TC05384

Appeal number: TC/2015/06995

VALUE ADDED TAX - Sole trader haulier - Purchase of a 'Jacuzzi' 'hot-tub' - Section 24 VAT Act - Whether purchase was for the purposes of the business? - No - VAT Notice 700/7 - Whether the hot tub was a business gift to taxpayer's mother? - No - Whether HMRC correct to disallow VAT element? - Yes - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR IAN KERRY LAMBERT (trading as IKL TRANSPORT) **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS RAYNA DEAN FCA

Sitting in public at Leeds Magistrates' Court, Westgate, Leeds, LS1 3BY on 13 July 2016

Mrs Mandy Lambert, for the Appellant

Ms Lisa Fletcher, an Officer of HMRC, for the Respondents

DECISION

1. The appellant was the sole proprietor of 'IKL Transport' which was in the business of haulage and plant hire.

2. The appellant did not attend the hearing of his appeal. But he was represented by his mother, Mandy Lambert. She confirmed that the appellant, who was dylexic,knew of the hearing, and that she was authorised to speak on his behalf. She was also involved with the appellant's business, and she was able to give us details of the underlying facts.

3. The appellant was occupying (rent-free) and trading from some land owned by his parents, adjacent to their home. His business was a modest one. He owned one lorry with a crane and an excavator. The appellant did some of the driving. He also employed his step-brother on a part-time basis as a driver. His mother helped with the books.

4. On 4 February 2015 HMRC made a VAT compliance visit to his premises. One of the invoices which considered HMRC during that visit related to the appellant's purchase of a 'Jacuzzi' J465IP 'hot tub' ('the Hot Tub') on 28 July 2014. The VAT inclusive price was £9,000.

5. On 6 February 2015 HMRC indicated that it considered that the VAT element (£1,500) had been incorrectly reclaimed by the appellant.

6. Although HMRC had made a detailed note of the compliance visit, that was not shared with the appellant so as to establish whether he agreed with it or not. Nor was that note disclosed in this appeal and so there was no copy of it in the materials before the Tribunal at the hearing. The appellant wished to rely on a short extract from notes which Ms Lambert said she had made at the compliance visit, and that document had been disclosed. It was unfortunate and impeded the timely resolution of this appeal that HMRC did not realise, as it should have done, that the appellant's disclosure indicated that the events of the meeting during the compliance visit were (at least potentially) in issue between the parties. This could easily have been addressed by HMRC's disclosure of its own note. It did not seem to us that there was any good reason why that note could not have been disclosed.

7. Given that neither we nor the appellant had seen HMRC's note of the compliance visit, and there was (at least, potentially) a dispute as to what HMRC had been told at the compliance meeting, and in particular what HMRC had been told as to the reason or reasons for buying the Hot Tub, we gave further directions, but we decided to proceed to hear the parties' cases rather than adjourning.

8. HMRC complied with our directions, and promptly produced its copy of the visit note. The appellant was ordered to produce his own note if he disagreed with the content or accuracy of HMRC's note. However, instead of doing that,

and producing a complete copy of his own note or notes, of which we had only seen a short extract, the appellant instead commented on HMRC's note. We have considered HMRC's note, and the appellant's comments. We have decided that no further hearing is necessary.

9. On 25 February 2015 the appellant wrote that the Hot Tub *'was a business purchase for a self-employed person as a gift'*. HMRC's response on 19 March 2015 was that it did not consider this purchase necessary in the appellant's business activity as a haulier. On 26 May 2015, the appellant wrote that he did not agree with the disallowance '*as this transaction was done under the correct HMRC Guidelines'*, albeit no particular guidelines were mentioned until 29 June 2015, when the appellant wrote that the guidelines referred to were *'VAT Notice 700/7: Business Promotions - the use of gifts and rewards given to self-employed persons.'*

10. On 16 July 2015 HMRC rejected that argument, on the basis that the appellant did not have any employees or self-employed persons working for him.

11. Pursuant to section 73 of the VAT Act 1994, HMRC raised a VAT assessment against the appellant for £1,852 for the quarter 08/14. £1,500 of that sum related to the Hot Tub. There is no appeal against the remaining £352 of the assessment which related to the supply and fit of a gearbox.

12. On 14 September 2015 the appellant requested a statutory review. The review, dated 2 November 2015, upheld the original decision. HMRC noted the visit notes from February 2015 in which the appellant had mentioned that the Hot Tub was assisting his recovery from recent shoulder surgery, and it also noted his claim that the Hot Tub had been purchased for a 'self-employed' person under the guidelines covering 'business promotions', in accordance with VAT Public Notice 700/7.

13. The Notice of Appeal is dated 16 December 2015. It says: "... *the hot tub purchase was initially for the aid of my injury and secondly ... it was also for the work my Mum had done 'unpaid' in getting some 'tele' sales work that I have. I note that under 'Business Gifts' the writer does not give an explanation as to why this particular part of the guidance was unacceptable ... It does not say anywhere in the Guidance I have read that there must be a link to the business when purchasing a gift. It was also used for employees of the business'*.

The Hot Tub

14. As the price perhaps suggests, the Hot Tub is a large and luxurious one. It can comfortably seat several people: Mrs Lambert thought up to ten people. It was installed outside the home of the appellant's parents in a pre-existing structure, described to us as like a bandstand or gazebo, which had previously been used as a smoking shelter by employees of another business with which Mrs Lambert worked. We were told that the Tub had been in regular use, not only

by the appellant, but also by his parents and other visitors. Insofar as the appellant said the Hot Tub was also used for employees of his business, the business only had one (part-time) employee, in the strict sense, who was the appellant's step brother.

The Law

15. Section 24 of the VAT Act 1994 provides as follows:

"***Payment of VAT by taxable persons***

24. Input tax and output tax.

(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) [...]

(c) [...]

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

16. The relevant parts of *VAT Notice 700/7: Business Promotions* read:

1.3 Who should read this notice?

This notice is intended for businesses who:

- make gifts of goods or services
- give away goods which are samples of their supplies
- are involved in business promotion schemes, for example cash-back schemes or where goods or services are given as rewards to either retail or trade customers
- are involved in the issue, supply or redemption of coupons or vouchers

2 Gifts of Goods

2.1 Free gifts of goods for no consideration

A free gift means that you receive no consideration in the form of money (monetary consideration) or non-monetary consideration...

If you give away goods and are entitled to recover VAT on them as input tax and you receive no payment or other consideration for them, you must

account for VAT on their cost value. That is unless they can be treated as business gifts under paragraph 2.3

2.2 What is a business gift?

A business gift is a gift of goods that is made in the course of your business and for which you were entitled to reclaim the VAT you were charged on its purchase as input tax.

Business gifts cover a wide range of items from brochures, posters and advertising matter to expensive goods of the kind given as 'executive presents'.

They also include:

- long service awards and retirement gifts
- goods supplied to employees under attendance or safety at work schemes
- items distributed to trade customers
- prizes dispensed from amusement and gaming machines
- prizes of goods in free lotteries

2.3 Do I have to account for VAT on business gifts of goods?

You do not have to account for VAT on business gifts made to the same person so long as the total cost of all the gifts does not exceed £50, excluding VAT, in any 12-month period. To check this it is acceptable for you to adopt any 12-month period that includes the day on which the gift is made.

But where the following apply:
the total cost of business gifts given to the same person in any 12-month period exceeds £50
you were entitled to claim the VAT on the purchase as input tax
you must normally account for output tax on the total cost value of all the gifts.
How to work out the cost is explained in Notice 700, 'The VAT Guide'.

2.5 Gifts of goods for non-business purposes

Gifts of goods made for non-business purposes include those applied to personal use, for example a gift to a relative or friend. If the goods were not purchased to be used for business purposes, they are not business assets and any VAT incurred on their purchase is not reclaimable as input tax.

If input tax has been claimed on goods that are diverted to private use and given away, output tax must be accounted for to the same amount and by the same business that claimed the input tax.

17. During the course of the hearing, several decided cases as to the meaning and effect of section 24 of the VAT Act 1994 were cited to us by HMRC's

representative. Unfortunately, those cases were not referred to in HMRC's Statement of Case and no other advance notice of them had been given to the appellant or to the Tribunal. Nor were any copies of these cases available at the hearing, whether for the appellant or the Tribunal. Therefore, directions had to be given (i) to afford the Tribunal time to read those cases; and (ii) to permit the appellant to make any comment on them, and indeed to afford the appellant the chance to draw to our attention to any other cases which the appellant considered to be relevant. The necessity for such directions also impeded the timely resolution of this appeal.

18. The first of these cases was *Customs and Excise Commissioners v Rosner [1994] STC 228*. Latham J. considered the meaning and effect of section 14(3) of the Value Added Tax Act 1983, which was the immediate precursor to section 24(1) of the VAT Act 1994, which is in materially identical terms to it. The facts are illustrative. Mr Rosner owned and ran a private educational establishment for foreign students. He was arrested and charged with conspiracy to defraud. It was alleged that he had given false information about the immigration status of the students. He paid for his own defence. He sought to treat the VAT element of his legal fees as input tax, and to obtain credit for it. At first instance, his claim was allowed, on the basis that the outcome of the criminal proceedings directly affected, and was bound up with, the purpose of his business.

19. However, Latham J. allowed the appeal. His reasoning is binding on us. The Judge said (at p 230f):

> "There must be a real connection, a nexus, between the expenditure and the business. It seems to me that the nexus, if it not to be benefit, must be directly referable to the purpose of the business."

20. Further guidance can also be derived from the other decision cited to us, a decision of the European Court of Justice in *Finanzamt Koln-Nord v Wolfram Becker [2013] C-104/12*. The facts are strikingly similar to Rosner. Mr Becker sought to deduct, as input tax, VAT paid on his lawyers' fees relating to criminal proceedings brought against him as managing director and majority shareholder in a limited company in the construction business. The Court remarked:

> "19 ... it should, first, be recalled, as the Court has previously held, that the existence of a direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement ... The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them is part of the cost components of the taxable output transactions giving rise to the right to deduct ...

> 20 It is however also accepted that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do, in effect, have a direct and immediate link with the taxable person's economic activity as a whole ...
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> 21 It should, next, be noted, with regard to the nature of the 'direct and immediate link' which must exist between an input and an output transaction, that the Court has held that it would not be realistic to attempt to be more specific in that regard. In view of the diversity of commercial and professional transactions, it is impossible to give a more appropriate reply as to the method of determining in every case the relationship which must exist between the input and output transactions in order for input VAT to become deductible ....
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> 22 Finally, it is apparent from the case-law that, in the context of the direct-link test, which the tax authorities and national courts are to apply, they should consider all the circumstances surrounding the transactions at issue ... and take account only of the transactions which are objectively linked to the taxable person's taxable activity."

Discussion

21. We accept that the Appellant told HMRC, at the compliance visit, that he had bought the Hot Tub to assist his recovery from a shoulder injury. It was noted that his arm was in a sling 'as he had recently had surgery on his shoulder'. However, the appellant did not put any medical evidence before us as to when he had been was injured (noting that the Hot Tub was bought and installed approximately six months before the compliance visit), the full extent of his injury, or any prescription or therapeutic recommendation for hot tub treatment. In any event, Mrs Lambert accepted at the hearing that the motive for purchase was '20% shoulder and 80% Mandy' (that is, Mrs Lambert). The explanation relating to injury was at best a minor component of the reasoning to buy the Hot Tub. Accordingly, we are bound to reject the appellant's suggestion, made in his email of 2 December 2015, that his dislocated shoulder was 'the primary reason for purchasing the tub'. It was not.

22. We reject the argument that the Hot Tub had been bought by the appellant in lieu of rent to his parents for using their land as an operating centre. There is no written contemporaneous evidence of any such arrangement. We also note Mrs Lambert's evidence to us that she and her husband had contributed 20% of the purchase price, but had paid the appellant. No invoice, or part-invoice, was made out to them. In our view, that reflected a deliberate decision made by the appellant, or consented to by him, to put the whole purchase through the books of the business, even though the appellant had not himself paid the whole price.

23. Mrs Lambert told us that she had been thinking of getting a hot tub for herself. She put it as 'mooting the idea'. She chose the particular model. She said that the decision to buy this particular model was motivated by comparing its value to the value of the benefit conferred by her on the business, in terms of its rent-free occupation of the land, and her work for the business.

24. We cannot accept that explanation. It was entirely clear from what we were told by Mrs Lambert that the appellant's parents wanted to help him out, in his business, at the beginning of his career, and that was why they did not charge him rent. There was simply no evidence of any suggestion or understanding, at the time, that rent was being charged, even if notionally, which could eventually be turned into a significant purchase.

25. We also reject the explanation that the Hot Tub was in lieu of wages to Mrs Lambert. Mrs Lambert was not an employee of the business. There was no evidence at all that Mrs Lambert was self-employed, and was providing services, as a self-employed person, to the appellant. Whilst we accept that Mrs Lambert was helping out, both with the books and with debt chasing, and that this may have been quite time-consuming, especially as the business grew, there was neither any suggestion or evidence that any running total of the value of her services to the business was being kept at the time which could eventually be 'cashed in' in lieu of wages. Nor was there any evidence that there was ever any expectation on the part of the appellant that his mother was not working for free, and that eventually the appellant would have to pay her for her help. Mrs Lambert told us that she would not have accepted cash payment for her services.

26. Insofar as we are required to do so, we find that Mrs Lambert was helping her son out simply through love and generosity, and a desire to help him on his way in life. Having had the opportunity to hear Mrs Lambert's evidence and assess her demeanour, we are confident in finding that she was acting entirely from a sense of altruism. She was not helping her son in any expectation of receiving any remuneration from him, whether money or money's worth. Indeed, our conclusion on that matter is only strengthened given that we note that although the business in question has since ceased, Mr Lambert is still in business, albeit now trading as a limited entity, and his parents still do not take anything from him.

27. The appellant has not persuaded us, even on the balance of probabilities, that there was any real connection or nexus of the required kind between the purchase of the Hot Tub and his business. Nor do we consider the purchase to be directly referable to the purpose of the business. Accordingly, we are not satisfied that the Hot Tub was supplied to the Appellant to be used for the purposes of the business being carried out by him within the meaning and effect of section 24 of the VAT Act 1994. His business was that of a haulier and a hirer of plant. Hot tubs are not required for that business. His outputs and inputs were correctly recorded at the compliance visit as hire services of output with crane, and fuel and repairs to lorry respectively.

28. Nor do we consider, for the reasons which we have already explained, that the Hot Tub can properly or genuinely be regarded as a business gift or as akin to an executive present. A strong indicator that this is not a business gift is that the appellant's business does not fall within any of the categories of the businesses at whom the Notice 700/7 is aimed. It is not a business which makes gifts of goods or services.

29. In our view, the guidance is clear as to the sort of gift which is contemplated - gifts of modest financial value. For example, the appellant bought, and sought to reclaim VAT, on a 'Vivienne Westwood' pendant for his girlfriend, said to be to as a 'thank you' to her for her contribution to the business. It cost about £100. The disproportion between the value of that gift and the value of the Hot Tub is very striking.

30. In our view, the appellant's various attempts, over the course of time, to rely on different parts of the guidance in VAT Notice 700 were ingenious and ambitious attempts to fit the purchase of the Hot Tub within the guidance. But those attempts were artificial and they do not succeed.

Decision

31. Accordingly, the Appeal is dismissed. HMRC has correctly disallowed the input claim for £1,500.

32. 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.

Dr **CHRISTOPHER McNALL**
TRIBUNAL JUDGE

RELEASE DATE: 23 SEPTEMBER 2016