[2015] UKFTT 0491 (TC)

TC04653

Appeal number: TC/2014/04125

VALUE ADDED TAX – input tax on property purchased – whether property to be used for making taxable or exempt supplies – held not to be used for making taxable supplies.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR SHEIKH GULZAR AND MR SASHA GULZAR (trading as LIONS CUB NURSERY) **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
SHEILA CHEESMAN

Sitting in public at 1 Edward St, Brighton on 10 September 2015

Mr Sheikh Gulzar for the Appellant

Mr B Haley, Presenting Officer, for the Respondents

DECISION

1. This is an appeal against an assessment to VAT and interest covering the prescribed accounting periods 03/12 to 03/13, and against a decision of HMRC denying credit for input tax (and hence refusing repayments) for the periods 06/13 to 12/13. Period 03/12 is the first period of trading which began with effect from 7 February 2012; the rest are periods of three months.

2. The assessment was made under s 73(2) Value Added Tax Act 1994 ("VATA") and its effect was to recover repayments of input tax claimed by the appellant in those periods. There are no outputs in any of the returns. The largest part by far of the tax in dispute is an amount of £57,939 which represented all or nearly all the VAT charged on the purchase of a property in February 2012 which falls in the first period, 03/12. The VAT assessed for the remaining four periods was £6,932, £2,045, £2,287 and £4,461. The interest on the total of these amounts was £4,177.37 and was charged to tax under s 76(1) VATA and included in the assessment to tax by virtue of s 76(5) VATA. An appeal against such a combined assessment is made under s 83(1)(p)(i) VATA (assessment to tax) and s 83(1)(q) VATA (assessment to interest).

3. The decisions denying credit for input tax relate to sums of £3652.52, £1692.92 and £740.30. They were said by the reviewing officer in the case to be made under s 25(3) VATA, but this cannot be right. But the amount of any input tax is an appealable matter by virtue of s 83(1)(c) VATA and no dispute arises about HMRC's right to make the decisions nor about the time at which they were issued.

4. There is mention in the papers, and in particular in the relevant officer of HMRC's witness statement, of a decision in relation to the 03/14 period and the charging of penalties. But so far as we can see there were no appeals against any of those matters before us, and we do not know if the decision was made or the penalties assessed.

Issue

5. The issue for the Tribunal is whether, for all the periods concerned, the input tax incurred by the appellant is attributable to taxable or to exempt supplies to be made or in fact made by the appellant.

6. We should say that although this is technically an appeal by a partnership of which Mr Sheikh Gulzar is the senior partner and his son Mr Sasha Gulzar is the junior partner, it is apparent that Mr Sheikh Gulzar, who conducted the partnership's case, is overwhelmingly the dominant force in the partnership and in his other related businesses, and all references to "Mr Gulzar" from here onwards are to Mr Sheikh Gulzar alone.

Evidence

7. We had witness statements from Mr Gulzar and from Mr Peter Hawley of Lion Hotels Ltd for the appellant, and they, together with Mr Manas Singh, also of Lion

Hotels Ltd, gave oral evidence on which they were cross-examined by Mr Haley for the Commissioners for Her Majesty's Revenue and Customs ("HMRC").

8. We had a witness statement from Mr Nicholas Hilton ("Mr Hilton"), the officer of HMRC who had conducted the compliance check into the returns, and he gave oral evidence and was cross-examined by Mr Gulzar.

9. We also had a single bundle of documents prepared by HMRC but which consisted a number of documents provided by the appellant, as well as those put in evidence by HMRC. Further documents were also tendered by the appellant during the course of the proceedings, to which HMRC had no objection.

10. We have set out our views of the witnesses and their evidence in in the part of this decision where we make our findings of fact (see §§62 to 68). We have also referred to the pages in the bundle for each document we mention as "**[p (or pp) X**]" where X is the number of the page concerned: this is primarily for the benefit of the parties so that they can quickly find the relevant document when they read this decision. It should be noted that documents with page numbers between 78 to 105 are the appellant's documents for the hearing, documents from 106 onwards are those exhibited with Mr Hilton's witness statement which he obtained from third parties, and those before 77 derive from correspondence between the parties during HMRC's enquiries.

Law

11. We deal with the statute law, both European and domestic, which relates to this dispute in §§90 to 94 below. We remark here only that HMRC cited only one section of VATA (section 26) and one (nor very relevant) regulation to us, and the appellant, who was not legally represented, none. No case law was cited to us.

Facts

12. We first set out the undisputed facts relating to the purchase, finance, works on and use of the property. These facts are mostly apparent from the documents in the case. It should be noted that we have reproduced the wording of documents, especially emails, exactly as they appear. Where we comment on the wording of any documents our comments are in square brackets.

13. Mr Gulzar is the moving spirit behind Lion Hotels Ltd which owns a number of hotels in Eastbourne and its vicinity. He also own a farm from which the hotels are supplied with food, both meat and vegetables.

14. A property in Eastbourne which had been a pub, 87 Beach Rd, ("the property") had been on the market in late 2011 **[pp 78 & 79]**. Mr Gulzar was attracted to the idea of buying the property and sought finance from NatWest Bank for this and for other transactions he intended to enter into. An email from NatWest dated 15 February 2012 **[pp 60 & 61]** addressed to Mr Hawley and Mr Sasha Gulzar stated that:

> "Funds will be used as follows.

…

> Purchase Beach Road property in Eastbourne for **£340k** and refurb for **£45k** into Wholesale butchers to compliment hotels and distribute meat to neighbouring businesses.

…

> I now understand that Mr Gulzar has entered into a contract to purchase Beach Road with completion in 10 days without a definitive offer or agreement in principle [of, and to, finance, we assume] …"

15. On 20 February 2012 the appellant (ie the partnership) completed an application to open a bank account with NatWest for "Lions Group Shop" **[pp 86 - 90]**. An account number was emailed to Mr Hawley on 27 February 2012 **[p 91]**.

16. On 29 February 2012 Mr Gulzar completed on the property. He obtained insurance for the property and in the insurance documents **[pp 93 - 97]** it is stated:

> "Policyholder: Sheikh A Gulzar trading as Lion's Group Shop
>
> Effective date 29/02/2012
>
> Premises Occupation: Farm Produce Retailing & Butcher"

17. Mr Gulzar had sought registration for VAT as a partnership with effect from 7 February 2012 (though we do not know the date on which he submitted the application for registration). The intended trade was to be the selling of meat **[p 8]**. In a letter of 5 March 2012 to HMRC **[p 98]** Mr Gulzar stated that he had been told the partnership had been registered but he had not been given a VAT number. The letter also said that he had requested monthly returns so he could reclaim the £49,500 VAT on the purchase of the property, as they needed the refund to pay labour and material.

18. On 26 March 2012 Mr Richard Garland of Gradient Consultants (Chartered Building Surveyors and Property Consultants) gave a quotation for professional services **[p 163]** which showed the "date of request" as 21 March 2012. The document contains the following details:

> "Property/Client: 74 Beach Road, Eastbourne / Mr Gulzar, C/o Mamas, Lion Hotels Limited.
>
> Project/works: Change of Use & Planning Consent for Alterations
>
> Scope of Quotation: Carry out a measured survey of 74 Beach Road and prepare drawings for a proposed first floor conservatory scheme and 'change of use' application for submission to Eastbourne Borough Council."

The "request" was contained in an email of 21 March 2012 **[p 175]** from Reid Dean (a firm of estate agents etc) to Richard Garland. This email had told Mr Garland that "the job will come your way". The email added that:

> "Mr Gulzar will be taking a very personal interest in the scheme and will brief you properly, but for the moment send the info to Manas: [email address].

> They do not hang around at all, and work has already started, so you will have to be hot on their tail."

19. On 29 March 2012 Mr Manas Singh of Lion Hotels Ltd emailed Mr Garland **[p 176]**. The email referred to a meeting and enclosed "drawings for windows and doors for the beach road property. Also can you please update me on the change of use application/windows and doors."

20. An email from Mr Garland to Mr Singh of 30 March 2012 **[p 180]** discusses the windows and conservatory scheme and adds:

> "…we will need to prepare a proposed scheme showing what the rooms will be used for. Once we have a scheme, we can agree it with you and take it to the Planners for their initial view prior to the application. This will then enable us to complete the application for change of use, and prepare the necessary supporting documentation."

21. On 8 April 2012 Mr Garland emailed Mr Singh again **[pp 181 & 182]** and said:

> "We completed the site survey on Thursday and will prepare a scheme for the nursery and conservatory at first floor level this week."

The rest of the lengthy email considered the issues which a change of use application threw up, including that no work on refurbishment should be undertaken while consent was being sought.

22. On 20 April 2012 **[p 183]** Mr Garland wrote to Mr Gulzar with the result of his meeting with the Council. He made it clear that planning approval would be needed. The Council had discussed the proposed change of use informally and suggested that "a day nursery on the site would be a favourable option".

23. An invoice dated 25 April 2012 from Gradient Consultant to Lion Hotels Ltd (c/o Manas **[p 178]**) showed:

> "Project Title: 74 Beach Road, Eastbourne - Change of Use & Planning Consent for Alterations
>
> Detail: Carry out a full measured survey of 74 Beach Road and annexe, and prepare drawings for the proposed window replacement, first floor terrace and conservatory scheme together with a change of use application (A4 to D1) for submission to Eastbourne Borough Council."

[It is not in dispute, and **[p 179]** shows, that A4 is "drinking establishment" and D1 includes "day nursery", or that a change from A4 to A1 (shops) does not need change of use consent.]

24. On 3 May 2012 Mr Singh emailed Mr Garland **[p 185]** and asked him "to update me with the Planning Application date of submission." Mr Garland replied that day **[p 184]** to say that the application was almost complete but he needed Mr Singh's view about which door was to be the access door for the nursery, referring to the security provisions that would be needed and the ability of mothers to get buggies etc across the road outside. He also asked about the signage for the nursery.

25. In response Mr Singh emailed on 4 May 2012 **[p 184]**:

> "Yes we will go ahead with 'LION CUB NURSERY' as recommended.
>
> As to the entrances as recommended ….
>
> Please let me what Chris comes back to you as and when we are submitting the application."

26. Mr Hawley put in evidence at the hearing two documents:

(1) An invoice from Travis Perkins dated 24 July 2012 showing delivery to "Lions Group Shop" of 63 metres of skirting, 5 x Knauf Moisture shield and 3 sheets of MDF caberlite.

(2) A "Statement of Account" dated 31 October 2012 from Haulaway Ltd addressed to Lions Group Shop showing unidentified "goods and services" which Mr Hawley said was to do with skip hire for removing rubbish from the property.

27. Mr Garland sent an email to Mr Peter Hawley on 7 August 2013 **[p 100]**. This had as its subject line "74 Beach Road, Eastbourne", and as attachment "74 Beach Road – Receipt of Application.pdf". It sets out "as discussed" a number of key dates in respect of the change of use, which were:

(1) 22 May 2012 the date of the original planning submission, which was subsequently withdrawn on the advice of the planners. This was because although a change of use from A4 to D1 was likely to comply with planning policy, a number of other issues arose.

(2) 23 July 2012 East Sussex CC confirmed that under their transport policy they would refuse any application for change of use. The email stated that Mr Gulzar was aware that the existing class A4 permitted changes without the need for consent to A1, A2 and A3 allowing Lions to operate a restaurant, shop café etc in line with current operations.

(3) August 2012. A noise impact assessment survey was commissioned.

(4) Over the next couple of months Gradient, working with Lions, ESCC and the planners, came up with a scheme that had, they said, a good chance of successfully obtaining planning consent and change of use.

(5) 30 October 2012. The planning application was considered by the planning committee and was granted approval subject to a s 106 agreement. This required the construction of a road traffic island.

(6) 16 April 2013 Road traffic refuge island completed and approved, with the s 106 agreement being signed it is believed at the end of April 2013.

28. In finding the matters set out in §§13 to 27 as facts, as we do, we stress that we are not at this stage drawing any inferences from the documents. We now turn to the oral evidence.

Mr Gulzar's evidence

29. Mr Gulzar represented himself before us (or rather, technically, the partnership, but there had been no trace of any involvement by the other partner, Mr Gulzar's son Sasha) and necessarily it was difficult for him to clearly separate submissions from evidence. He had produced a signed witness statement dated 28 January 2015 **[pp 104 & 105]** the significant parts of which we set out:

> "Between 2003 and 2011 I developed my business in Eastbourne and owned and operated four Hotels and had 200 acres of grazing farmland. The farms were producing eggs, lamb and beef for the Hotels and during 2011 we had over capacity of livestock. It became a logical extension of my business to open a retail outlet to sell meat and other products. In London I had owned a supermarket for twenty years A. G. Stores Ltd. and was fully conversant with this type of business.
>
> …. The purchase price [of the property] was £275,000 plus VAT and I was advised that I would be able to reclaim the VAT as the new shop would be a taxable supplier. I would not have gone ahead with the purchase if I could not have reclaimed the VAT. …
>
> I wrote to my bank on 23rd December 2011 and laid out my plans for the Lions Farms and Shop with profit projections. (List of Documents 2 and 3) …
>
> On 19th April I met with Mr Goodall and explained the shop projects and he fully supported to refund of the VAT, which was to be fully invested in renovations to the property. This included fully opening up the ground floor to have a clear are for shelving to be fitted.
>
> It was during May 2012 that one of my team suggested that we coder a Nursery and not a Shop. I was not sure and we asked an architect to look at it and he felt there could be change of use difficulties. Never the less we tried a planning application which eventfully many months.
>
> Throughout this time the option to open as a Shop was always there. The suggestion that I had changed my mind is not correct as until the change of use was confirmed in October I could have open the shop. …"

30. The document he numbers as 2 is a letter, dated 23 December 2011 **[pp 80 & 81]**, to NatWest Bank and headed "Lion Farms & Shop". It is addressed to Mr Suter, Senior Relationships Manager in Chichester, and refers to the figures attached replacing more conservative figures previously given to Mr Suter.

31. In the letter he says that:

> "… all purchases for all four hotels will done through our Farm Shop and we also have half a dozen other Hoteliers who will be buying their requirements from us. So our turnover and sales in first year will be nearer to £1,000,000 producing good positive profit on top of that we have excellent location right on the sea front …".

It ends by saying:

> "Your positive and prompt consideration with maximum security to bank as we are willing to give would be appreciated.
>
> ….
>
> I look forward to your urgent response."

32. The document numbered as 3 **[pp 82 & 83]** includes the cash flow projections referred to in the letter. These show that:

(1) the cash flow from the "Retail Farm Shop" was projected to be £5,000 in June 2012 increasing to £45,000 in December 2013

(2) £800 per month was projected from "flat rental" starting in April 2012

(3) £340,000 was to be spent in March 2012 on purchasing the freehold and £45,000 in April 2012.

33. In oral evidence Mr Gulzar elaborated on his witness statement describing his background, business experience, business success, charitable and other public work in Eastbourne, his character as a workaholic and his respect for Mr Hilton and HMRC as a whole, adding that "I have not lied, I will never lie".

34. In his evidence he reiterated that his intention was to open a shop and that he intended to completely rewire the property and install new plumbing, plastering, flooring, boilers and kitchen. He also referred to other possible uses of the property including a soap factory in relation to which he had produced to Mr Hilton a newspaper cutting dated 20 April 2012 **[p 62]** stating that "[a]n Eastbourne hotelier is planning to expand into the soap manufacturing business" together with emails about soap production. These included an email from a Mr Mukat Gupta to Mr Gulzar and his son dated 9 April 2012 referring to a quotation for a reconditioned used bar soap finishing line (for €69,000) to which Mukat added £25 to 30k for transportation etc. **[pp 63 & 64]**. Another possible use as a restaurant or bar was mentioned.

35. In cross-examination by Mr Haley, Mr Gulzar was asked whether he took advice about VAT. He stated that he had spoken to a VAT officer to establish that it was correct that he was charged VAT on the purchase and that he could reclaim it.

36. Mr Gulzar was asked if he had a supermarket in mind on 7 February [the date from which VAT registration was requested]. His reply that it was in his mind before that.

37. Asked if he had applied for a licence to sell alcohol, he said he did not need one, and that he might not sell alcohol anyway.

38. When asked what happened to the supermarket idea he had no reply. The idea for a nursery came to him from he said a "lady from Ofsted" but he could not specify when this was. He accepted that there was not and there never had been a Lions Farm Shop. But Mr Gulzar pointed to the fourth paragraph of his witness statement to show that there had been work carried out for a shop.

39. Mr Gulzar was then asked about Gradient Consultants with whom he agreed he was familiar. He was taken to the quotation from Gradient (see §18) and asked if he understood "A4 to D1" which he said he did. He was asked if the quotation evidenced a firm intention to open a nursery, to which he replied "Not really".

40. He agreed that no equipment was bought for the shop and that he knew the difference between taxable and exempt supplies.

Mr Singh's evidence

41. Mr Singh had not made a witness statement. In his oral evidence he stated that the property had been marketed in late 2011 at £275,000 plus VAT. There were discussions with the in-house accountant about VAT in November and December 2011.

42. He stated that there were no conversations with Eastbourne Council about a change of use because planning use category A4 (pubs etc), which was what the property was, could be changed to A1 (retail) without planning consent.

43. Mr Singh also mentioned that in a supermarket the owner does not need to buy shelving as suppliers will install it free of charge. There only needed to be a "shell".

44. In cross-examination by Mr Haley, Mr Singh was taken to the Gradient documentation.

45. On the email from Reid Dean (see §18) Mr Singh said it was not clear to him what job was being talked about.

46. On his email to Mr Garland of 29 March (see §19) he suggested that the change of use application referred to there was the replacing of the windows and doors by uPVC ones.

47. Asked about the conservatory referred to in the Gradient documents (see §§18, 20, 21 and 23) he maintained that this was nothing to do with the nursery.

Mr Hawley's evidence

48. Mr Hawley had provided a witness statement signed and witnessed on 9 July 2015, the gist of which was as follows.

49. Mr Hawley was an experienced hotelier and Group General Manager of Lion Hotels. He said he had worked for Mr Gulzar since 2005 and that Mr Gulzar had been talking for some time about purchasing a suitable property as a retail outlet for the produce from his farm, and that they had discussed employing a full time butcher.

50. He said that Mr Gulzar would not have gone ahead with the purchase if he could not have reclaimed the VAT. Nor would he have contemplated purchasing any property without establishing if change of use was required.

51. He said that, after completion, work started to strip the old pub out to create floorspace for retail. They were getting prices for shelving and refrigeration, and that

from March to July all renovation works were with the shop in mind even though the nursery idea had been conceived.

52. He added that it was not until planning approval was received in February 2013 that a commitment to open the nursery was made.

53. Mr Haley asked Mr Hawley why there was a change to going for a nursery. He replied that he didn't know how it happened. He agreed he was on the sidelines to a degree with Mr Singh and Mr Gulzar being at the forefront. He said that he thought the meat selling idea was a good one, but he was not keen on the nursery from a business point of view.

Mr Hilton's evidence

54. Mr Hilton's witness statement was taken as read, subject to the correction of incorrect dates (wrong years) which had no material effect.

55. In examination in chief, Mr Hilton explained that his initial thoughts about the case were that there had been a change of intention (from shop to nursery) and as a result he had told Mr Gulzar that he would be seeking to claw back the input tax under regulation 108 of the VAT Regulations, but he was not yet sure in which period the claw back ought to be made.

56. Asked what had changed his mind he explained that he had been seeking, and eventually obtained, from Mr Gulzar a mandate to approach Mr Garland of Gradient Consultants. He had put in evidence as an attachment to his witness statement the notes of a meeting **[pp 171 to 174]** he and another officer, Jill Tyler, had had with Richard Garland and Clare Armstrong of Gradient on 9 January 2014 at their offices. It was as a result of the information from this meeting and the documents supplied ("the Garland documents") **[pp 175 to 185]** that he came to the view that the real intention all along had been to open a nursery.

57. Mr Gulzar cross-examined Mr Hilton about the visit to the appellant by Mr Goodall on 18 April 2012. This was, Mr Hilton said, standard in a case where a first return shows a substantial repayment and the visit was to verify the repayment. The HMRC documents included Mr Goodall's handwritten notes of the meeting **[pp 145 & 146]** and in Mr Hilton's letter of 5 August 2013 **[pp 147 - 149]** he had produced a copy of the notes which Mr Goodall had added to the HMRC computer system on 19 April 2012.

58. Mr Gulzar wished to know why there was a statement on the computer record that he had been told about a clawback if there was a change of intent and that letting the property out would cause such a change, given that there was no mention of the clawback etc in the handwritten notes. Mr Hilton said he could not speak for Mr Goodall who had retired, but from personal experience he would say that handwritten notes were drafted up immediately to be used as an *aide memoire* and that once back in the office an officer might recall other matters.

59. Mr Hilton was asked to confirm that it was correct that Mr Goodall had cleared the repayment and that he must have been satisfied about the intention to open the shop. Mr Hilton replied that Mr Goodall was not told about the plan to apply for change of use from A4 to D1. That process had started in March 2012 before Mr Goodall's visit.

60. We add that Mr Goodall's entry on the computer record **[p 142]** contained this paragraph:

> "Purchase invoices seen which are commensurate with the declared refurb. The pd [period] 6/12 return is anticipated to be a repayment claim for about £40k which will include the cost of the shops shelving (£40k), refrigerators (£40) and stock (£50k). At this time the shop should be open. In the long term it is unclear as to the quarterly liability of this entity."

61. This is reflected in his handwritten notes **[p 146]**. Mr Gulzar did not query this.

Our view of the witnesses

62. We did not find Mr Singh a convincing witness. He was too ready to give an improbable explanation for anything that might tell against Mr Gulzar. In particular we noted his attempt to explain a reference in a document **[p 163]** to a change of use that did not refer explicitly to use category D1 by arguing that it referred to windows, when all the subsequent documents showed that this could not be the case. Mr Singh had been, with our permission, priming Mr Gulzar with some of his answers, and it seemed to us that Mr Singh was not of a mind, or in a position, to say anything that would not be in line with the narrative that Mr Gulzar and he had put forward to HMRC and then the Tribunal.

63. Mr Hawley was more impressive. He had a mind of his own as was apparent from his disagreement with the concept of a nursery. But he was clearly not a major player in the property venture, his primary job being as the general manager of the hotels. He agreed with Mr Haley that he was to a degree on the sidelines. We accept his evidence with the caveat that some of it is his view of Mr Gulzar's motives and business practices which is opinion rather than fact, and in any event adds nothing much to Mr Gulzar's own evidence.

64. Mr Gulzar did not impress us. This was not because of his general demeanour before the Tribunal which might best be described as exhibiting braggadocio. We will mention however that we were not amused by his offer, whether in jest or not, to give the HMRC officers a free stay in his hotels, and we would have been even less amused if we had not cut off what seemed to be an attempt to make the same offer to the Tribunal.

65. Mr Gulzar was also apparently subject to memory lapses but we put that down to age rather than selective memory (especially as Mr Singh was having to prompt him with answers in some cases).

66. What particularly did not impress us was Mr Gulzar's performance under cross-examination. To straightforward questions from Mr Haley clearly admitting of only one answer, Mr Gulzar would do anything, mostly embarking on speeches telling us for the umpteenth time of his business background and achievements, rather than give a straight answer. Even after being advised by the Tribunal that his refusal to give an answer was not helping his case, he continued to do so. This meant that he did not engage at all with the documentary evidence that was put to him.

67. We therefore do not accept Mr Gulzar's evidence without there being clear independent documentary corroboration (ie not from Mr Gulzar or reflecting information supplied by him and his team), except where it is against his own interests.

68. We have no hesitation in accepting Mr Hilton as an honest and credible witness whose evidence was given straightforwardly. In so far as it consists of an explanation of his view of the case and why he changed his mind it is irrelevant, as it is the Tribunal's job to determine whether his revised view, the one now put forward, is correct and can be supported by the evidence. As to the Goodall notes, Mr Hilton fairly stated that he could not speak for Mr Goodall, and his evidence of what is standard practice for officers of HMRC engaged in VAT interviews means little in the absence of evidence from Mr Goodall.

Further findings of fact

69. Based on the evidence we heard and our reading of the witness statements and their attachments, and drawing inferences from the documentary evidence including in particular the Garland documents, we make the following further findings of fact.

70. No later than 21 March 2012 the appellant had formed an intention to open a nursery in the property and to take all appropriate steps and bear all appropriate costs to achieve the necessary change of use. This is demonstrated by the Garland documents and certain other documents involving Gradient that Mr Hawley supplied to Mr Hilton on 30 October 2013, and it is clear to us, and we find, that all references to change of use in these documents are to a change of use from A4 to D1.

71. But we go further. Given the short time elapsing between the purchase of the property and the first document relating to the nursery (the email from Reid Dean on 21 March 2012 **[p 175])** and the lack of detail about the circumstances in which the idea of a nursery came to the appellant, we find on the balance of probabilities that Mr Gulzar had formed the intention to open a nursery *at the time of the purchase of the property* and that this was the favoured option.

72. We also find it telling that Mr Gulzar deliberately did not tell Mr Goodall of the commissioning of Gradient Consultants to apply for change of use to D1 and we find that Mr Gulzar was aware of the fact that such a change of use could cast considerable doubt on his ability to properly reclaim the input tax on the purchase of the property. In that regard we consider it more likely than not that Mr Goodall did tell Mr Gulzar about a possible clawback if he were to start, or form an intention, to carry on exempt activities.

73. We also note that there is one document originating with Mr Garland that is dated much later than the rest and that is the email of 7 August 2013 (see §27). That email is intended to show the important dates in the nursery application, but it starts with 22 May 2012. That date is after Mr Goodall's visit and so the existence of the work carried out by Gradient before that date is not mentioned. The significance of this is that this email was sent by the appellant to Mr Hilton a few days after Mr Hilton's meeting with the appellant on 29 July 2013 in which Mr Hilton had set out his view that the input tax should be clawed back. The notes of this meeting and Mr Hilton's follow up letter of 5 August 2013 refer only to the planning application of 23 May 2012 (which is obviously a public document). We find then that the email of 7 August was prepared by Mr Garland on instructions that the planning application was the earliest matter to be mentioned and that it was intended to give the email to Mr Hilton to reinforce the view that the idea of a nursery and charge of use was not current at or before the time of Mr Goodall's visit.

74. We further note that in his witness statement **[p 104]** Mr Gulzar stated that "It was *during May 2012* [our emphasis] that one of my team suggested that we consider a nursery and not a shop. I was not sure and we asked an architect to look at it …" This is contradicted by the Garland documents and the quotation documents supplied by Mr Hawley to Mr Hilton on 30 October 2013. On 20 April 2012 Mr Garland had emailed Mr Gulzar about the results of his meeting with the Council, and the original email of 21 March 2012 from Reid Dean had said to Mr Garland that Mr Gulzar would be taking a close personal interest in the project. Other correspondence between Mr Garland and his client was with Mr Singh, but we have no doubt that Mr Singh would have acted on Mr Gulzar's instructions and would have relayed everything he received to Mr Gulzar. The apparent falsity of this part of Mr Gulzar's witness statement was pointed out in Mr Hilton's witness statement, but Mr Gulzar did not challenge Mr Hilton on that point. We therefore find that Mr Gulzar's assertion in his witness statement that the first time the idea of a nursery occurred to him or was mentioned to him was in May 2012 was untrue.

75. We do however accept that it is likely that Mr Gulzar, a man with obvious entrepreneurial spirit, had various projects in mind at different times, planning for the possibility that the council might eventually refuse consent to the change of use to a nursery, but we also think we can take judicial notice that planning applications, especially commercial ones, are often "pitched high" to start with, expecting a refusal followed by acceptance of something closer to the original intention, so that the initial refusal was not something Mr Gulzar would not have expected or planned for.

76. As to the shop idea more specifically, Mr Gulzar said in his witness statement (and Mr Hawley confirmed it) that he was aware that he could only reclaim VAT if the property was used or to be used for making taxable supplies and that he would not have bought the property without the ability to reclaim the VAT. The appellant, we find, was also aware that it was unlikely, given the property's past reputation, that he would be able to open it as a pub, nor, we accept, did he wish to. We accept that the idea of a farm shop made some commercial sense and we had the unchallenged evidence of Mr Hawley that he thought it a good idea.

77. Mr Gulzar made great play of the fact that the VAT officer he spoke to before registration had told him he could credit the VAT on the purchase of the property in his first return. We do not doubt that he was told that: but that is a natural response by an officer of HMRC if he had not been told of the nursery plan. And even if at the date of the call (which we do not know) Mr Gulzar had not formed the nursery plan, his subsequent formulation of it and commissioning of Gradient consultants to apply for planning consent amounted to circumstances which vitiated any advice or ruling given to Mr Gulzar.

78. We further note that all the documents which describe the intended use as a shop are those either created by Mr Gulzar or based on information which must have been given by Mr Gulzar, such as the letter from the bank (see §14) and the insurance documents (see §16). And with one exception they date from mid-February 2012 onwards, suggesting to us that that was when the notion of a possible meat selling business came about, and although we were not given the date on which the appellant said he spoke to HMRC before completion of the purchase, we would, if it were necessary to do so, find that on the balance of probabilities it was around this time, ie in February 2012.

79. The one exception is the letter to the bank (see §30), to which was attached cash flow and profit projections for the activities to be carried on from the shop. The letter is dated 23 December 2011. What strikes us as odd about this letter is that 23 December 2011 is the Friday before Christmas yet Mr Gulzar is seeking an urgent reply. Nor has Mr Gulzar put in evidence any response from the bank to this letter (the email from the bank of 15 February 2012 does not refer to this letter). Without corroborating evidence we are not prepared to accept that any letter was sent to the bank in December 2011.

80. We also find that the work carried out on the property is work that would have been needed whatever the intended use. That includes removal of rubbish and a large number of bottles from its previous existence as a pub and the materials obtained from Travis Perkins and the services from Haulaway Ltd. Conversely although it is accepted that Mr Goodall was told that £40,000 of VAT would be claimed back in period 06/12 from purchases of shelving, stock and refrigeration equipment, matters which were clearly appropriate to a shop and not a nursery, they were never purchased.

81. We also note that by April when possible alternative uses were being considered in the event that the planning application did not succeed, things like soap manufacture were being looked into, not the idea of continuing with the shop. There is mention in some of the Garland documents and elsewhere of the idea of a conservatory scheme and flat roof and of letting part of the property (we assume the first floor). We had no evidence about this possible activity or whether any of the input tax related to work on the first floor, and we make no findings in relation to it.

82. We find that the idea of opening a shop was just that, an idea which, though it might have made commercial sense had it been pursued, conveniently enabled a VAT repayment claim to be made. But it was never seriously pursued and no money was

spent that was specific to a shop, by contrast with the costs associated with the nursery application.

The parties' submissions

83. The appellant has not, as far as we can tell, been legally represented in relation to this appeal and the matters leading up to the appeal. We have therefore examined all the points put forward at various times by Mr Gulzar and we consider that his submissions in the case are:

> (1) At the time he incurred VAT on the purchase of the property and for a number of periods after that, the only business which he had in mind and on which he had incurred expenditure was a business whose supplies would be taxable supplies.
>
> (2) Correspondingly he did not have a firm intention to open a nursery until at the earliest the date on which change of use consent was given.

As a consequence if we should make findings on this basis, the input tax on the purchase of the property and (some or all) later input tax is exclusively attributable to taxable supplies to be made.

84. The only contention put forward in HMRC's statement of case is that, in effect, we should find that the appellant had a firm intention to open a nursery in late March 2012 before any taxable supplies "have/will take place".

85. We do not know whether HMRC's statement of case or Mr Haley's submissions to us benefitted from any legal input from HMRC's Solicitor's Office: we very much doubt it. Our doubts arise because HMRC do not seem to have thought through the legal consequences of their contention, and do not seem to have considered whether they should ask us to make a finding in relation to Mr Gulzar's statements that he had a firm intention to open a shop when he purchased the property.

86. We note that a letter from the reviewing officer in the case to Mr Gulzar giving the conclusions of his review states:

> "The VAT assessments issued by Mr Hilton are based on his decision that the partnership did not have an intention to make taxable supplies, there being no evidence that any such intention existed. Also that an intention was formed to make exempt supplies before the partnership submitted its period 03/12 VAT return to HMRC on 2 April 2012. … The VAT credits denied for periods 06/13, 09/13 and 12/13 were denied on the basis that the partnership had been making wholly exempt supplies since April 2013 when it began trading as a Day Nursery." "

This is more comprehensive, dealing as it does with the shop issue, and since we have sought to articulate from various statements made by Mr Gulzar and his team submissions as to what out findings of fact should be, and the legal consequences that should follow, we think that we can, from the reviewing officer's letter and statements made by HMRC during the enquiry by Mr Hilton, also attribute to HMRC a

submission that the shop notion was never a serious proportion on the appellant's part. The legal consequences of their submissions would be that no input tax is deductible.

Discussion

87. Having extracted from various sources the submissions on the law that we set out in the previous section of this decision, we can characterise the issue that divides them, and which we are asked to decide, as whether the appellant's firm intention was to open a day nursery or to open a shop selling meat and other food. We have found as a fact that there was no genuine intention to open a retail shop, and we consider that statements that there was such an intention were made merely to support a claim to deduct the VAT on the purchase of the property. We have also found as a fact that the appellant's firm intention was to open a day nursery in the property and furthermore that intention was there at the date of completion of purchase of the property. In so finding we have gone beyond HMRC's contentions as we have recast them.

88. We do not think that we should shrink from making this finding about the date of the intention to open a nursery for a number of reasons. Firstly, as we have mentioned, HMRC have not been legally advised as far as we can tell. If they had been then we are sure they would have been advised to put forward a different submission as to the nursery idea. Second, the burden is on the appellant to displace the assessment and the decision as to credit for input tax, and there is no challenge to the assessment on best judgment grounds. Third by advancing the idea of a nursery by some three weeks we are not in any way ambushing, or allowing HMRC to ambush, the appellant, whose consistently advanced contention is that his intention to open a nursery (and to abandon a shop idea) was formed much later than March 2012. Finally having made our clear finding of fact about the date of the nursery idea, we think it would be absurd, and not in the interests of justice or in accordance with the overriding objective in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to apply the law to a different finding of fact that we have not made, merely because that was the finding of fact that the Respondents was asking us to make.

89. We now have to consider how the law applies to the findings of fact that we have made. We remind ourselves again that where an assessment has been made the burden is on the appellant to show that it should be cancelled or varied. The same applies to an appeal against a decision as to input tax falling within s 83(1)(c) VATA. This being a VAT appeal, we turn first to European law as that will be the relevant law in the event of any difference between it and domestic law.

90. The relevant European law is, of course, the Principal VAT Directive (EC/2006/112) ("PVD") and in particular Title X (Deductions), the relevant articles of which are:

CHAPTER 1

Origin and scope of right of deduction

Article 167

A right of deduction shall arise at the time the deductible tax becomes chargeable.

Article 168

In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…

Article 179

The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178 [properly invoiced]

…

Article 183

Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant."

91. The domestic law on deductions is to be found in Part 1 VATA which relevantly provides:

"*Input tax and output tax*

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;

…

being … goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

…

Payment by reference to accounting periods and credit for input tax against output tax

25(1) A taxable person shall—

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a "VAT credit".

…

Input tax allowable under section 25

26(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies … in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

…"

(Section 26(1) and (2) is the only primary legislation cited by HMRC in this case).

92. The regulations referred to in section 26(1) are the Value Added Tax Regulations 1995 (SI 1995/2518) ("the VAT regulations"), and the relevant part of the regulations relating to input tax deduction are in Part 14 as follows:

"**101** Attribution of input tax to taxable supplies

(1) … the amount of input tax which a taxable person shall be entitled to deduct provisionally shall be that amount which is attributable to taxable supplies in accordance with this regulation.

(2) … in respect of each prescribed accounting period—

(a) … goods or services supplied to … the taxable person in the period shall be identified,

(b) there shall be attributed to taxable supplies the whole of the input tax on such of those goods or services as are used or to be used by him exclusively in making taxable supplies,

> (c) no part of the input tax on such of those goods or services as are used or to be used by him exclusively in making exempt supplies, or in carrying on any activity other than the making of taxable supplies, shall be attributed to taxable supplies, …"

This is *not* the regulation cited by HMRC in their statement of case. From this point on any reference to a "regulation" without more is a reference to that numbered regulation of the VAT regulations.

93. Comparing the European and domestic legislation, we note that Article 168 PVD says:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person …"

whereas section 26(2) VATA says:

> "The supplies within this subsection are the following supplies made *or to be made* by the taxable person in the course or furtherance of his business" [Our emphasis]

and this emphasized term is also used in regulation 101(2)((b) and (c).

94. The addition of the words "or to be made" is not due to "gold-plating" by the United Kingdom but is an expression in legislation of several decisions of the Court of Justice of the European Union (before 2009 "of the European Communities") ("ECJ") which has consistently held that it does not matter that no supplies are made in the period in which the input tax is incurred, and, further, that member states may not impose conditions or restrictions on deductibility even if, because of events outside the entity's control, no supplies are ever made: see for example Joined Cases C-110/98 to C-147/98 *Gabalfrisa SL and others v Agencia Estatal de Administración Tributaria*) [2000] ECR I-1577, [2002] STC 535) "*Gabalfrisa*", Case C-37/95 *Belgium v Ghent Coal Terminal NV* [1998] ECR I-1, [1998] STC 260) and Case C-400/98 *Finanzamt Goslar v Breitsohl* [2000] ECR I-432, [2001] STC 355.

95. The ECJ has in these cases and many others also consistently held that the time at which the intention to use in the future the goods and services acquired is to be tested is the time when the goods etc were actually acquired and the input tax incurred (and this is reflected in Article 167 of the PVD). In this case that date is 29 February 2012. As we have found that the appellant had the intention *on that date* to use the property for the purposes of making exempt supplies (the day nursery) it follows by virtue of regulation 100(2)(b) that no amount of input tax can be attributed *exclusively* to taxable supplies in the period 03/12 or any subsequent period because the property cannot have been intended to be used exclusively for such supplies.

96. At this stage of the discussion we cannot however go on to say that regulation 100(2)(c) applies to eliminate any possibility of an attribution to taxable supplies in periods before 06/13. We can only do that if at the time of the purchase of the property there was no intention to make taxable supplies or no intention that need be taken into account.

97. We observe here, before we consider these points, that we may well have had to find for the appellant on the regulation 100(2)(b) issue in relation to the property purchase (though not on subsequent expenditure), if we had simply accepted HMRC's submissions as to the relevant date for the nursery idea at face value (see §88). As we have said it seems to be HMRC's contention that it was sufficient that a firm intention to make exempt supplies was present at a time before the relevant VAT return was submitted. We do not agree, and that is because, as we have shown above, the ECJ has held, and Article 167 PVD shows, that the date on which questions of attributability are tested is the date of the expenditure. Accepting HMRC's submissions would have left us with only Mr Gulzar's unchallenged assertion that the only use he had in mind on that date was a taxable use.

98. We now turn to the question whether, if not all, any of the input tax can be attributed to taxable activities. There are, we think, two issues here. Should the professed intention of Mr Gulzar to make taxable supplies be ignored, and if, not, do the provisions relating to partial exemption apply? To which latter question we add the further question whether as a Tribunal we can apply the partial exemption rules (should we find them relevant) in the absence of a claim by the appellant.

99. As to the first issue we have found that the idea of the retail shop (a taxable activity) was created for the purpose of obtaining a deduction for input tax, and that the appellant did not take any steps to seriously pursue the idea. But it is a fact that the appellant has consistently maintained that it was his intention on 29 February 2012 to use the property to make taxable supplies, even though he never in fact did make any such supplies. So we need to consider whether that professed intention can affect the question of whether input tax is attributable to that type of supplies.

100. We have therefore considered whether the test of an intention to use supplies in a business or particular type of business is an objective or a subjective one. In *Ian Flockton Developments Ltd v Commissioners of Customs and Excise* [1987] STC 394 *("Flockton")* the High Court has said that the test is subjective (at p 399). The words "to be used" in VATA and the VAT Regulations do indeed suggest a subjective test, as the best person to know how an asset not yet in use is intended to be used is the person who bought it: they must have bought it for a reason which was in their mind at the time. But in *Flockton* there is a caveat:

> "In a case such as this, where there is no obvious and clear association between the taxpayer company's business and the expenditure concerned, the tribunal should approach any assertion that it is for the taxpayer company's business with circumspection and care, and must bear in mind that it is for the taxpayer company to establish its case and the tribunal should not simply accept the word of the witness, however respectable. It is both permissible and essential to test such evidence against the standards and thinking of the ordinary business man in the position of the applicant. If they consider that no ordinary business man would have incurred such an expenditure for business purposes that may be grounds for rejecting the taxpayer company's evidence, but they must not substitute that as the test. It is only a guide or factor to take into account when considering the credibility of the

> witness, and no doubt there will be many other factors which bear on that question which the tribunal should well understand."

101. The ECJ decisions show a similar approach. In Case 268/83 *Rompelman v Minister van Financiën* [1985] ECR 655 ("*Rompelman*") the Court said at [24]

> "As regards the question whether Article 4 must be interpreted as meaning that a declared intention to let future property is a sufficient ground for assuming that the acquired property is to be used for a taxable activity and that therefore, on that basis, the investor must be treated as a taxable person, it must first be pointed out that it is for the person applying to deduct VAT to show that the conditions for deduction are met and in particular that he is a taxable person. Therefore Article 4 does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence such as proof that the premises which it is proposed to construct are specifically suited to commercial exploitation."

102. Neither *Flockton* nor *Rompelman* is exactly in point as in those cases the issue was whether a single proposal was by way of a taxable activity or not. But we think the principle established by those cases, examining the subjective intention of a person by reference to objective factors, is equally applicable here. In this case we had Mr Gulzar's evidence that his sole intention at the time of buying the property was to make taxable supplies. But we had a great deal of objective evidence that the property was to be used for making exempt supplies (the Garland documents in particular) and no objective evidence that the property was to be used for making taxable supplies, using "objective" here to means documents not supplied by the appellant or not using information supplied by him and which could only be regarded as referring to the making of taxable supplies.

103. We have also noted a consistent line taken in ECJ decisions that expands to some extent on [24] in *Rompelman*. It is exemplified in *Gabalfrisa*, where at [46] the Court says:

> "Article 4 of the Sixth Directive does not, however, preclude the tax authority from requiring objective evidence in support of the declared intention to commence economic activities which will give rise to taxable transactions. In that context, it is important to state that a taxable person acquires that status definitively only if he made the declaration of intention to begin the envisaged economic activities in good faith. In cases of fraud or abuse, in which, for example, the person concerned, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively on the ground that those deductions were made on the basis of false declarations *(Rompelman,* paragraph 24, and *INZO,* paragraphs 23 and 24)."

104. In our case the appellant did indeed make a declaration of intention to begin the envisaged taxable activity, and has continued to maintain that that was his intention. Our finding in relation to this intention is that it was not seriously pursued and was maintained simply to justify the deduction. We characterise our finding in relation to

the meat shop idea as one where the requisite good faith was not present. We say this because of, for example, the holding back of relevant information from Mr Goodall, the claim in Mr Gulzar's witness statement that the first he heard of a nursery was in May 2012 (which is clearly contradicted by the Garland documents etc) and the creation of the email of 7 August 2013 (see §27).

105. We have further considered whether the test set out in *Gabalfrisa* etc (which postdate *Rompelman*) requires a finding of fraud or abuse in addition to a finding that there is not the requisite good faith. We take the view that fraud or abuse are two examples of lack of good faith but they do not have to be present to enable the input tax to be denied.

106. In case we are wrong about whether abuse or fraud has to be shown before input tax can be denied in the face of declared intention, we have considered whether it would be appropriate for us to make findings on this issue where it has been established that the burden of showing that there is abuse falls on HMRC and they have not at any time indicated that they would take this point. And because there has been no indication that they would take the point, the appellant has had no opportunity to argue against it. We consider that we should not consider whether there was abuse in this case.

107. As we have held that the *Gabalfrisa* caveat about good faith applies, then the intention to make taxable supplies is to be ignored, and regulation 101(2)(c) applies to deny any credit for input tax for the purchase of the property and any subsequent input tax.

108. But if we are wrong on the "good faith" point, then we have to consider the position on the basis that there were two intentions on 29 February 2012, one to make taxable supplies and one to make exempt supplies, and that the eventual answer as to which would be the case being dependent on the outcome of the planning application or some other decision. The relevant sub-paragraphs of regulation 102(2) are (d) to (g), and we set them out:

> "(d) where a taxable person does not have an immediately preceding longer period and subject to sub-paragraph (e) below, there shall be attributed to taxable supplies such proportion of the residual input tax as bears the same ratio to the total of such input tax as the value of taxable supplies made by him bears to the value of all supplies made by him in the period,
>
> (e) the attribution required by sub-paragraph (d) above may be made on the basis of the extent to which the goods or services are used or to be used by him in making taxable supplies,
>
> (f) where a taxable person has an immediately preceding longer period and subject to sub-paragraph (g) below, his residual input tax shall be attributed to taxable supplies by reference to the percentage recovery rate for that immediately preceding longer period, and
>
> (g) the attribution required by sub-paragraph (f) above may be made using the calculation specified in sub-paragraph (d) above provided

> that that calculation is used for all the prescribed accounting periods which fall within any longer period applicable to a taxable person."

109. We take the phrase "shall be attributed" in sub-paragraph (d) and (f) to mean that the appellant, in making its returns, should have applied those sub-paragraphs, rather than, as it did, apply regulation 101(2)(b) to claim the whole of the input tax as a credit. We consider, in answer to the question we asked ourselves at §98, that if we hold that any part less than the whole of the input tax should have been attributed to taxable activities, we can vary the assessment or decisions accordingly.

110. In the period 03/12 at least the appellant does not have an "immediately preceding longer period", because there is no immediately preceding period at all before the period 03/12, so regulation 101(2)(d) applies and the question is whether the input tax incurred on the property is "residual input tax". Regulation 101(10) shows that it is, as the input tax is, on the hypothesis we are considering, "incurred by a taxable person on goods or services which are used or to be used by him in making both taxable and exempt supplies." We then have to find the "proportion of the residual input tax as bears the same ratio to the total of such input tax as the value of taxable supplies made by him bears to the value of all supplies made by him in the period". No supplies of either type were made in the period. The ratio mentioned in regulation 101(2)(d) is therefore 0:0 (or 0% as required by regulation 101(4)). Thus by virtue of that sub-paragraph no input tax is deductible.

111. For subsequent periods up to 06/13 the position is it seems the same. There is in 06/12 and the next three periods (which form a "tax year") an "immediately preceding longer period" which is, paradoxically, the short period between the date of the purchase of the property (or the start of registration) and 31 March 2012 (regulation 99(5)). Regulation 101(2)(f) requires the ratio used in the preceding longer period to be applied provisionally to the tax year ended 31 March 2013, so the percentage is 0%. There is nothing that requires the provisional attribution to change, and so the ratio for the longer period (the tax year) starting with the quarter 06/13 would also be 0%. We note however that from the quarter 06/13 (though possibly earlier) there were actual exempt supplies once the nursery opened. By this time the possibility of a shop making taxable supplies would have vanished, and the position is therefore governed by regulation 101(2)(c) (input tax which relates exclusively to exempt supplies not deductible at all) and not 101(2)(f), but the result would be the same: no input tax would be deductible.

112. We note that sub-paragraph (e) is an alternative to sub-paragraph (d) and is therefore applicable only in the case where there is no "preceding longer period" and thus only to the period 03/12 (but this period is by far the most important). But sub-paragraph (e), unlike sub-paragraphs (d) and (f), is discretionary on the business's part ("attribution … *may* be made") and as no choice was made by the appellant we ignore sub-paragraph (e). Similarly, sub-paragraph (g), which applies where there is a "preceding longer period", is discretionary and we can ignore it.

113. As a result of our consideration of these matters, 0% of the input tax (ie none of it) can be attributed to taxable supplies by virtue of regulation 101(2)(d) and (f). Thus

the appellant would still lose even if we did not ignore his professed intention at 29 February 2012.

114. On the other hand had we found as a fact that the position in relation to the nursery idea was as HMRC contended (being formed in late March) *and* that the intention to make taxable supplies was not to be ignored, then following the test laid down by Article 167 of the PVD we would have held that the input tax on the property *was* exclusively attributable to taxable supplies. We consider that HMRC would then have been correct in their initial thoughts that there was at a later date a change in the intention that would have allowed regulation 108 (the regulation they did cite in their statement of case) to apply. HMRC agreed with us when we put it to them that they were now out of time to assess the appellant under regulation 108, so the change of tack by them, without in the alternative raising assessments under regulation 108, could have been costly. But that was their choice.

115. In the correspondence with the appellant Mr Hilton raised the question of the application of the capital goods scheme (Part 15 of the VAT Regulations) to the property. On the face of it the property does appear, because of its purchase price, to come within that scheme. But no point on this was taken before us, presumably since, like regulation 108, it would only have applied if we had found for the appellant. We have therefore ignored the point and express no views on whether and how it would apply in the event that we had found for the appellant.

Decision

116. We dismiss the appeals against the assessment to VAT, the assessment to interest and the decisions to deny credit for input tax.

117. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 08/10/2015