[2021] UKFTT 165 (TC)

TC08134

VAT – denial of input tax credit – credit previously claimed by associated company but that claim rejected – identity of recipient of supplies - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04193

BETWEEN

BLAENAU BACH FARM **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing conducted remotely in public by video on 12 May 2021

Mrs Emily Turner partner in the Appellant for the Appellant

Mrs Helen Davies of the solicitor's office of HMRC for the Respondents

DECISION

INTRODUCTION

1. This is a VAT case. The appellant is both the name of a farm in Wales (the "**farm**") and also a partnership in which Mr and Mrs Turner are partners (the "**partnership**"). Mr and Mrs Turner are also equal shareholders in a limited company, Trans Wales Trails Ltd ("**TWT**"). In 2017 the partnership registered for VAT and sought to recover input tax on two invoices which related to supplies of building works carried out at the farm in 2014. TWT had already sought to recover that VAT, but such recovery had been denied since it accounted for VAT using a flat rate scheme. HMRC has also denied the partnership VAT recovery (or more correctly, its credit) of £9,856.14 on those invoices. The partnership has appealed against that decision.

RELEVANT LAW

2. There is no dispute about the relevant law which I summarise below:

(1) Input tax in relation to a taxable person is the VAT on the supply to him of any goods and services (Section 24 VAT Act 1994).

(2) Where a taxable person makes a supply of goods or services to another person, he should provide a VAT invoice with the name and address of the person to whom the goods or services are supplied (Regulations 13 and 14 VAT Regulations 1995).

(3) A taxable person is entitled to credit against output tax for the amount of input tax incurred by that taxable person in that period provided, broadly speaking, the inputs are attributable to taxable outputs (Section 26 VAT Act 1994).

(4) In order to obtain that credit, the taxable person claiming it must possess, at the relevant time, the VAT invoice provided by the supplier or such other evidence that he has been charged to VAT as HMRC may direct (Regulation 29 (1) and (2) VAT Regulations 1995).

THE FACTS

3. I was provided with a bundle of documents. I was also provided with a witness statement from Chris Lewis of the appellant's accountants ("**DMJ"**). Although Mr Lewis did not attend, Mrs Davies did not object to his witness statement being accepted in evidence. Mrs Turner gave oral evidence and I found her to be an honest and truthful witness. From the evidence I find the following facts:

(1) TWT is a horse riding holiday business. Guests are taken riding each day and can also be accommodated at the farm. TWT was established in the 1960s and its VAT registration number was transferred to it in September 2012 following the transfer of a previous business to it as a going concern.

(2) The farm was bought by Mr and Mrs Turner in their own names in 2013. This required them to take out a considerable mortgage. At that time the farm consisted of a small cottage and two flats which Mr and Mrs Turner planned to convert into guest accommodation for their business. This was to be used to house customers of the horse riding business in the summer but also to provide bed and breakfast accommodation in the winter.

(3) They commissioned an architect to draw up plans and several builders provided them with quotes for this work. They also took advice from DMJ since they wanted to ensure that they could recover VAT which they were charged in relation to the project. TWT accounted for VAT under the flat rate scheme, and they were told by DMJ that TWT could recover any VAT which TWT incurred on those building works since it was capital expenditure of more than £2,000. This advice was wholly incorrect. It was not possible for TWT to recover the input tax which it was charged by those builders.

(4) The disputed amount of VAT in this case, £9,856.14 is the VAT which was charged by two builders under two invoices which were issued to and paid by TWT. One was an invoice for £2,000, with VAT of £333.34 and the other invoice was for £57,136.80 with VAT of £9,522.80. In her evidence, Mrs Turner explained that everyone knew her business as TWT and so it was unsurprising that that was the entity which the builders invoiced.

(5) TWT sought to recover this VAT in its return for period to 1 April 2014, but that claim was rejected by HMRC on 10 October 2014 on the basis that the VAT was not recoverable given the rules of the flat rate scheme used by TWT. The appellant does not challenge this as the correct analysis.

(6) Mr and Mrs Turner, and TWT, relied very heavily on DMJ. Mrs Turner's evidence was that she did not look closely at the top of any invoice and just assumed that it would have been made out to the correct person and that DMJ would ensure that even if an invoice had been paid by TWT, which should have been paid by the partnership, DMJ would sort that out by making the appropriate bookkeeping entries.

(7) Following rejection of TWT's input tax claim, Mr and Mrs Turner took further advice from DMJ who suggested that the partnership should register for VAT (I am not entirely clear when the partnership was established, whether, for example, it was established at the time when the farm was purchased or subsequently. The only evidence I can find on this point is in an email dated 7 June 2018 from Mrs Turner to HMRC in which, in answer to a question as to when the partnership started trading in its current form, she answered that it could not as it does now until the building works had been finished and the only transactions on the account between 11 October 2013 when the farm was purchased up to 10 November 2014 (I do not know whether this is a joint account or a partnership account) were mortgage payments, insurance premiums, and transfers from TWT). The partnership registered for VAT in February 2017 and included a claim for input tax recovery for the VAT on the two builders' invoices, in its 03/17 return.

(8) HMRC opened an enquiry into this return in June 2017 and sought further information about the input tax claim. DMJ, on behalf of the partnership, provided all of the information sought by HMRC. Furthermore, an HMRC officer visited the farm in July 2017 and as well as reviewing the records, he was shown the physical nature of the farm and the use to which it was put was also explained to him.

(9) By way of a letter dated 28 September 2018 HMRC reduced the VAT claimed by the partnership for the period 03/17 from £24,218.09 to £14,361.95 which reflected the disallowance of the input tax claim relating to the two invoices. This was on the basis that the partnership did not hold valid VAT invoices. The VAT invoices in respect of the

claim had been made out to TWT and not to the partnership. It was also TWT which paid those invoices.

(10) The partnership requested a review of the decision on 26 October 2018. Mrs Turner, in her letter requesting a review, explained that she went about the building work on the basis that they would be able to reclaim the VAT on the advice of their accountant whom they had no reason to distrust. The costs incurred were genuine and associated with the building of the farm. They have often paid different invoices through the TWT bank account but those payments were retrospectively allocated to different businesses as well as private use by their accountant's bookkeeper. They had paid the invoices out of the TWT account assuming it would be allocated to the partnership but the bookkeeper had failed to pick up on this and put it through TWT as a VAT reclaim which was a genuine mistake.

(11) During cross-examination, Mrs Turner explained that following rejection of the partnership's VAT recovery claim, DMJ were coming up with a variety of solutions to assist in recovering VAT and she and her husband just went along with them. One of these suggestions was that the payment of invoices by TWT was some form of loan repayment to either Mr and Mrs Turner or the partnership. That suggestion was made by DMJ to HMRC in an email dated 27 October 2018.

(12) Following registration of the partnership for VAT in 2017, the partnership charged TWT a fee for services supplied by the partnership. These services included the right to use the accommodation at the farm for TWT's guests, as well as ancillary goods and services such as fencing and grazing. The partnership charged TWT VAT on such services as were subject to VAT.

(13) On 13 May 2019 HMRC issued a review conclusion letter which upheld the original decision, and that decision was then appealed to the Tribunal on 12 June 2019.

(14) In examination in chief and cross-examination, Mrs Turner indicated that the builders who issued the invoices had issued them to TWT which was correct. At that time, having been told that TWT could recover the VAT, she did not think that the builders had invoiced the wrong person. It was a conscious decision at the time that TWT would be invoiced, but this was on the assumption TWT could recover the VAT and that in turn was based on the advice given by DMJ. In answer to a question from me, Mrs Turner confirmed that had TWT been able to recover the input tax on the invoices, she would not have tried to "unscramble" the position, something which she had considered since the partnership was denied VAT recovery. In other words she has thought about going back to the builders and asking them to re-invoice the partnership for the works carried out in 2014 on the basis that in her view that might enable the partnership to recover the VAT.

BURDEN OF PROOF

4. The burden of establishing that HMRC have incorrectly reduced the partnership's VAT credit by the aforesaid amount rests with the partnership. It must establish that reduction is incorrect on the balance of probabilities.

SUBMISSIONS

5. The partnership submits as follows: the VAT in the invoices reflects genuine work undertaken at the farm and which was paid for; the appellants have made a genuine mistake; they commissioned the work in the name of TWT and paid for it out of the TWT account on the basis of the advice from DMJ that TWT could recover the VAT notwithstanding that it operated a flat rate scheme; DMJ submitted to HMRC that it was always intended that this cost would be recharged to the partnership but that bookkeeping exercise was never undertaken; TWT did not have a proprietary interest in the farm and received no benefit from the works which were undertaken to it; therefore the only entity which could have commissioned the works was the partnership; DMJ accept that their advice was wrong; Mr Lewis's evidence is that DMJ should have advised Mr and Mrs Turner to transfer the funds from TWT to the partnership and that the builder should have been asked to re-invoice the partnership for the works that had been undertaken; HMRC have allowed input VAT recovery on certain invoices reflecting VAT paid by the partnership in their March 2017 VAT return notwithstanding that those invoices were not made out to the partnership but to a number of associated entities (even though the invoices were paid by the partnership); this reflects sentiments expressed in a letter dated 28 September 2018 in which HMRC say that having considered these invoices which do not quite meet the legal standard for VAT recovery, recovery is being allowed because there is sufficient supporting evidence of the supplies having been made to the partnership; if Mr and Mrs Turner had known that TWT could not recover the VAT on the supplies of building works, then they could have, for example, appointed a non VAT registered builder; or commissioned the works in the name of the partnership and registered the partnership for VAT at that time; stepping back, the cost of the building works was clearly a cost of works done to the farm and the VAT system allows recovery of VAT for a genuine business expense; and here there was a genuine business expense, and that was an expense of the partnership; the attempt to explain away the situation by way of some form of loan repayments was suggested by DMJ in an effort to rectify the situation given that they had made the mistake in the first place of telling them that TWT could recover its VAT on costs of the building works.

6. On behalf of HMRC, Mrs Davies submits as follows: the partnership fails the legal test for recovering or obtaining credit for the VAT on the builders invoices since it does not hold invoices made out in its name; the invoices were made out in the name of TWT; these invoices reflect the reality of the situation, namely that the work was commissioned by TWT (on the advice of DMJ) and thus it was only TWT who could, potentially, recover the VAT on those invoices; it is agreed that TWT could not recover because it used the flat rate scheme; the supplies of the building works were made to TWT and the invoices correctly reflect that; the appellant accepts that the reason why the work was commissioned by, invoiced to, and paid by, TWT was not a mistake or some form of loan arrangement; it was a conscious decision in order to reclaim VAT; the partnership was not registered for VAT at that time; no remedial action has been taken either by TWT or by the partnership in respect of rectifying the alleged error in supplies having been made to TWT rather than the partnership; whilst it is not absolutely clear which legal entity should have taken responsibility for commissioning and paying for the building works, what is clear is that as a matter of fact the supply was commissioned by TWT and paid for by TWT; there was nothing wrong with TWT commissioning these work since it clearly benefited from them given that the intention was that guests of the TWT business would occupy the newly renovated flats; some of the appellant's submissions are contradictory and there have been a number of inconsistencies in the explanations offered throughout the period of enquiry; the truth of the matter is that the appellants dispute is with its accountants who have given it bad advice rather than with HMRC; responsibility for dealing with the appellant's tax affairs rests ultimately with the appellant and

not with the appellant's agent; any complaint about that agent's behaviour is a matter between the appellant and the agent and is not a matter for HMRC or the Tribunal.

DISCUSSION

7. For the purposes of recovering input VAT, a trader must meet two fundamental criteria. The first, and most important, is that the person seeking to recover that VAT must be the person to whom the relevant supply has been made. The second is that that person must also hold a valid VAT invoice (or other evidence of having been charged VAT by a supplier as HMRC might direct).

8. In this case, it is abundantly clear that the supply of the building services under the two invoices was made to TWT and not the partnership. And that the invoices reflecting those services was correctly made out to TWT. Not only is this what actually happened, but it is the only conclusion I can come to given that, at the time that those works were commissioned, Mr and Mrs Turner had been advised by DMJ that it was TWT who should commission, be invoiced for, and pay for the works on the basis that it was TWT who would be able to recover the VAT on those invoices.

9. Mrs Turner submitted that she never considered the identity of the person to whom invoices were addressed and assumed that DMJ would simply sort out the internal accounting between the various entities and bank accounts run by Mr and Mrs Turner and TWT. But if she had raised her head above the parapet in 2014 and considered the identity of the recipient of the supplies on the two invoices, she would not have questioned them since she had been advised by DMJ that TWT was the correct recipient of the supplies as TWT could recover the VAT on those invoices.

10. The fact that this advice was spectacularly incorrect does not change the fact that the supply was made to TWT.

11. Nor does it reflect, as suggested by Mrs Turner, a mistake. It was certainly not a mistake at the time that TWT should commission and pay for the works. Nor was it a mistake as between the builders on the one hand and TWT on the other. As far as the builders were concerned, there was nothing wrong in treating Mr and Mrs Turner as directors of TWT, and as Mrs Turner accepts, most people (suppliers of services and goods) knew them as TWT since that was the name of their trading business. There was no mutual mistake that would enable either party to resile from the contract reflected in the invoices.

12. Whilst there are certain legal principles which enable discretionary trustees to ask a court to unscramble decisions by trustees on the basis that those decisions were based on incorrect tax advice, there is no such principle of which I am aware which will enable TWT to unscramble its decision to commission and pay for the building works in 2014.

13. The appellant and DMJ should also be aware that simply paying for works does not mean that the supply of those works is made by the payer. The Supreme Court decision in *Airtours* makes that expressly clear. The only person who can make a prima facie claim for input tax recovery is the person to whom the supplies are made, and if they are not made to the paying person, then that paying person cannot recover the VAT. So in the circumstances of this appeal, given that the supplies were made to TWT, the partnership could not have recovered the VAT on those supplies simply by paying the invoices. The partnership would have to show that the supplies of building services in 2014 were made to the partnership. And they were not. They

were made to TWT which was what was intended by TWT, Mr and Mrs Turner and DMJ since DMJ had advised that TWT could recover the input tax.

14. This case is an example of the wish to rewrite history with the benefit of hindsight. And unfortunately for the appellant, history shows that the supplies were made by the builders to TWT and the invoices correctly reflect those supplies.

15. I wholly accept Mrs Turner submission that had they known then that TWT would not have benefited from input tax recovery, they might have restructured the arrangements; and in particular might have registered the partnership for VAT which would have commissioned and paid for the works. But that did not happen, and whilst it is highly relevant (i.e. the opportunity cost) should the partnership wish to bring a claim against DMJ, I have to look at the facts as they were rather than as the appellant would now, with the benefit of hindsight, like them to be.

16. I have mentioned above that HMRC have a discretion as to whether they might accept alternative evidence of supplies having been made to the partnership. HMRC have certainly taken into account, when reaching their conclusion that the partnership is not permitted to recover VAT on the invoices, the submissions made by the appellant concerning mistake, incorrect advice having been given by DMJ, that a genuine cost was incurred for business purposes, and that payment was made by TWT but should have been recharged to the partnership. So they have considered this alternative evidence and have rejected it . They have, if not in so many words, considered and not exercised their discretion in the partnership's favour.

17. Mrs Turner has submitted that in respect of input tax on invoices which HMRC have permitted to be recovered by the partnership, those invoices were not all made out to the partnership and some are made out to other trading names or entities in the Turner's business empire. Mrs Davies rejected this and said there was no evidence of that, but it is clear from the letter that I have already referred to dated 28 September 2018 that HMRC have, as regards certain invoices, appeared to have adopted a more relaxed approach towards input tax recovery. However, that does not impact on the fact that as regards the two invoices which are the subject of the input tax recovery claim in this appeal, they have adopted a strict approach. If the appellant considers that they have been unfairly treated, then I am afraid I have no jurisdiction to consider the unfairness which is more properly the subject of an application for judicial review.

18. Mrs Turner also makes the point that the only entity which could have properly commissioned the building works in 2014 was the partnership (or Mr and Mrs Turner as joint owners of the farm) since it was only they or the partnership who had an interest in the farm and TWT had no such interest. But as far as the builders were concerned, the works were commissioned by Mr and Mrs Turner acting as agent for TWT, and it was not for them to look behind that and consider whether TWT was competent to commission those works. And indeed, as Mrs Davies has pointed out, TWT clearly had an interest in the works since they were to benefit the TWT business. And as things turned out, TWT was then invoiced by the partnership for the occupation rights granted by the partnership to TWT to enable TWT to put their guests up at the farm. So in my judgment there was no legal or contractual impediment for TWT to commission and pay for the building works. Indeed if it had not been on the flat rate scheme and it had accounted for VAT in the conventional manner, it could have recovered input tax on those works on the basis that it was making taxable supplies of guided horse riding services.

19. Furthermore, Mrs Turner submits that VAT recovery is intended to be permitted where genuine business expenses have been incurred for genuine business purpose. I accept that, but in this case, the genuine business expenses have been incurred at the request of, and for the purposes of, TWT. And so, absent the flat rate scheme, the VAT on those expenses would have been recoverable (subject to the usual rules of recoverability) by TWT.

20. Finally, it is telling, to my mind, that Mrs Turner accepted that had TWT been able to recover its VAT on the invoices, there would have been no need to unscramble the contractual and invoicing arrangements. In other words she is tacitly accepting that the supplies had been made to TWT. And the only reason for unscrambling the situation is to recover VAT and not because the supplies were made to the partnership rather than TWT. Had she genuinely believed that supplies had been made to the partnership, then they should have been unscrambled even if TWT had recovered the input tax. The truth of the matter is that the supplies were not made to the partnership. They were made to TWT. TWT holds a valid VAT invoice. The partnership does not hold a valid VAT invoice nor can it provide alternative evidence of the supply being made to it which HMRC could, using its discretion, treat as alternative evidence of a supply made to it. The only person able to recover the VAT on the builders invoices was TWT, but it could not do so because of its use of the flat rate scheme. It was always however intended that TWT should commission the building works, be invoiced for them, and then pay for them, since DMJ had advised that TWT could recover the VAT. In that they were plain wrong. But that must be a matter for a claim against DMJ, should the partnership wish to pursue one, and as Mrs Davies has submitted, that is not something with which either HMRC or the Tribunal can become involved. Whilst I cannot blame the appellant for seeking to recover VAT from HMRC, and I have considerable sympathy for her plight, I am afraid that I must dismiss this appeal.

DECISION

21. For the foregoing reasons I dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

22. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 21 MAY 2021