



Neutral Citation: [2023] UKFTT 00009 (TC)

Case Number: TC08671

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/18467

VALUE ADDED TAX – exclusion of credit for input tax – motor car – whether on acquisition of motor car taxable person intended to use it exclusively for the purposes of its business – Value Added Tax (Input Tax) Order 1992, art. 7(2G)(b) – penalty for careless inaccuracy – schedule 24 of the Finance Act 2007

Heard on: 5 December 2022

Judgment date: 14 December 2022

Before

**TRIBUNAL JUDGE JENNIFER LEE
ANN CHRISTIAN**

Between

LONDON DRYLINING LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Niyi Idowu, Partner at ATN Partnership, agent for the Appellant

For the Respondents: Mr Andrew Cameron, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. With the consent of the parties, this hearing was conducted remotely by way of the Tribunal's video platform, VHS (Video Hearing Service). Mr Idowu of ATN Partnership and Mr Marian Cioara, co-director of the Appellant, attended remotely, as did Mr Cameron and Ms Amy Doherty of HMRC.
2. We have had the benefit of considering a number of documents, including the Appellant's notice of appeal dated 16 December 2021, HMRC's statement of case dated 6 July 2022, a witness statement from Ms Doherty dated 26 October 2022, and an electronic documents bundle prepared by HMRC running to 187 pages.
3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND

4. This is an appeal brought by the Appellant against HMRC's decision to issue:
 - (a) An assessment dated 25 June 2021 under section 73 of the Value Added Tax Act 1994 ("VATA 1994") for the tax period 8/2019 for the amount of £9,052.00;
 - (b) A penalty assessment for careless inaccuracy dated 9 August 2021 under Schedule 24 of the Finance Act 2007 ("FA 2007") for the tax period 8.2019 in the amount of £1,357.80.
5. The background is comprehensively set out in the notice of appeal and HMRC's statement of case. In summary, the assessment under section 73 of the VATA 1994 relates to input tax reclaimed by the Appellant in respect of VAT on a motor car (an Audi Q5) which the Appellant had purchased on 18 July 2019. The Appellant contends that the Audi Q5 was purchased exclusively for business purposes.
6. HMRC were conducting enquiries into the Appellant's 2/2021 VAT return for a matter unconnected to the present appeal, and which was satisfactorily resolved without further ado. However, during those checks, HMRC (via Ms Amy Doherty who was the VAT caseworker at the time) noted the purchase by the Appellant of the Audi Q5 in their fixed asset register.
7. Enquiries in relation to the Audi Q5 indicated that input tax had been claimed on its purchase in 2019, in the VAT quarter 8/2019. The Appellant via its agent, ATN Partnership, explained in an email of 13 May 2021 that the motor car was used purely for business purposes and that Mr Cioara (one of the directors) has another car personally, and also access to his spouse's car.
8. HMRC requested copies of the motor insurance policy and mileage log. They also raised a number of questions by way of email on 14 May 2021. In that email, the Appellant was asked what prevented the directors from using the motor car for personal reasons.
9. The Appellant via ATN Partnership responded by email on 28 May 2021, stating that:

"While there is nothing preventing the director from using the vehicle for personal reasons, he can categorically say that the vehicle was never used for personal reasons and that is indicated by the number of mileage done so far by the vehicle."

Mr Cioara is adamant that he has never used the vehicle for personal reasons and it is up to HMRC to prove otherwise.”

10. The Appellant also produced the mileage log for the Audi Q5 and a policy of insurance from Admiral for the period 1 February 2021 to 1 February 2022, which indicated that the vehicle’s permitted use was “social, domestic, pleasure and commuting”. Notably, the vehicle had not been insured for business use.
11. Furthermore, in their email of 28 May 2021, the Appellant stated as follows:
 - (a) There were only two employees on the payroll, namely, Mr Cioara and his wife. Both had access to the Audi Q5, but only Mr Cioara used the car;
 - (b) That the Audi Q5 was parked at the Appellant’s trading and registered office address at 14 Coombe Road, London N22 5LB. It appears that this address is also the residential address of Mr Cioara and his wife;
12. When HMRC queried the policy of insurance, the Appellant’s agent responded by email on 18 June 2021, stating that the reason the vehicle’s permitted use was stated to be “social, domestic, pleasure and commuting” was due to a clerical or administrative error, caused by Mr Cioara having part-exchanged his previous motor car for the Audi Q5. They indicated that the insurance company had been informed that the new motor car would be owned by the Appellant and would be used for business purposes. The Appellant had trusted the insurance company to ensure that everything was reflected accurately on the insurance documents.
13. HMRC were not satisfied with the Appellant’s responses. On 25 June 2021, Ms Doherty raised an assessment for 8/2019 on the ground that the input tax reclaimed by the Appellant for the Audi Q5 was excluded because, as HMRC contends, the Appellant had failed to show that it did not intend to make the motor car available for private use at the time of purchase, pursuant to section 25(7) VATA 1994 and art.7(2G) (b) of the Value Added Tax (Input Tax) Order 1992 (“the 1992 Order”).
14. HMRC also raised a penalty assessment for careless inaccuracy in relation to the return for 8/2019, pursuant to Schedule 24 of the FA 2007. Ms Doherty regarded the Appellant’s behaviour as a prompted disclosure and provided full mitigation. The minimum penalty was charged at 15%. The penalty explanation letter was issued on 8 July 2021. The notice of penalty assessment was issued on 9 August 2021.
15. The penalty explanation letter of 8 July 2021 explained that whilst HMRC could suspend a penalty for careless inaccuracy where conditions were set that would assist the taxpayer avoid a penalty in the future, it appears that Ms Doherty had decided not to suspend the penalty, as the error had been a one-off and unlikely to reoccur.
16. On 26 July 2021, Ms Doherty took up a new post as an Assistant Private Secretary at HMRC.
17. The Appellant via its agent provided further information to HMRC on 25 and 27 July 2021. Their letter of 27 July 2021 was stated to be an appeal and a request for a review, if HMRC decided not to change their decision.
18. HMRC issued a review conclusion letter on 16 November 2021. The review officer’s conclusions were as follows:
 - (a) To uphold the decision to disallow the input tax claim for the purchase of the Audi Q5 in the amount of £9,052 and to assess that amount; and
 - (b) To cancel the decision not to suspend the careless inaccuracy penalty on conditions and to remit the matter to the decision maker for a reconsideration of the suspension issue. This was on the basis that although the error had been

deemed a one-off and unlikely to reoccur, HMRC can use other aspects of a taxpayer's VAT obligations to set suspension conditions.

19. Notwithstanding the outcome of the review dated 16 November 2021, the careless inaccuracy penalty was not suspended.
20. On 16 December 2021, the Appellant lodged an appeal with the Tribunal. Thereafter, the parties agreed to engage in ADR. Consequently, on 14 March 2022, HMRC applied for a stay of the proceedings. The application was granted and directions issued on 19 April 2022. Unfortunately, ADR was not successful.
21. On 13 June 2022, HMRC sent the Appellant and his agent a disclosure request, seeking a copy of the car insurance policy obtained at the time of purchase (namely on 18 July 2019) and a copy of the car logbook (V5C) since the time of purchase.
22. On 27 September 2022, the Appellant's agent responded with a copy of the logbook. In response to the request for a copy of the insurance policy obtained at the time of purchase, they state "*unfortunately, our client is unable to locate this document at the moment but is trying to get a copy from the insurer. Should this become available, it will be sent to you.*"
23. On 6 October 2022, HMRC applied to the Tribunal to admit into these proceedings a witness statement from Ms Doherty outside of the deadline set by the Tribunal for the provision of witness statements. The application came before me. I decided to grant the application unless an objection was received within 7 days. I gave both parties permission to rely on witness statements, if they wished, to be served by 4 pm on 28 October 2022. No objection was received.
24. On 28 October 2022, HMRC provided a witness statement from Ms Doherty. The Appellant has not provided a witness statement (there is no criticism of the Appellant for not having done so).

THE ISSUES

25. The issues for consideration by this Tribunal are as follows:
 - (a) Whether, at the time of purchase, the Appellant intended to make the Audi Q5 available for private use;
 - (b) Whether HMRC were correct to impose a penalty for careless inaccuracy;
26. In relation to issue (a) above, the burden rests on the Appellant to prove that, at the time of purchase, the Appellant did not intend to make the Audi Q5 available for private use. In relation to issue (b), the burden rests on HMRC. The standard of proof is the civil standard, namely, on the balance of probabilities.
27. In addition, there is the related issue of whether the penalty for careless inaccuracy should have been suspended on conditions. As will be explained in this judgment, the parties were ultimately able to agree on suspension conditions during the hearing. If the Tribunal decides to dismiss the appeal in respect of issues (a) and (b), HMRC have confirmed that they will suspend the penalty for careless inaccuracy.
28. The relevant statutory provisions are included as an Appendix to this decision. Where necessary, certain provisions and the relevant authorities are also set out in the body of this decision.

DISCUSSION AND DECISION

29. In addition to considering all the documents before us, the Tribunal received oral submissions from Mr Idowu on behalf of the Appellant and from Mr Cameron on behalf of HMRC. We also heard from Mr Cioara, co-director of the Appellant, and from Ms Doherty of HMRC. We are grateful to them.

Whether, at the time of purchase, the Appellant intended to make the Audi Q5 available for private use

30. Art. 7(1) of the 1992 order provides for exclusions from the general right of a taxable person under section 25 VATA 1994 to deduct input tax in respect of a supply to him of a motor car. However, by virtue of art. 7(2)(a), art. 7(1) is not to apply if:

- (i) The car is a qualifying motor car,;
- (ii) The car is supplied to a taxable person; and
- (iii) The 'relevant condition' is satisfied.

Thus the effect of the satisfaction of the three conditions is that the taxable person can avail himself of the right to deduct input tax.

31. By art. 7(2E), the relevant condition is, so far as material, that the supply is *'to a taxable person who intends to use the motor car... (a) exclusively for the purposes of a business carried on by him, but this is subject to paragraph (2G) below ...'*.

32. Art. 7(2G), so far as material, provides:

"A taxable person shall not be taken to intend to use a motor car exclusively for the purposes of a business carried on by him if he intends to... (b) make it available (otherwise than by letting it on hire) to any person (including, where the taxable person is an individual, himself, or where the taxable person is a partnership, a partner) for private use, whether or not for a consideration."

33. It is the meaning to be attached to the words 'make it available' which is crucial. This is a strict test. Unless the criteria is met, the tax relief is not available.

34. We were referred by HMRC to the Court of Appeal decision in *Customs and Excise Commissioners v Upton (trading as Fagomatic)* [2002] EWCA Civ 520, in which the Court considered the meaning of art. 7(2G) of the 1992 Order.

35. The appellant in *Fagomatic* carried on business as a cigarette vending machine operator. For the purposes of impressing his customers, he bought a Lamborghini car. He had made inquiries as to whether it could be insured for business use only but was told that all insurance policies covered private use without charge. He conducted his business seven days a week, and when not in use, the Lamborghini was parked in a car park. The appellant owned no other car for private use but did not need one. He did not use the car for shopping or on social occasions. He claimed the VAT paid on the purchase of the Lamborghini car as input tax.

36. The tribunal held that 'made available' had to mean more than 'be available' and that there was no evidence, in the specialised circumstances of the appellant's business and personal life, that he had intended to make the car available for his own private use. The commissioners appealed. They were successful on the ground that a car might be 'made available' if it was available in fact and the owner did nothing to prevent its private use by himself.

37. The appellant appealed to the Court of Appeal. The Court dismissed the appellant's appeal and held that the appellant's deliberate action in acquiring the car and obtaining insurance permitting private use was to make the car available to himself for private use and that he must be taken to have intended that result in the absence of evidence to the contrary, even if he did not intend to use the car privately.

38. The following passages from the Court of Appeal's judgment in *Fagomatic* are worth repeating in full:

“[22] The very fact of his deliberate acquisition of the car whereby he makes himself the owner of the car and controller of it means that at least ordinarily he must intend to make it available to himself for private use, even if he never intends to use it privately....

[23]...But what is plain is that the tribunal did not recognise that Mr Upton's deliberate action in acquiring the car and obtaining insurance permitting private use was to make the car available to himself for private use and that he must be taken to have intended that result in the absence of evidence to the contrary, even if he did not intend to use the car privately...

[29] The question has to be decided as at the moment of acquisition of the car. On the facts of the present case, I see no escape from the conclusion that the car was at that moment, as a matter of fact, available for Mr Upton's private use, however little he then had any intention of actually so using it.

[31] Did Mr Upton at the moment of purchase intend to make the car available to himself for private use? The question is not whether he intended to use it, but whether he intended to make it available for use...

[35] I readily recognise that it will be difficult for a man who purchases a car for business use as a sole trader to demonstrate that he did not thereby make the car available to himself for private use also. The cases suggested by the commissioners in which that might be achieved lacked conviction. I do not, however, think that we should seek to alleviate the position of the sole trader by allowing ourselves to be driven to a construction of the regulation that it does not otherwise bear. A sole trader such as Mr Upton does have difficulty in establishing that he has not made available to himself for private use, and therefore did not intend to make available to himself for private use, a vehicle that he intended on purchase to have immediately available to him for business use. That however demonstrates, not the unreasonableness of the regulation, but rather the unusual nature of the arrangements made by Mr Upton.”

39. We were also referred to the FTT case of *Waddell t/a LCD Plant Hire* [2009] UKFTT 185 (TC). The tribunal in that case said this:

“[6] In short, the thrust of the Upton case is that on the acquisition of a car the tax payer, if he is successfully to reclaim VAT, must not only establish the Purpose Test (i.e. exclusivity of business use) but, in addition, he must also have done something specific which makes clear that the vehicle has been put beyond or is not available for private use. That requires a very high onus of proof, but nonetheless it is the position of the current law.”

40. In response to a question by the Tribunal, Mr Cameron also made reference to the Court of Appeal decision in *CEC v Elm Milk Ltd* [2006] EWCA Civ 164, which had been determined in favour of the taxpayer. Its omission from the bundle and from HMRC's statement of case was slightly surprising, given that the Court of Appeal in *Elm Milk Ltd* had considered the judgement in *Upton* at some length and provided a comprehensive overview of the Courts' approach in relation to cases concerning the recovery of VAT on cars intended to be used for business purposes.
41. In *Elm Milk*, prior to the purchase of a car for the use of the director, the company had passed a resolution noting the intention to purchase the car, that it was intended to be used solely for business purposes, and that any private use would be a breach of the employee's terms of employment. The insurers had stated that it was not possible to insure the car solely for business purposes. The insurance policy named a number of drivers who were insured for private use. The car was kept overnight near the company's premises, situated only 50 yards from the directors home. The keys were kept in the office and the director had access to the keys.

42. Arden LJ gave the leading judgment in *Elm Milk*. She referred to the distinction drawn by Buxton LJ in *Fagomatic* between intention to use and intention to make available; an intention to use for business purposes was not considered to be the same as an intention not to make the car available for private use. Both intentions must be separately established in order for the VAT to be recoverable as input tax.
43. Arden LJ advocated a purposive approach to the interpretation of Art. 7 and held that the scheme underpinning Art.7 was to exclude the right to deduct VAT paid on the purchase of a motor car to which the 1992 Order applied. Art. 7(2) then created an exception to that exclusion, and Art.7(2G) created an exception to that exception.
44. To bring himself within the exception to the exception a taxpayer had to show not simply that he did not intend to use the car for private use but that it was not even available for private use. The concept of availability was not restricted to physical availability but included also cases of unavailability due to the imposition of effective legal restraints. It was a question of fact whether in all the circumstances a taxpayer intended not to make a car available for private use by whatever means and thus there was no reason why a car could not be made unavailable for private use by suitable contractual restraints, if they were effective.
45. In the words of Arden LJ:

[36] The taxpayer has a high threshold to cross if he wishes to bring himself first within the exception and then within the exception to the exception. For this purpose he must show that the intention is to use the car exclusively for business use. Then he must bring himself within the exception to that exception and for this purpose he has to show not that he does not intend to use the car for private use ... but it is not his intention even to make it available for private use.... The convoluted nature of the provisions demonstrate that Parliament regards the deduction of VAT on the purchase of cars as the exception rather than the rule and something that has to be subject to rigorous scrutiny and the satisfaction of tough conditions.

[37] In my judgment, while, if “available” meant only “physically available”, there would undoubtedly be fewer cases where VAT paid on the purchase of a car could be deducted, that itself is not the object of the provision. The object is to prevent claims to deduct tax on cars purchased for business save where the possibility of private use is excluded. That purpose can equally well be achieved if the concept of availability is not restricted to physical availability but includes also cases of unavailability due to the imposition of effective legal restraints.
46. On the facts in *Elm Milk*, the prohibition had been backed up by the terms of the employee’s employment terms and the location of the keys. The tribunal had held that the board resolution was genuine and that the appellant intended to be bound by it. A company could contract with its sole director even when he was also the controlling shareholder. The position was different from that of a sole trader (*Fagomatic* distinguished). Further, the terms of the insurance did not mean that an intention not to make the car available for private use could not be shown.
47. Returning to the facts of the present case, as stated above, the burden rests on the Appellant to prove that, at the time of purchase, it did not intend to make the Audi Q5 available for private use.
48. Having carefully reflected on the available evidence and on the parties’ submissions, the Tribunal has determined that at the time of purchase, the Appellant intended to make the Audi Q5 available for private use, within the meaning of Art. 7(2G)(b) of the 1992 Order.

49. We are therefore satisfied that the VAT which had been reclaimed on the purchase of the Audi Q5 was not recoverable by the Appellant. In reaching this conclusion, we take into account in particular:
- (a) The fact that on the Appellant's own case, it accepts that there was nothing preventing the directors from using the vehicle for personal reasons (see its agent's email of 28 May 2021). This point was reinforced during the hearing, when we were told by the Appellant that it would simply be impractical to put in place any measures or arrangements to prevent personal use of the Audi.
 - (b) The fact that the policy of insurance for the period 1 February 2021 to 1 February 2022 described the permitted use of the car as "social, domestic, pleasure and commuting", without reference at all to business use. We do not accept, on the balance of probabilities, that this was a result of clerical or admin error on the part of the insurers. If this had been an error, it would have been more likely than not that the Appellant (or its co-directors/ employees) would have noticed the mistake and taken steps to rectify the error as soon as the insurance documentation was received when the policy was initially taken out, and at subsequent renewals.
 - (c) We also note that the Appellant has not provided the policy of insurance taken out at the date of purchase in July 2019. Mr Cioara indicated during the hearing that he had not been asked to provide a copy of the initial policy. However, HMRC had requested a copy of the initial policy by email on 13 June 2022, addressed to the Appellant's agent. The request was renewed by email on 21 September 2022, addressed to the agent and also to Mr Cioara.
 - (d) We are prepared to accept that the mileage log produced by the Appellant would have roughly matched the odometer reading, and that any discrepancy between the log and odometer would have been as a result of the Audi having had to be delivered to the Appellant when it was purchased, and sent for periodic service/ repairs. However, this point does not assist the Appellant. The fact remains that at the time of purchase, the Appellant intended to make the Audi Q5 available for private use, in the absence of anything specific which would have ensured that the vehicle was put beyond, or not made available for private use.
 - (e) The fact that the Audi Q5 was parked overnight at the Appellant's registered address, and that the keys were held at the directors' home office, do not assist the Appellant. The registered address is also the directors' residential address. There was nothing specific in place which would have ensured that the vehicle was put beyond, or not made available for private use.
50. The Appellant argues that additional restraints, controls or measures to restrict the use of the car for business purposes are not specified in HMRC guidance (VAT Notice 700/64) and that, on this basis, the appeal should be allowed. This is not within the jurisdiction of the Tribunal. Matters of complaint going to matters of general fairness are not within our purview: *The Commissioners for HMRC v Hok Ltd* [2012] UKUT 363 (TCC).
51. In response to the Tribunal's questions as to what restraints or measures in this case would be sufficient from the perspective of HMRC, Mr Cameron did helpfully suggest by way of a non-exhaustive list that:
- (a) The policy of insurance for the Audi Q5 could have been amended as soon as possible to permit business use only;
 - (b) It would have been open to the company to agree to restrict the use of the motor car by its directors/ employees to business use only, to be buttressed by a

condition that any use otherwise than for business would be grounds for dismissal, and for this to be recorded in the company minutes.

Whether HMRC were correct to impose a penalty for careless inaccuracy

52. HMRC has deemed the inaccuracy to be careless (not deliberate). There was a prompted disclosure. The penalty range is from 15% to 30%. As a result of the quality of the disclosure provided by the Appellant/ its agent, HMRC have decided to apply the maximum reduction. HMRC did not consider there to be any special circumstances which would justify a further reduction. The penalty was therefore charged at 15%.
53. In our view, the penalty for careless inaccuracy was correctly imposed pursuant to Schedule 24 of FA 2007. We agree with HMRC's conclusions as set out in its letter of 8 July 2021. The inaccuracy was careless, there was a prompted disclosure, and HMRC were correct to apply the maximum reduction. We agree that there are no special circumstances which would justify a further reduction.

Whether the penalty should have been suspended

54. In response to questions from the Tribunal during the hearing, it transpired that notwithstanding the outcome of HMRC's review to cancel the decision not to suspend the careless inaccuracy penalty and to remit the matter for reconsideration, no further discussions between the Appellant and HMRC had ensued as to what suspension conditions would be deemed acceptable.
55. By the time the review conclusion letter was issued, Ms Doherty had left her role as the VAT caseworker to take up her new post (Ms Doherty in fact left prior to the notice of penalty). The issue of whether the penalty should be suspended on conditions was therefore passed back to her team. It is unclear as to who exactly within the team reconsidered the matter. Ms Doherty also stated that she did not know whether anyone in her team contacted the Appellant to discuss the issue. She and Mr Cameron quite properly accepted that there was no evidence, by way of letters or otherwise, which indicated that HMRC contacted the Appellant about the issue after the review conclusion letter. Mr Idowu stated categorically that HMRC did not contact him or the Appellant to discuss the issue.
56. At the Tribunal's invitation, Mr Cameron and Ms Doherty helpfully agreed to take some time to confer and to take further instructions in relation to what suspension conditions could be put in place to enable the suspension of the penalty, under paragraph 14 of Schedule 24 of FA 2007. I adjourned the hearing for a short period for this purpose.
57. When the hearing resumed (on the same day), Mr Cameron stated that he and Ms Doherty had had the opportunity to discuss the matter further. According to Mr Cameron, the following three conditions would be agreeable to HMRC:
 - (a) The Appellant should maintain yearly business mileage records for the Audi Q5 and ensure that there is evidence which cross references to the mileage records, e.g. MOT records or photos of the odometer reading, which co-relates with the mileage records;
 - (b) The Appellant should check the terms & conditions of its policy of insurance for the Audi Q5 annually and keep a note of these checks in its business file.
 - (c) The Appellant should check all relevant HMRC guidance and make a note of all its contacts with HMRC, any conversations with HMRC, and internet searches, and keep a record of these in its business file.

58. Mr Cameron confirmed that HMRC would suspend the penalty for a period of 12 months if the Appellant accepted the three conditions above. Mr Cameron reiterated the importance of the Appellant ensuring that evidence of compliance was maintained, as HMRC may wish to check that the conditions were being complied with. Mr Idowu on behalf of the Appellant confirmed that the Appellant would accept the three conditions to enable the penalty to be suspended for 12 months.

CONCLUSION

59. For the reasons set out above, the appeal against HMRC's decision to issue the assessment dated 25 June 2021 for the period 8/2019 for the amount of £9,052.00 is dismissed.
60. The appeal against the penalty for careless inaccuracy for the period 8/2019 in the amount of £1,357.80 is also dismissed. However, as noted above, HMRC have agreed to suspend the penalty on the basis of the three conditions above, which the Appellant has accepted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. 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.

**JENNIFER LEE
TRIBUNAL JUDGE**

Release date: 14th DECEMBER 2022

APPENDIX RELEVANT STATUTORY PROVISIONS

1. Section 24 Value Added Taxes Act 1994 ("VATA") provides:
- (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;

being (in each case) goods or services used or to be used for the purposes of any business carried on or to be carried on by him.

2. Sections 25 and 26 provides that where a taxable person incurs input tax which is used for the purposes of making taxable supplies, it is recoverable and offset against the output tax he pays. Tax incurred in connection with goods and services used for private or non business use is not so recoverable.

3. Section 25 refers to payment by reference to accounting periods and credit for input tax against output tax. Section 25(7) reads:

(7) The Treasury may by order provide, in relation to such supplies ... and importations as the order may specify, that VAT charged on them is to be excluded from any credit under this section; and—

(a) any such provision may be framed by reference to the description of goods or services supplied or goods ... imported, the person by whom they are supplied ... or imported or to whom they are supplied, the purposes for which they are supplied ... or imported, or any circumstances whatsoever; and

(b) such an order may contain provision for consequential relief from output tax.

4. So far as is relevant, Article 7 of the Value Added Tax (Input Tax) Order 1992 10 (“the 1991 Order”) provides:

(1) Subject to paragraph (2) to (2H) below tax charged on (a) the supply ... to a taxable person ... of a motor car shall be excluded from any credit under section 25 of the Act.

(2) Paragraph 1 above does not apply where:

- (a) the motor car is:
 - (i) a qualifying motor car
 - (ii) supplied ... to ... a taxable person; and
 - (iii) the relevant condition is satisfied....

(2E) For the purposes of paragraph (2)(a) above the relevant condition is that the ... supply ... is to a taxable person who intends to use the motor car ... (a) exclusively for the purposes of a business carried on by him, but this is subject to paragraph (2G) below...

(2G) A taxable person shall not be taken to intend to use a motor car 25exclusively for the purposes of a business carried on by him if he intends to ... (b) make it available ... to any person ... for private use, whether or not for a consideration ..

5. Schedule 24 of the Finance Act 2007 relates to penalties for errors in a taxpayer’s document. Paragraph 1 reads as follows:

(1) A penalty is payable by a person (P) where—

- (a) P gives HMRC a document of a kind listed in the Table below, and
- (b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

- (a) an understatement of [F1 a] liability to tax,
- (b) a false or inflated statement of a loss F2 ..., or

- (c) a false or inflated claim to repayment of tax.
 - (3) Condition 2 is that the inaccuracy was [F3 careless (within the meaning of paragraph 3 or deliberate on P's part].
 - (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.
6. Paragraph 3 deals with degrees of culpability.
 - (1) For the purposes of a penalty under paragraph 1, inaccuracy in] a document given by P to HMRC is—
 - (a) “careless” if the inaccuracy is due to failure by P to take reasonable care,
 - (b) “deliberate but not concealed” if the inaccuracy is deliberate but P does not make arrangements to conceal it, and
 - (c) “deliberate and concealed” if the inaccuracy is deliberate and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).
 - (2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate when the document was given, is to be treated as careless if P—
 - (a) discovered the inaccuracy at some later time, and
 - (b) did not take reasonable steps to inform HMRC....
 7. Paragraph 4 of Schedule 24 relevantly provides that the penalty for careless action is 30% of the potential lost revenue.
 8. Paragraph 5 of Schedule 24 deals with the definition of “potential lost revenue”. Paragraph 5(1) states that “the potential lost revenue” in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.
 9. Paragraph 10(1) of Schedule 24 provides that if a person liable to a penalty has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.
 10. Paragraph 10(2) provides that where a person would otherwise be liable to a penalty of 30%, the penalty may not be reduced to a percentage that is below 15% of the potential lost revenue where the disclosure is prompted
 11. Paragraph 11 of Schedule 24 provides for the reduction of penalties where HMRC think it right because of special circumstances. Paragraph 11(2) states that “special circumstances” does not include ability to pay.
 12. Paragraph 14 deals with suspension of penalties and states that:
 - (1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.
 - (2) A notice must specify—
 - (a) what part of the penalty is to be suspended,
 - (b) a period of suspension not exceeding two years, and
 - (c) conditions of suspension to be complied with by P.
 - (3) HMRC may suspend all or part of a penalty only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.
 - (4) A condition of suspension may specify—
 - (a) action to be taken, and
 - (b) a period within which it must be taken.
 - (5) On the expiry of the period of suspension—
 - (a) if P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and

- (b) otherwise, the suspended penalty or part becomes payable.
- (6) If, during the period of suspension of all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable.
13. Paragraph 15 of Schedule 24 provides for appeals to the Tribunal against a decision of HMRC that a penalty is payable, against a decision as to the amount of a penalty, against a decision not to suspend a penalty, and against a decision of HMRC setting conditions of suspension of a penalty payable.
14. Paragraph 17 of Schedule 24 provides that in an appeal against the amount of a penalty, HMRC may rely on paragraph 11 to a different extent to HMRC, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed. "Flawed" means "flawed when considered in the light of the principles applicable in proceedings for judicial review".