Street: 15 February 2002.
- 66 London Wall: 6 May 2003.
- 18 Lime Street: 19 September 2003.
- 177 Regent Street: 18 October 2004.
- 70 Regent Street: 27 January 2005.
- 39 King's Road: 13 May 2005.
- 14 Fleet Street: 5 October 2005.

8 In practice the rents were paid by the taxpayer to the landlords direct, and the landlords approved shopfitting plans for the premises prepared and submitted by architects indicating the nature and identity of the business. An example of shopfitting plans for such approval was shown to us and the architect's drawing bore the name simply 'Hawes & Curtis'. Mr Suleyman's evidence was categorical that all the landlords knew that the taxpayer company as such was in occupation of the shops and the effective tenant, though he accepted that they were unaware of the terms of the board minutes quoted above.

9 As against this, all the leases contained the usual restrictions on subletting or parting with possession, and in no case was there a licence or even an informal consent for

the taxpayer's occupation and use of the premises; and all the rent invoices were consistently addressed to LPP (which was not VAT registered). In all the cases except one the leases were, after the periods we are concerned with, assigned to the taxpayer with the landlords' consents, so that the landlords would of course have been aware of the reality of the taxpayer company as the occupying trader thenceforth.

10 But before that stage was reached, it is highly improbable that in seven instances the landlords of prime commercial properties would all have ignored the restrictions in the lease against subletting and parting with possession and have failed to record even informal consent to occupation by another limited company; the fact of the subsequent assignments is indeed an indicator that landlords had not previously seen the taxpayer company as the recipient of the supply of services constituted by the grant of the leases.

11 As far as the landlords were concerned, it has not been proved that there was any recognition of the taxpayer being in occupation or dealing with them as a limited company, and the evidence points to an understanding on their part that the conduct of the business was being undertaken under the well known name of 'Hawes & Curtis' but not that 'Hawes & Curtis Limited' was the occupant, either tacitly approved or otherwise.

12 In the case of 23 Jermyn Street, where the taxpayer company had previously been the legal tenant, this understanding was actually expressed in the lease, and in the other cases we consider it the most probable explanation of the circumstances. We bear in mind that this conclusion is in opposition to Mr Suleyman's sworn evidence that the landlords knew that Hawes & Curtis Limited was in actual occupation, but it was explicitly put to him in cross-examination that the landlords would not have granted the leases at issue had they understood that they were entering into direct relations with the taxpayer company as tenant. That is clearly so in the case of 23 Jermyn Street, and we find that it is so in the case of the other leases also.

13 We do not suggest that Mr Suleyman's description of matters was intentionally untruthful, but it is necessary to note that he was purporting to state what had been the position of several different landlords between seven and ten years ago, and from whom there was before the tribunal no corroborative evidence, written or oral; his description, moreover, is at odds with the documentary evidence and the clear probabilities of the case. The distinction between trading under a well known brand name and the role of a limited company of the same name may not be immediately obvious to many people and the probability is that, precisely because that distinction is not immediately obvious, the technical error of LPP not registering, opting to tax and recharging the rent to the taxpayer did in fact occur. We fully accept, as do the commissioners, that there has been no intention to defraud the revenue or to avoid tax.

14 *Value Added Tax Act 1994 - section 24*

> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say-

(a) VAT on the supply to him of any goods or services;

(b) VAT on the acquisition by him from another Member State of any goods, and

(c) VAT paid or payable by him on the importation of any goods from a place outside the Member States,

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

Submissions

15 For the taxpayer, it was argued in its notice of appeal, drafted by PWC, that notwithstanding what the formal documentation showed the continuing services supplied by the grant of the leases were effectively supplied to the taxpayer and not to LPP, so that the input tax on the rents should be recoverable by it. In support of this, several authorities were cited including the decision of the House of Lords in CEC v Redrow Group Plc [1999] STC 161.

16 In that case the issue concerned the fees of estate agents acting for the sellers of properties, who were also the buyers of new properties from Redrow; in order to encourage such persons to buy their new properties, Redrow agreed to pay the estate agents fees on their buyers' corresponding sales of their previous houses. The commissioners considered that the services of the estate agents had not been supplied to Redrow but to the house sellers, and that Redrow could not therefore recover the VAT on them as its input tax.

17 The House of Lords allowed Redrow's appeal on the basis that they had not only received a benefit from the agents' services indirectly but had a direct relationship with them. Lord Hope of Craighead, at page 166, said:-

The estate agents received their instructions from Redrow and, so long as the prospective purchasers completed with Redrow, it was Redrow who paid for the services which were supplied.

18 The same point was emphasised by Lord Millett, at page 171:-

> In the present case, Redrow did not merely derive a benefit from the services which the agents supplied to the householders and for which it paid. It chose the agents and instructed them.

19 The notice of appeal also cited the judgment of the Court of Appeal in Baxi v CEC [2007] EWCA Civ 1378 and Loyalty Management UK v RCC [2007] EWCA Civ 965, saying that "the approach of the Court of Appeal appears to have been to consider the validity of the input tax claim by starting from the perspective of the claimant himself and asking whether he has received any benefit at all for the services received for the payment made". These cases have since been the subject of a reference to the Court of Justice from the House of Lords, reported at [2010] STC

2651, and it is clear that the four parties involved were, so far as relevant, in direct relationships with each other and that the decision does not assist us on the facts in the present appeal.

20 Reference was also made to case C-185/01 Auto Lease Holland BV v Bundesamt für Finanzen [2005] STC 598 which, again on the facts found in this appeal, appears to us to have no bearing on the issue we have to determine. The facts in that case were that a car leasing company authorised the lessees of its cars to fill up with petrol using a credit card supplied by the company, but the lessees had to make payments to the lessor equal to the amounts spent at the pumps. The Court held, at [34] to [36]:-

> 34. It is common ground that the lessee is empowered to dispose of the fuel as if he were the owner of that property. He obtains the fuel directly at filling stations and Auto Lease does not at any time have the right to decide in what way the fuel must be used or to what end.
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> 35. The argument to the effect that the fuel is supplied to Auto Lease, since the lessee purchases the fuel in the name and at the expense of that company, which advances the cost of that property, cannot be accepted. As the Commission rightly contends, the supplies were effected at Auto Lease's expense only ostensibly. The monthly payments made to Auto Lease constitute only an advance. The actual consumption, established at the end of the year, is the financial responsibility of the lessee who, consequently, wholly bears the costs of the supply of fuel.
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> 36. Accordingly, the fuel management agreement is not a contract for the supply of fuel, but rather a contract to finance its purchase. Auto Lease does not purchase the fuel in order subsequently to resell it to the lessee; the lessee purchases the fuel, having a free choice as to its quality and quantity, as well as the time of purchase. Auto Lease acts, in fact, as a supplier of credit vis-à-vis the lessee.

21 For the commissioners, it was submitted that the landlords had no relationship with the taxpayer company and would not have agreed to have one if they had been asked to. It was for that reason that the leases were granted to LPP and it was impossible to deduce any recognition by the landlords of the taxpayer as the direct recipient of the landlords' services, or any relationship of agency in which the taxpayer would feature as the principal. The correct analysis is that at the relevant times LPP had (without consent) sublet to the taxpayer company in consideration of its paying the rents on the properties but, in the circumstances of LPP not having been registered for VAT or opting to tax, this would be an exempt supply.

Conclusions

22 The taxpayer has not been able to establish that the landlords of the shops it traded in made or intended to make supplies to it, or ever intended to deal with it whether through the agency of LPP or otherwise, or even that they acquiesced in the taxpayer as a limited company occupying their premises. None of the authorities cited in its notice of appeal seem to us to assist the taxpayer, since they all concerned cases in

which there were direct dealings between the supplier and the claimed recipient of the supply and do not address the issue of whether input tax on a supply can be claimed by a beneficiary with whom the supplier neither deals nor intends to deal.

23 Since LPP was not at the material times registered for VAT and had not opted to tax property rents, it could not pass on the right to deduct tax on the rents to the taxpayer company. We much regret having to reach a conclusion that the essentially technical failures in the property leasing arrangements in this case result in a substantial liability for the taxpayer which could have been avoided, but as we explained more than once in the hearings the tribunal has no jurisdiction to do other than apply the law. The appeal therefore cannot succeed.

Further appeal rights

24 This document contains the 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 no 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.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 11 December 2012