[2017] UKFTT 776 (TC)

TC06183

Appeal number: TC/2016/3929

VALUE ADDED TAX – assessments and an amendment to return blocking input tax recovery – whether input tax deductible on property fit out costs – IN PART – whether input tax deductible on alcohol purchase – YES – APPEAL ALLOWED IN PART

FIRST-TIER TRIBUNAL
TAX CHAMBER

MG & ND STORER **Appellant**

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN
PAUL ADAMS

Sitting in public at Taylor House, 80 Rosebery Avenue, London on 3 October 2017.

Mr M Kaney of X Tax, for the Appellants

Mr Bingham, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

1. This appeal concerns certain amounts of value added tax claimed by the partnership of MG and ND Storer ("the Appellants") as input tax but denied by HM Revenue & Customs ("HMRC") for prescribed accounting periods 02/12 to 05/15.

Background and facts

2. The Appellants were, at the relevant time, in business in partnership operating a sea food take away establishment in Swanage Dorset. The Appellants business involved the sale of shell fish (oysters, dressed crabs, lobsters, cockels winkles etc), fried fish and chips and drinks from premises known as Gee White Kiosk.

3. Mr MS Storer (one of the partners) owns the freehold in the premises from which the Appellants' business is operated. It is situated on the sea front. Prior to 2014 the building was essentially a single story stone building. The building was used as the business premises not only for the Kiosk but also an ice cream parlour trading as Quay Desserts, operated by Mr Storer's son, and a waitress service fish and chip/seafood restaurant trading as Quay Hole, operated by Mr Storer's partner in life Ms Thomas.

4. In 2014 Mr Storer intended to refurbish the building. For reasons not relevant to the appeal it is understood that it was not possible to refurbish the building which, in the end, was completely demolished and rebuilt. The rebuilt building again housed the three businesses. The pictures available to the Tribunal illustrated a modern wooden clad building with large glass frontage and a pleasant outdoor seating area.

5. The Tribunal were informed that the building (both before and after reconstruction) had a single shared kitchen. Staff from the Kiosk prepared shell fish in the kitchen. Hot food was prepared and cooked in the shared kitchen by staff from Quay Hole but was served through both the Kiosk and the restaurant. Quay Hole (the restaurant) also sold dressed crabs, oysters, lobsters.

6. On the basis of the evidence available to the Tribunal it is fair to say that the separation between the three businesses that operated from the premises was somewhat laisez faire.

7. The Tribunal heard evidence from Mr M Storer. The Tribunal found him to be a straightforward business man and accepted his evidence. Mr Storer confirmed that he was the freeholder of the property and a partner in the Appellants' business. He explained that as he was connected (in a common parlance way) with the owners of Quay Hole and Quay Desserts that together with the proprietors of those businesses he sought to operate in a way which was as commercially efficient as possible.

8. So far as material for this appeal, this efficiency included him ordering and paying for all the alcohol and shell fish sold by both Quay Hole and the Kiosk. Ms Thomas would order and pay for all potatoes and white fish. Unfortunately there was

no formal commercial agreement underpinning these arrangements nor were they reflected in formal recharges or accountancy adjustments. The consequence was that purchasing was done within each businesses for the areas in which they had greatest experience but on behalf of both businesses with alcohol and shell fish in essence bartered for cooked fish and chips.

9. Mr Storer was categorical with the Tribunal that in terms of the employment of employees and the recording of sales made by each business there was no overlap. He stated that in terms of payroll and as regards the declaration of sales there was a clear demarcation between the businesses. HMRC did not challenge the statements to this effect.

10. Mr Storer also gave evidence as to the input tax claimed in connection with the redevelopment of the building. He appeared fully cognisant that as the freeholder of the premises (and not registered for VAT in his capacity as such) he was not entitled to recover VAT incurred by him in the demolition and reconstruction of the building. He described having worked with his accountants to identify the works which together they considered represented capital costs and as such those that he considered proper to him as landlord. He believed that works to the fit out of the premises for the purposes of making it a take away kiosk, restaurant and ice cream parlour were costs which were not those referable to him as a landlord but rather to the occupants. He stated that invoices relating to the fit out were paid for by the Appellants; recharges were made to Quay Hole though not to Quay desserts.

11. Mr Storer stated that the total cost of the works to the building were approximately £500,000 including VAT of which the Appellants considered approximately £75,000 to be attributable to the works they wanted undertaken as a occupant (or on behalf of all the occupants) rather than to Mr Storer as landlord.

12. There were only two invoices relating to the refurbishment available to the Tribunal. One was from Wessex Ducting Limited and related to the supply and installation of: ice cream ventilation, roof mounted stainless steel funnel section, stainless steel wall sheets, fixing of wall sheets, Bits supplied to Harian, 2 No catering grates, floor sheet. Total value net £18,250 plus £3,650 VAT." The second was from AEG Acoustic Moving Partitions for supply and installation of glass sliding folding partitions consisting of 16 standard panels and 2 door panels at a cost of £10,080 plus £2,520. The Tribunal were informed that these panels were etched with the trading name Gee White.

13. In evidence Mr Storer accepted that the ice cream ventilation was for the benefit of Quay Desserts but had not been the subject of any recharge. He also confirmed that Ms Thomas had contributed to the cost of the glass doors.

14. Finally, Mr Storer gave oral evidence and produced photographic evidence that the Kiosk sold alcohol to its customers. In oral evidence he indicated that for the Kiosk it was largely beer, small bottles of wine and cava, the cava frequently sold with oysters. He confirmed that the remaining alcohol was sold by Ms Thomas through the Quay Hole restaurant.

15. The Tribunal finds that Mr Storer did have sufficient awareness of the nature of expenditure appropriate to the property owner and that appropriate to the occupant businesses. Whilst only two invoices were made available to the Tribunal in connection with the refurbishment costs the Tribunal considers that the works evidenced by these invoices were consistent with occupant specific works which it is reasonable to conclude were costs proper to those occupants and not to the landlord. This is the case even where the supplies resulted in the installation of fixtures and fittings which, as a matter of land law, would have become part of the land. Ventilation and glass doors are all removable and another business may not have wanted them. The items were ones that may have made reletting more attractive to another possible occupant or less attractive dependant on the business operated by them.

16. It is clear, by reference to the photographs produced by the Appellant that they did supply alcohol and some of the alcohol purchases made were sold by retail by the Appellant to the customers also purchasing shell fish and fish and chips from the Kiosk.

17. The Tribunal further finds that the Appellants operated the barter system Mr Storer described. The closeness of the businesses resulted in a failure to record the transactions adequately (or potentially at all) but on the evidence available the Tribunal considers that alcohol was purchased by the Appellants for onward supply to Ms Thomas's business the consideration for which was the supply of fish and chips prepared and purchased by Ms Thomas for sale in the Kiosk. The VAT consequences of this conclusion are set out below at paragraphs 30 – 33 below.

Assessments

18. On 1 January 2015 the Appellants submitted their period 11/14 VAT return. The return claimed £8325.26 by way of repayment from HMRC. On 20 January 2015 HMRC opened a repayment verification query pursuant to which they proposed to ensure the accuracy of the return prior to making the repayment claimed on it.

19. Over a somewhat protracted period of correspondence between the parties HMRC identified firstly that the Appellants had claimed input tax to the value of £12,966 in connection with the redevelopment of the premises over the period 1 December 2013 through to 28 February 2015. HMRC took the view that this input tax was proper to Mr M Storer in his capacity as freeholder of the building. Secondly they identified that the Appellants had claimed input tax in connection with the purchase of alcohol sold by Quay Hole in the course of its business. HMRC took the view that this input tax was not the Appellants' input tax as it related to a supply of goods by the vendor of the alcohol to another taxable person (i.e. Ms Thomas). The input tax disallowed in this regard was £20,904. This represented the total value of input tax incurred on the purchase of alcoholic beverages.

20. On 8 January 2016 HMRC issues a notification of "reduction to amount claimed on VAT return and notice of assessment" for period 11/14 together with assessments for periods 02/12 through to 08/15.

21. Prior to the hearing HMRC claimed to have been unaware that the Appellants' sold alcohol to their customers. In light of the evidence HMRC accepted that there was an adjustment due to the assessments. The Tribunal were invited by both parties to take a decision in principle as to the recovery of input tax incurred on the purchasing of alcohol which the Appellants' accepted was purchased by them for sale in the Quay Hole business.

Legislation

22. Section 24(1) Value Added Taxes Act 1994 provides: "… 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…"

HMRC's arguments

23. HMRC contend that in relation to both the refurbishment costs and the alcohol the VAT was not input tax proper to the Appellant on the basis that the true recipient of the supplies of refurbishment was Mr Storer in his capacity as owner of the property and the true recipient of the supplies of alcohol was Quay Hole the restaurant owned and run by Ms Thomas. No further argument or submission was made.

Appellants' arguments

24. As regards the refurbishment costs the Appellants contended that only such costs as were proper to the occupant specific fit out had been claimed by them. They argued that all "capital" costs had been borne by Mr Storer in his capacity as a property owner and the VAT incurred in connection with them had been suffered by him. It was initially argued by the Appellants that the items of expenditure for which input tax had been claimed were all proper to the Appellants' business.

25. During the course of the hearing the Appellant's acknowledged that, certainly to the extent of the contribution made by Ms Thomas to the glass door, whilst the input tax remained deductible there should have been an output tax charge made to Quay Hole. The position was less clear on the proportion of the ventilation attributable to Quay Desserts as there was no recharge or contribution made.

26. In connection with the alcohol the Appellants contended that some of the alcohol was sold by the Appellants to retail customers and to the extent of those sales input tax must be recoverable. In respect of the remaining alcohol purchases the Appellant accepted that they were liable to an output tax charge on the disposal to Quay Hole but contended that the input tax was deductible as attributable to the on supply made in consideration of the fish and chips.

Discussion

27. It is fundamental to the VAT system that a taxable person be able to deduct from the amount of VAT for which he is liable the amount of VAT incorporated in the cost of the taxable supplies that such taxable person makes. Such a principle stems back to Article 2 of the First VAT Directive. Deduction of input tax should

relieve the taxable person entirely of the burden of VAT paid or payable in the course of making supplies which are themselves subject to VAT. A long line of European case law has established that the burden of VAT should fall on final consumers; economic traders should be fiscally neutral to the imposition of VAT. It is not permissible for VAT to be "stranded" in the chain of supply. It is from this fundamental premise that the Tribunal has viewed the present case.

28. There is no question that the Appellants failure to adequately delimit its business from that of Quay Hole (in particular) and Quay Desserts led it to the present position and the assessments it faced from HMRC but it is the role of the Tribunal to identify from the evidence available whether the assessments should stand as made.

29. HMRC challenge the Appellants' input tax recovery on the basis that it was not the Appellants which received the supplies and that the supplies were proper to other businesses (registered – Quay Hole and Quay Desserts - and unregistered – Mr M Storer).

30. The input tax incurred on the alcohol is simpler to resolve. The Appellants' business there is unquestionably a right to deduct the input tax concerned. HMRC accepted as much in the hearing but suggested that they had been unaware that the Appellant sold alcohol. Whether that is right or wrong an adjustment would need to be made in respect of such items as the Appellant could satisfy HMRC was sold by their own business.

31. However, as regards the alcohol purchased and bartered with Quay Hole the Appellant finds that the input tax is also recoverable but subject to an output tax charge in respect of the on supply of the alcohol to Quay Hole. Only by permitting recovery and raising an output tax charge which then becomes the subject of recovery by Quay Hole is the neutrality of the tax preserved (Quay Hole has already accounted for the output tax on the retail supply into final consumption of the alcohol). HMRC are in time to raise an output tax assessment and, in any event, consistent with the judgment *BUPA Purchasing Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 542 could reclassify the existing assessment as an output tax assessment.

32. The consideration for the supplies of alcohol made are the fish and chips bartered with Quay Hole. By reference to the European Court of Justice judgment in *Empire Stores Ltd v HM Customs & Excise C-33/93* [1994] STC 623 where a supply is made in return for non-monetary consideration (in this case fish and chips) the value of that supply is to be determined by reference to the cost to the supplier of making it. In the present case the value of the supply of alcohol made in return for fish and chips will be determined by reference to the cost incurred by the Appellants in purchasing the alcohol.

33. Whilst not strictly relevant to the present appeal Ms Thomas of Quay Hole should expect to receive an assessment in the same sum in respect of her supply of fish and chips the consideration for which was the alcohol received in return. Whilst the same considerations apply in determining the value of that supply (i.e. it should be determined by reference to the value of the fish and the potatoes) it seems reasonable

to assume that the value of the two supplies was considered by the parties to be equivalent and both assessments will be in the same amount.

34. The question in relation to the refurbishment costs is more complex. The Tribunal accepts the Appellants' evidence that they sought to attribute the costs as between those proper to the demolition and reconstruction of the property and those which were specific to the fit out necessary for that occupant businesses. The Tribunal considers that costs proper to occupant specific fit out are costs proper to the occupant and any VAT incurred in connection with such fit out would be recoverable by the occupant.

35. However, it is clear that there were three occupants of which the Appellants were only one. Unless there was an on supply of the works on which output tax was accounted for (or would be due) the VAT suffered by the Appellant does not meet the definition of input tax as it is not VAT incurred on a supply to them but rather to or at least for the benefit of another business.

36. At no time did the Appellants maintain that they had engaged the various supplies of fit out as agent for the three businesses. It was also acknowledged that as regards Quay Desserts there was no recharge or reimbursement of any kind. Ms Thomas contributed to some costs (i.e. the glass doors).

37. Unlike with the alcohol, the Tribunal does not see that the Appellant bought in and sold on the glass doors in consideration for the contribution payable by Ms Thomas. At best the Appellant acted as paymaster for a supply made jointly by the supplier to Ms Thomas and the Appellants but that would not give the Appellant the right to recover that part of the input tax attributable to Ms Thomas. Ms Thomas would either need to satisfy HMRC as to the proportion of the supply received directly by her or she would need to ask the supplier to reissue the invoice with part to her and part to the Appellant.

38. The ventilation invoice did not give rise to any recharges but again appeared to involve work of benefit to all three businesses. The Tribunal determines that as regard that invoice too that of the total tax incurred on the invoice only one third represents input tax of the Appellants.

39. On the basis of the above the Tribunal concludes that as regards the invoice two invoices available the Appellant has established on the balance of probabilities an entitlement to one third of the VAT incurred as they clearly relate to expenditure referable to the occupants (collectively) business.

40. As regards the remaining invoices which give rise to the assessment the Tribunal accepts that the Appellants have applied a similar methodology to determining recovery and are prepared to agree that for these too one third recovery has been made out.

Decision

41. The Tribunal has concluded that:

(1) as regards the input tax incurred on supplies of alcohol to the Appellant all input tax incurred is recoverable (subject to the requirement that the Appellant should voluntarily disclose to HMRC or be the subject of an assessment in respect of the corresponding output tax due on supplies to Quay Hole).

(2) as regards the refurbishment costs only one third of the VAT incurred shall be deductible as input tax with the remaining tax being subject to the assessment raised by HMRC.

42. 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.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 26 OCTOBER 2017