TC07653

VALUE ADDED TAX – disallowance of input tax credit under s26A VATA 1994 – unpaid consideration for supplies between related companies– was consideration unpaid 6 months after "relevant date"? – Found: consideration became payable later than date of supply – "relevant date" not yet reached – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01374

BETWEEN

THE PREMSPEC GROUP LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE ZACHARY CITRON
MRS SONIA GABLE

Sitting in public at Eastgate House, Cardiff on 20 January 2020

Mr N Stewart, consultant, for the Appellant

Mr D Hopkins, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal against disallowance of input tax credit on supplies to the appellant company from sister companies under common ownership, on the grounds that the consideration for those supplies remained unpaid six months after the "relevant date" per s26A Value Added Tax Act 1994, which HMRC asserted was the date of supply. The appellant company argued that the "relevant date" had not yet been reached, as the consideration was not yet payable.

BACKGROUND TO THE APPEAL

2. HMRC wrote to the appellant company ("Premspec") on 12 September 2018 reducing the input tax claimed in the 04/18 period by £81,227.32, resulting in an assessment under s73 Value Added Tax Act 1994 for that period in the sum of £26,315.21.

3. Premspec requested a statutory review; the conclusion of this was given in a letter from HMRC dated 1 February 2019, upholding their original decision.

4. Premspec notified its appeal to the tribunal on 28 February 2019.

EVIDENCE

5. We had a documents bundle and an authorities bundle prepared by HMRC. We also heard oral evidence on oath from

(1) Mr Dennis Boseley, sole shareholder of Premspec and joint shareholder (with his wife) and managing director of Swanson Mackay & Co Ltd ("Swanson") and of Dean Electrical Wholesale Ltd ("Dean");

(2) Mr William Winter, managing director (and sole director) of Premspec from 17 August 2016 (Mr Boseley resigned as a director of Premspec on the same date); and

(3) Ms Abbie Boardman, officer of HMRC.

We found all of them to be open, straightforward witnesses as to matters of fact.

6. The documentary evidence included the following:

(1) 14 pages from the accounting records of Premspec, listing out "purchase ledger invoices" received from Swanson and Dean, showing (inter alia) the date, amount of money, amount of VAT, and whether the total amount was paid (and, if so, the date of payment). The first three pages were invoices from Dean in the date range 30 July 2013 to 10 May 2018. Those on the first page were largely shown as "paid"; the rest were not. The next nine pages were invoices from Swanson; the date range was 31 July 2013 to 31 May 2018. Again, those on the first page were largely shown as "paid"; the rest were not. The last two pages were also invoices from Swanson – the date range was 1 October 2014 to 10 May 2018. None of these were shown as "paid". The parties referred to these pages as the "extended terms accounts" (and we shall do likewise here).

(2) Five sample invoices for the supply of goods and/or services by Swanson and Dean, respectively, to Premspec, which gave rise to the unpaid amounts shown in the extended terms accounts. All such sample invoices included amounts in respect of VAT and bore a date after the words "tax point". They were in respect of:

(a) Ice box fridge (from Swanson – tax point 28 June 2017)

(b) Vehicle rental (from Swanson – tax point 26 October 2017)

(c) Office rent (from Dean – tax point 9 December 2016)

(d) Fuel (from Swanson – tax point 9 February 2018)

(e) Glamorgan Council rates (from Dean – tax point 29 March 2018)

(3) Letter from Mr Boseley to the Tribunal of 28 February 2019

(4) Letter from Mr Winter to the Tribunal of 4 October 2019

(5) Correspondence between the parties leading up to the appeal.

7. In his oral evidence, Mr Boseley described the business of Premspec and how it related to the businesses of Dean and Swanson; he also related his understanding of the terms of the amounts owed from Premspec to Dean and Swanson respectively, as reflected in the extended terms accounts. Mr Winter's oral evidence covered similar areas, from his perspective.

8. Ms Boardman's oral evidence covered matters relating to her enquiries into the matters now before the Tribunal.

FINDINGS OF FACT

9. Premspec, Dean and Swanson were all private UK companies under the control of Mr Boseley.

10. Dean and Swanson were longer-established – their business was as wholesalers of electrical goods, which were largely supplied by third party manufacturers and distributors in the UK.

11. Premspec was incorporated by Mr Boseley in October 2012 to operate as a distributor in its own right, importing stock (electrical goods) from Europe and China and selling to UK wholesalers (effectively, to companies like Dean and Swanson). Mr Boseley chose to conduct this business through a separate company, Premspec, because the potential customers were competitors of Dean and Swanson in the wholesale business.

12. Premspec faced significant funding challenges in its early years. This was because its suppliers in (for example) China demanded upfront payment for manufacture of the electrical items, whereas delivery could take six months or more, taking into account shipping time; and Premspec needed large very quantities of stock in order to be able to meet customers' requirements (which included large retailers). Premspec had relatively weak credit status in its early years, compared to Dean and Swanson. For these reasons, Mr Boseley, as controlling shareholder and managing director of Dean and Swanson, procured that those companies acquire goods or services or pay for goods or services that were actually needed by Premspec – and then make those goods or services available to Premspec, but without requiring immediate payment. In effect, Dean and Swanson were subsidising Premspec (though as time went on, Premspec became more self sufficient). To take the examples indicated by the sample invoices:

(1) Swanson acquired a fridge from a third party and then supplied it to Premspec

(2) Swanson rented vehicles for Premspec's sales team and provided them on to Premspec; it did the same for fuel cards

(3) Dean paid the rent on property occupied by Premspec and then charged this amount to Premspec

(4) Dean/Swanson paid the council rates that arose on Premspec's property and then charged this amount to Premspec

13. Accordingly, a large number of taxable supplies of goods and/or services were made by Swanson and Dean, respectively, to Premspec during the period from the end of July 2013 (this being the time that Premspec started trading, following incorporation nine months earlier). The

consideration for these supplies was the amount set out in invoices that were materially similar to the five sample invoices presented to the Tribunal. Such amount of consideration was reflected in the accounting books of Premspec as amounts owing to Swanson and Dean, respectively. As the extended terms accounts showed, some such amounts had been paid by Premspec by the end of 2018 but most had not; the subject matter of the appeal was those supplies where, according to Premspec's accounting records, the consideration remained unpaid.

14. Each invoice bore a date after the words "tax point" – this indicated when the invoice was issued. None of the invoices indicated the date on which the consideration set out was payable.

15. The payment terms of on which these supplies of goods and services were made from Dean and Swanson, respectively, to Premspec, during this period, were not on the face of the invoices, and were not otherwise documented. Mr Boseley controlled the three companies involved, and so did not think it necessary to document the payment terms.

16. Mr Winter was hired by Mr Boseley to work for Premspec in April 2013. He was promoted to become managing director of Premspec in August 2016. He was aware of the extended payment terms as between Premspec and Dean and Swanson, respectively, from the time that he was first hired.

RELEVANT LAW

17. The relevant subsections of s26A Value Added Tax Act 1994 are:

> (1) Where
>
> (a) a person has become entitled to credit for any input tax, and
>
> (b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of six months following the relevant date,
>
> he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.
>
> (2) For the purposes of subsection (1) above "the relevant date", in relation to any sum representing consideration for a supply, is –
>
> (a) the date of the supply; or
>
> (b) if later, the date on which the sum became payable.

COMMON GROUND AND ARGUMENTS OF THE PARTIES

18. It was common ground in this appeal that:

(1) there had been a large number of supplies of goods and/or services by Dean and Swanson to Premspec in the period of time since 30 July 2013, each evidenced by an invoice;

(2) those supplies were for the consideration in money in the amount shown on the invoice, which was also recorded in Premspec's accounting books;

(3) in relation to some of those supplies, the consideration had been paid;

(4) in relation to many of the supplies – and those that form the subject matter of this appeal – the consideration had not been paid;

(5) the VAT on these supplies – in the amounts shown in the "VAT" column in the extended terms accounts – was input tax for Premspec; and

(6) the time of these supplies was the "tax point" date on the invoices (being the date when the invoice was issued).

19. Premspec relied on the oral evidence of its witnesses that the consideration for these supplies was payable no later than ten years from when Premspec commenced its business in July 2013. Mr Stewart argued that such arrangement made commercial sense in the context of the companies concerned being under common ownership and Premspec being a "start up" business; that Premspec's input tax claims involved no loss of revenue to the exchequer because the supplier companies had accounted for output tax and not claimed VAT bad debt relief; and that the "relevant date" had not been reached by the time of the assessment in question; and so s26A was not engaged.

20. HMRC emphasised the lack of contemporaneous written evidence of agreement between Premspec and its supplier companies as to the date when the consideration for the supplies became payable; Mr Hopkins, in cross examination of Premspec's witnesses, suggested it was odd that the "ten years from commencing trading" date (as the date of payment) had never emerged in Premspec's correspondence with HMRC, and seemed somewhat imprecise.

21. HMRC's essential argument was that Premspec had not proven that the date when the consideration became payable was later than the date of supply; and this meant that s26A(2)(a) must apply, by default.

22. Mr Hopkins (and HMRC in correspondence) made reference to an HMRC internal manual (VDBR 5400) which indicated that "debt management" activity would not alter the time at which a business is required to repay input tax.

23. Mr Hopkins also cited HMRC's VAT Notice 700/18 (Bad Debt Relief) at paragraph 4.3 (addressed to taxpayers):

> "If your supplier allows you time to pay, for example 30 or 60 days, then you are not required to repay any input tax until 6 months from this later date. In the absence of any separate agreement you can use the invoice date as the due date for payment and so use this as the time at which the 6 months starts."

DISCUSSION

24. The issue in this appeal is the application of s26A to input tax relating to those supplies where the consideration remained unpaid as at the end of the 04/18 period. The particular question is: was the date on which that consideration became payable later than the date of the original supply?

25. The difficulty in resolving this stems from the fact that was no contemporaneous documentary evidence as to the date on which that consideration became payable.

26. We begin with what might be a called a "prior question" to the one posed in [24] above – namely, was the consideration for those supplies payable at all?

27. Despite the absence of a written contract giving Dean or Swanson the right to be paid, we find, on the balance of probabilities, that the consideration was payable – in other words, that there was as legal obligation on Premspec to pay. The evidence swaying us to this finding was:

(1) The extended terms accounts – these were documentary evidence, forming part of Premspec's accounting records, that Premspec regarded these amounts as due to be paid to Swanson and Dean; as all three of these companies were engaged in business with third parties, the amounts recognised in their accounts as payable and receivable were significant to their credit status and how they were perceived by customers and suppliers; hence this evidence carried weight with us.

(2) The fact that not insignificant amounts of consideration due from Premspec to Swanson and Dean had already been paid.

(3) The oral evidence of Mr Boseley and Mr Winter, directors of the creditors and the debtor respectively, that the three companies concerned regarded the unpaid consideration as a legal obligation of Premspec.

28. Having found that the consideration was payable, we turn to the question of – when? The oral evidence of Mr Boseley and Mr Winter was that the consideration was payable not later than ten years from the date when Premspec began trading, being on or around 30 July 2013. Mr Winter said that the reason Premspec had already paid the consideration for some supplies was that this reduced creditors on its balance sheet, which helped its credit status – and was part of an overall process of Premspec moving away from being subsidised by the sister companies and standing on its own two feet.

29. We agree with HMRC that it was odd that "ten years from commencing trading" as the payable date (a) never emerged as a fact in Premspec's correspondence with HMRC, and (b) was not a precise date. HMRC urged us to draw the inference there was no "later" date on which the consideration became payable and so, by default, the "relevant date" must be the date of supply.

30. In our view, the oddity of the arrangements here must be understood in the commercial context. All three companies were under common control. Mr Boseley wanted Dean and Swanson to subsidise Premspec during its early years – in effect, giving it a line of credit, on interest free terms. He never documented (or caused the companies he controlled to document) the precise long stop date, for the same reason that he never documented the precise terms – he did not think he needed to. We find that the answer to the question of when the consideration "became payable" was: within about ten years of Premspec commencing trading, with the option for Premspec to pay earlier if it so wished.

31. All this means it is not possible to say, with date-precision, when each of these amounts of unpaid consideration would become payable: we accept the evidence of Mr Boseley and Mr Winter that it will be no later than around July 2023 – but that of course is not a precise date – and it could be sooner, if Premspec so choose.

32. What is in our view sufficiently proven, however, is that each such payable date, whenever precisely it is, (a) will be later than the date of supply; and (b) had not yet occurred (in respect of the supplies where the consideration remained unpaid) at the time that HMRC made the input tax disallowance under appeal here. This means that the "relevant date" under s26A for input tax relating to supplies where the consideration remained unpaid had not been reached at that time; s26A(1)(b) was not satisfied; and so the input tax relating to such supplies did not fall to be disallowed under that section.

33. For completeness, we note that we have not found the internal HMRC publications to which we were referred of assistance here (and in any case they are not in themselves legal authorities). The interactions between Premspec and its sister companies were not, in our view, in the nature of "debt management" as mentioned in VDBR 5400, as it was clear from the outset that payment of the consideration would be deferred. As for paragraph 4.3 of VAT Notice 700/18, this addresses a quite different situation from ours, one where there was an originally agreed "payable" date, which is then extended by further agreement – what the second sentence in paragraph 3.4 is saying is that if there is no such agreement to extend (a "separate agreement"), then the original payment date holds. This makes sense – but we are not dealing here with the extension of an agreed payment date, but rather with the payment date originally agreed.

34. The foregoing is the analysis, based on findings of fact on the balance of probabilities, that leads us to allow the appeal. We would note by way of postscript that, as Mr Stewart said at the hearing (and in earlier correspondence with HMRC) – and on which he was not challenged by HMRC – Dean and Swanson accounted for output tax on the supplies in question and had not sought refunds under the VAT bad debt provisions. This means that our finding that s26A is not engaged does not create asymmetry of treatment as between the three companies under Mr Boseley's control.

35. Finally we note – again as a postscript, rather than forming part of the reasons for our decision – that the VAT outcome here is the same as would have ensued had Premspec borrowed from Dean and Swanson (on interest free terms) just before the supplies in question and used the funds to pay for the supplies immediately. In that scenario, which is economically equivalent to the facts before us, Premspec would have been left with amounts payable to its sister companies but s26A would not have been engaged, because the consideration had been paid.

CONCLUSION

36. The appeal is allowed: Premspec is entitled to the credit for input tax claimed in its original 04/18 return.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

Release date: 25 March 2020