[2011] UKFTT 797 (TC)

TC01633

Appeal number TC/2010/09078

Appeal against the disallowance by HMRC of input tax totalling £5,516.48 claimed by the Appellant on their VAT return – appeal allowed in part

FIRST-TIER TRIBUNAL

TAX

SASSOON BURY LIMITED **Appellant**

- and -

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

TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)
R.A.LAW

Sitting in public at 45 Bedford Square, London WC1 on 7 November 2011

Mrs P Mason for the Appellant

Mr H O'Leary for the Respondents

DECISION

1. This is an appeal against the disallowance by HMRC of input tax totalling £5,516.48 claimed by the Appellant on its VAT return for the period ended 30 June 2010.

2. HMRC came to the conclusion that the £5,516.48 which was claimed on the Appellant's VAT return for the period ended 30 June 2010 and subsequently disallowed by HMRC reflected input tax paid by the Appellant for supplies of services, rather than goods.

Background and Facts

3. The Appellant's business is that of a hairdressing salon and it was incorporated on 27 May 2009. It commenced trading on 5 September 2009. Between these dates, it incurred various expenses on fitting out the salon. Among the charges incurred were a number of invoices dated from July to September 2009 for mixed supplies of goods and services, the VAT on which is the subject of this appeal.

4. The Appellant reached the VAT registration threshold during April 2010 and was subsequently registered for VAT with effect from 1 June 2010.

5. The Appellant's first VAT return was submitted on 28 July 2010 to reflect the period from 1 June 2010 to 30 June 2010. Total outputs of £8,965 and total inputs of £102,821 were declared on this VAT return. The corresponding output tax paid and input tax paid declared on this return was £1,568.98 and £13,630.34. The net tax due per this return was a repayment to the Appellant of £12,061.36.

6. In a letter dated 20 August 2010 the Appellant was advised by HMRC that a meeting had been arranged for 31 August 2010 for the purpose of checking their VAT return for the period ended 30 June 2010.

7. On 31 August 2010 the director of the Appellant, Lawrence Garnett, and the company secretary, Paula Mason, visited the office of VAT Officer Mr A Pocock.

8. On 3 September 2010 a letter was issued by the VAT Officer to the Appellant stating that input tax totalling £5,710.73 would be disallowed as it reflected input tax paid by them for supplies of services received more than six months before the date they were registered for VAT.

9. As a result the repayment of input tax to the Appellant would therefore be £6,350.63 rather than £12,061.36. The letter also contained an offer of a statutory review of the decision to disallow the Appellant's claim of input tax of £5,710.73.

10. In a letter dated 28 September 2010 the Appellant accepted the VAT Officer's view that the VAT of £117.75, reflected on an invoice from Haywood Moon for legal services, should be disallowed. However the Appellant also stated in this letter that

they disagreed with the Respondents' decision to disallow further VAT of £5,592.98 (being £5,710.73 minus £117.75).

11. Having reviewed the decision dated 3 September 2010, the HMRC Review Officer substantially upheld the VAT Officer's decision. In a letter dated 4 November 2010 the Review Officer notified the Appellant that input tax of £76.50 reflected on an invoice from Bartlett Signs would be allowed.

12. Mrs Reid, the Review Officer, stated that in reaching her decision she had reviewed the case of *GJ & B Miller* VTD 18630 ("*Miller"*) together with two other appeals relating to shop fitting, *Rayner & Keeler* STC 724 ("*Rayner*") which she confirmed was remitted to the Tribunal and *M E J Burgess and A P Holmes T/A Cards N Cuddles v The Commissioners of Customs and Excise VTD* 14475 ("*Burgess*") which she stated was dismissed.

13. Mrs Reid stated however that the case of *Card Protection Plan* ECJ C349/96 ("*CPP"*) could not be disregarded as it was the first time that the question of how to determine single/multiple supplies had been referred to the ECJ.

14. The Appellant appealed against the disallowed tax in respect of Global Fire Services ("GFS") VAT £16.13; Mark Joy Plumbing and Heating Ltd ("MJPH") VAT £345.21 and £160.29; and Cubitt Theobald ("CT") VAT £1,994.85, £1,500.00 and £15,000.

15. CT had project managed the shop fit for the Appellant with the exception of the plumbing requirements which were taken care of by MJPH. The Appellant had decided that both CT and MJPH should purchase the goods required for the shop fit on their behalf in order that the goods could be obtained at a cheaper price.

16. Mrs Mason stated that it made sense for them to ask the suppliers to purchase the goods on the Appellant's behalf as they would know where to go to get the best price and had the resources to collect and deliver the goods. Additionally it would save time for the Appellant.

17. The invoice for GFS stated that it was for a 4 zone fire alarm system, for works carried out as per the engineers report certificate. The invoice was dated 15 September 2009 and was marked as paid on 18 November 2009. The engineer's report provided with the invoices showed that two existing detectors were incorporated into a new grid; two new detectors were supplied and fitted into the grid; and the detectors and call points were then tested.

18. The Review Officer stated that it was clear from the engineer's report that the main purpose of the work was the repositioning of existing fire detectors and testing the system. The installation of two new detectors could therefore be said to be incidental to the main supply.

19. The invoice for MJPH was said to be to "carry out works at new salon as instructed". The invoice detailed the supply and installation of various items including a hot water cylinder and taps at the business premises and showed an amount of VAT

of £345.21. The invoice was dated 11 August 2009 and marked as paid on that date. It replaced an earlier more detailed invoice for the same amount dated 4 August 2009. The input tax of £345.21 on this invoice showed £265.41 charged on materials and £79.80 charged on labour.

20. A further invoice from MJPH stated that it was in respect of "complete works at new shop". The input tax of £160.29 on this invoice showed £61.89 charged on materials and £98.40 charged on labour. The invoice was dated 2 September 2009 and marked as paid on 9 October 2009.

21. The Review Officer stated that in the records she held MJPH described themselves as providing a service of plumbing and in order to provide that service it would be quite usual to supply materials which she considered to be incidental to the main supply.

22. The invoices from CT in respect of the input tax claimed all stated that they were for "refurbishment of the salon" and were dated 11 August 2009, 21 August 2009 and 1 September 2009.

23. The Review Officer confirmed that she did not consider the supplies by CT to be supplies of goods.

24. After the review the Appellant appealed and at the same time asked CT and MJPH for a breakdown of their invoices. These were produced to the Tribunal.

25. Mrs Mason confirmed that the supplies were in connection with a complete shop fit of their business premises in order to convert what was originally an estate agent to a luxury hair salon. This involved replacing the ceiling, flooring and lighting throughout the premises and adding retail fixtures and fittings, signage, water systems and sanitary fittings. She produced photographs showing the nature and extent of the changes.

26. Under the terms of their lease the Appellant was required to have a fire alarm. The existing fire detectors were above a faulty ceiling which required to be replaced. The Appellant approached GFS to prepare an engineer's report and instal, fit and test what was necessary according to the report.

27. The replaced invoice from MJPH listed a number of items provided and Mrs Mason gave evidence that the Appellant had provided MJPH with a list of the equipment needed for a hair and beauty salon and asked MJPH to purchase and install such equipment.

28. The breakdown for CT divided the labour from the supplies. The supplies amounted to £20,783.53. The labour amounted to £17,893.18 and Mrs Mason stated that the majority of the carpentry labour cost which amounted to more than £3,000 was in respect of custom made cabinets for the retail display area. A further element of the carpentry labour cost related to the installation of wood flooring.

The Legislation

29. Section 24(1)(a) VAT Act 1994 (VATA) provides that the definition of input tax in relation to a taxable person means 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.

30. Section 25(2) VATA states that a taxable person, subject to the provision of this section shall be 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.

31. Section 26(1) VATA states that 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, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2).

32. Paragraph (1)(a) of Regulation 111, VAT Regulations 1995 ("Regulation 111) provides that VAT on the supply of goods or services to the taxable person before the date with effect from which he was, or was required to be, registered, for the purpose of a business which either was carried on or was to be carried on by him at the time of such supply may be treated as if it were input tax.

33. Paragraph 2(b) of Regulation 111 provides that no VAT may be treated as if it were input tax under paragraph (1) of that Regulation in respect of goods which had been supplied to the relevant person more than 4 years before the date with effect from which the taxable person was, or was required to be registered.

34. Paragraph 2(c) of Regulation 111 states that no VAT may be treated as if it were input tax in respect of services which had been supplied to the relevant person more than 6 months before the date with effect from which the taxable person was, or was required to be registered.

35. The question of how to determine single/multiple supplies was referred to the ECJ in the case of *CPP*. The ECJ provided the following guidance in deciding the nature of a supply:

"In determining what the appropriate criteria were for deciding for VAT purposes, whether a transaction which comprised several elements was to be regarded as a single supply or as two or more distinct supplies assessable separately, it was necessary to ascertain the essential features of the transaction. There was a single supply where one or more elements constituted the principal service and others were merely ancillary, in that they did not constitute for customers aims in themselves but simply a means of better enjoying the principal service. Where a single price was charged for a service consisting of several elements if circumstances…indicated that the customers intended to purchase two distinct services it would be necessary to identify the calculation or assessment to be used for that purpose".

HMRC's Submissions

36. HMRC noted that that the invoices in question were dated between 12 July 2009 and 15 September 2009 and the Appellant was registered for VAT with effect from 1 June 2010 which was more than six months after the supplies by GFS, MJPH and CT were made.

37. HMRC therefore submitted that in order for the Appellant's appeal to succeed, they were required to establish that the supplies made by GFS, MJPH and CT were supplies of goods, or a mixed supply of goods and services.

38. With regard to the supplies made by GFS, HMRC submitted that the supply made to the Appellant was that of rerouting, enlarging and testing a four zone fire alarm system. There was no evidence to demonstrate that any of the goods supplied by GFS were not fitted. The supply made by GFS was therefore a composite supply of services. The goods provided by GFS in the form of the additional detectors were incidental to the supply of rerouting, enlarging and testing.

39. With regard to the supplies made by MJPH, HMRC submitted that MJPH provided a supply of plumbing services, in the form of the supply and installation of various necessary plumbing and heating appliances. The Appellant had asked MJPH to provide any necessary goods to be fitted as they could procure these at a better price than the Appellant.

40. HMRC contended that as there was no evidence to demonstrate that any of the goods supplied by MJPH were not fitted, the supply of plumbing services from MJPH was therefore a composite supply of services and the goods provided by MJPH were incidental to this supply.

41. With regard to the supplies made by CT, HMRC submitted that the supply of refurbishment was a composite supply of refurbishment services and the goods provided by CT were incidental to this supply. HMRC submitted that the Oxford Dictionary defined "refurbish" as a verb to "renovate and redecorate".

42. The Appellant had asked CT to supply the goods needed to complete the refurbishment as they were able to procure the necessary items at a better price than the Appellant. HMRC submitted that there was no evidence to demonstrate that any of the goods supplied by CT were not fitted.

43. HMRC noted that on their website CT stated that that they "…carry out refurbishment, restoration, new build and maintenance projects in East Anglia and London. The supply of refurbishment was therefore a composite supply of refurbishment services, the goods provided by CT being incidental to this supply.

44. HMRC submitted that the decision to disallow the VAT paid by the Appellant as detailed on the invoices was made in line with the guidance provided by the ECJ in *CPP*.

45. HMRC submitted that the case of *Miller* was decided on its own facts, the Tribunal having taken into account "…fact and degree". HMRC preferred the decision of the VAT and Duties Tribunal in the case of *Burgess*.

46. In conclusion HMRC submitted that the supply made by GFS was a single composite supply of services with the goods ancillary to the supply of services. The supply made by MJPH was a single composite supply of services with the goods ancillary to the supply of services and the supply made by CT was a single composite supply of services with the goods ancillary to the supply of services. Accordingly HMRC submitted that the input tax of £5,516.48 was therefore correctly disallowed.

Appellant's Submissions

47. Mrs Mason contended that the information on the website concerning CT was irrelevant as was the advertising on the invoice of MJPH. Both CT and MJPH were known to the Appellant before being asked to carry out the necessary work.

48. Although HMRC had contended that their decision had been made following the guidelines in *CPP* Mrs Mason submitted that it appeared that HMRC had reached their decision on the face of the invoices alone. They had at no time asked for a breakdown of the invoices or inspected the premises. As a result of this she contended that HMRC did not have the necessary information to decide that the invoices were in respect of services to which the supplies of goods were ancillary.

49. She referred to the case of *CPP* and stated that this case had confirmed that where one or more elements were regarded as constituting the principal service the others should be regarded as ancillary services.

50. HMRC had accepted that in respect of Bartlett Signs the fitting was ancillary to the supply of the signs and so Mrs Mason submitted this approach should be applied to the other services supplied by GFS, CT and MJPH.

51. She submitted that the principal service supplied by CT was that of the supply of flooring, ceilings, lights and a bespoke retail display area.

52. She submitted that the principal service supplied by MJPH was the supply of the boiler, sanitary fittings, basins and sinks. All of these could not be used unless they were fitted. In accordance with *CPP* she contended that the fitting of these goods did not constitute an aim in itself but a means of better enjoying the goods. She submitted that it was logical that the fitting was ancillary to the supply.

53. She submitted that the case of *Burgess* as cited by HMRC was a 1996 case and therefore not based on the guidelines in *CPP*. Similarly the other case cited by HMRC of *Rayner* was a 1994 case.

54. Mrs Mason submitted that the case of *Miller* took place after *CPP*. She submitted that therefore only this case should be considered. The *Miller* case referred to a very

similar scenario of a complete shop fit but regarding a fashion retailer rather than a hairdressing salon.

55. She stated that in this case, when asked to decide whether the supply of a complete shop fit made to the Appellant more than 6 months before it registered for VAT were supplies of goods, or of services, or a combination of the two, the Tribunal stated that:

> "taking into account fact and degree, and ignoring the themed painting of the shop (which was quoted for separately and constituted a supply of services), we conclude that in the instant case, the remaining supply was one of goods".

and it was therefore held that the Appellant was entitled to recover the input tax on their supplies as being attributable to a supply of goods.

56. She submitted that that it was inequitable that when meeting with HMRC on 31 August 2010 to go through their first VAT return, they were told that if they had purchased the goods separately and then been invoiced for the fitting of those goods separately, the input tax on the goods would have been allowable. However, because they were invoiced for both the goods and the fitting costs together, this made all the input tax disallowable as it made the supply one of services.

57. She submitted that on obtaining breakdowns of the invoices from CT and MJPH these showed that the cost of goods invoiced was significantly higher than the cost of the fitting.

58. In conclusion she contended that either all the supplies were supplies of goods with the fitting being ancillary and therefore by virtue of Regulation 111 of the VAT Regulations 1995 the VAT on the supplies should be allowed; or the supplies were both a supply of goods and services with the VAT on the goods being allowed and the VAT on the services being disallowed.

Findings

59. We found Mrs Mason's evidence to be truthful and credible.

60. We have reviewed the authorities provided to us. In *Rayner* Owen J concluded by stating:

> "In the final analysis I can only agree with each counsel that necessarily the answer is, to a great extent, a matter of impression. It is noteworthy that Balcombe LJ in Card Protection Plan did not add the adjective 'first' but, having explained that the answer is a matter of impression he added, 'on which different minds may reach different conclusions'. I question the chairman's decision that the contract was for shopfitting and therefore for services. It seems to me that just as easily and possibly more accurately he could have found that it was for the supply of goods to be fitted."

61. In *Miller*, a case very similar to this matter, Judge Demack quoted Owen J's words as set out above and concluded that the shop fitting was primarily a supply of goods.

62. Similarly in *Burgess* Owen J's words were again quoted by the chairman of the Tribunal.

63. We agreed with HMRC that any decision should primarily follow in line with the guidance provided by the ECJ in *CPP*. Additionally we found the facts in the case of *Miller* very similar to this matter and the decision of persuasive value. We took note of Owen J's words that "in the final analysis the matter is one of impression".

64. We found that the supply made by GFS was primarily that of producing an engineer's report and installing, fitting and testing a new fire alarm system. We found that this was primarily a supply of services.

65. We found that the supply made by MJPH was primarily one of supplying goods. The Appellant provided MJPH with a list of the equipment needed which MJPH agreed to procure for the Appellant. MJPH had the means to collect the equipment and obtain it at a favourable price. The impression we drew from the facts and by using the *CPP* guidelines was that the supply of the goods was the essential feature of the transaction and the fitting of them was ancillary.

66. The impression we drew from the facts was that the supply by CT comprised primarily two independent supplies, firstly project management and other services and secondly construction and installation of retail display units, being a mixed supply of goods and services. Although we accepted that part of the charge for the carpentry labour related to the supply of the retail display units, which would in principle allow the related input VAT to be attributed to a supply of goods, as Mrs Mason was unable to identify the carpentry labour costs relating to these units we are unable to allow these costs as part of the supply of goods. Mrs Mason was also unable to identify the element of carpentry labour costs relating to the installation of wood flooring, so that we are equally unable to allow these costs as part of the supply of goods.

Decision

67. The appeal is dismissed with respect to the invoice of GFS, allowed in respect of the MJPH invoices and allowed in respect of the supply of goods by CT in amount of £20,783.18 as specified in the breakdown of their invoice. As Mrs Mason was unable to prove how much of the carpentry labour costs accounted for the custom made retail display units ands flooring, we are unable to allow any of these labour costs as ancillary to supplies of the related goods. If further details can be obtained, we direct that the parties further amend the assessment to allow for the VAT on these costs

68. 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.

TRIBUNAL JUDGE
RELEASE DATE: 7 December 2011