TC01320

Appeal number TC/2009/14115

VALUE ADDED TAX – Decision of HMRC to cancel the Appellant's VAT registration with effect from a particular date on the grounds that he was not currently trading nor had traded for the past 5 years – whether within the powers of HMRC under para.13(2), Sch. 1, VATA – held no, because not a cancellation with effect from the day on which the registered person ceased to be registrable – whether the Appellant was entitled to be registered on that date on the basis that he was then carrying on a building business and intending to make taxable supplies in the course or furtherance of it within the meaning of para. 9(b), Sch. 1, VATA – held yes, because he had at that date made a preparatory act which must itself be treated as an economic activity (*Rompelman v Minister van Financïen) – *whether tax claimed as recoverable input tax in VAT periods falling after that date was properly repayable to the Appellant – held in principle that such tax was properly repayable if it was tax on cost components of the outputs of the Appellant's building business* (Inverstrand BV v Staatssecretaris van Financïen) – *case adjourned for the parties to agree how much, if any, of the tax claimed as recoverable input tax was repayable in the light of the Decision – Direction to apply to re-list in the event of failure to agree – Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARDNER & CO. **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (*Value Added Tax*) **Respondents**

TRIBUNAL: JOHN WALTERS QC
JOHN ROBINSON

Sitting in public in London on 23 March 2011

Michael Gardner, for the Appellant
Sarabjit Singh, Counsel, instructed by the Solicitor for HMRC, for the Respondents

DECISION

1. This is an appeal by Gardner & Co. which, as we understand, is effectively Mr. Michael Gardner, who appeared before us – we will refer in this Decision to Gardner & Co. and Mr. Gardner, without making any difference between them, as "the Appellant" – against the decision of the Respondent Commissioners ("HMRC"), communicated to the Appellant by HMRC Officer Kathryn Jenkins in a letter dated 10 August 2009 that the input tax claimed by the Appellant in its VAT return for the period 03/09 was to be reduced to nil and that the Appellant would be 'deregistered from VAT'. (The date from which the cancellation of the Appellant's VAT registration was to take effect was stated to be 10 August 2009 in HMRC's letter to the Appellant of 7 September 2009.) The reason given by Officer Jenkins for her decision was:

> 'You are not currently trading, nor have traded since 2004. The input tax claimed relates to costs you have incurred whilst contesting a decision of insolvency and are deemed to be unclaimable as they do not relate to taxable supplies.'

2. The Appellant immediately objected to Officer Jenkins's decision and she wrote again to the Appellant on 18 August 2009 indicating that the input tax claimed by the Appellant in its VAT return for the period 06/09 had also been disallowed. She elaborated on her reasoning in this letter, saying:

> 'You have not made any taxable supplies* (in your case done any building work) since March 2004 when you were declared bankrupt. I understand that you have an intention to build a new property again but unless the appeal against your bankruptcy is upheld this will not be possible. I am not willing to allow you to remain registered whilst you await this decision but you would be allowed to re-register if your bankruptcy is overturned.
>
> *A taxable supply is defined in the VAT Act 1994 s.4(2) as "a supply of goods or services made in the United kingdom other than an exempt supply".'

3. Officer Jenkins went on in the letter dated 18 August 2009 to set out the law on which she had relied in making her decision, in particular, paragraphs 13(2) and (5) of Schedule 1 to the VAT Act 1994 ("VATA"), which deal with de-registration, and paragraph 9 of Schedule 1 to VATA, which deals with entitlement to be registered for VAT purposes.

4. The appeal originally came on for hearing on 17 January 2011. At that hearing the Appellant produced material which HMRC had not seen up to that point. In consequence the hearing was adjourned to enable HMRC to consider the material produced. The adjourned hearing took place on 23 March 2011.

5. We received evidence from the Appellant and from Ms. Julia Reay (who were both cross-examined by Mr. Singh) and we were also provided with two bundles of documents. The parties have agreed a Statement of Facts which we have taken into consideration.

6. From the evidence and the Statement of Facts we find facts as follows.

The facts

7. The input tax claimed for the period 03/09 amounted to £10,809.39. The figure for the period 06/09 was £206.79. It represented tax on utility bills, motoring expenses (in particular, fuel), telephone bills, veterinary bills (in relation to dogs in the yard where the Appellant lives and where he keeps his equipment) and legal expenses.

8. The Appellant went into business in 1959. He built his first house in 1968. He registered for VAT with effect from 1 April 1973, when VAT was introduced in the UK. He was in a considerable way of business when, in 1995, family difficulties led to various reverses which resulted in his entering into an Individual Voluntary Arrangement, which in turn led to his becoming bankrupt in 1998 or 1999. He was made bankrupt again in November 2004. He contests the validity of this second bankruptcy. Since the second bankruptcy he has occupied a yard and converted an outbuilding in it into a dwelling.

9. Since 2003 the Appellant has dealt with day to day litigation matters arising out of these events.

10. On 1 June 2007 the Appellant received a VAT control visit from Officer Mike Robbins. The non-submission of VAT returns had given rise to the visit and according to the Report of the Visit complied by the Officer, the Appellant stated at the time of the visit that:

> 'he has been totally involved in continuing to try to appeal against bankruptcy proceedings imposed in 1998 and 2005. He is attempting to bring legal proceedings against Ernst and Young (alleging mis-management of his IVA) and the Official Receiver for alleged errors in their handling of the 2004 bankruptcy. He is due to attend a Court of Appeal case on 13 – 15 June 2007, and stated that should he fail there, he intends to give up. He was adamant that the business has not undertaken any building work since the previous visit, stating that he had been supported by his brother (also met on the visit) and living in his elderly Mother's house. He showed me bank statements showing just tax credit income.
>
> He said he had no current involvement or contact with Palmer & Co. and he was no longer required to submit yearly self-assessment returns to IR [Inland Revenue], until his situation changed. Any limited companies he had been involved in were now dissolved. The chicken rearing business planned 2-3 years ago was now shelved. I enquired why the VAT registration had been retained, and why returns 12/05 to 03/07 had not been submitted. [The Appellant] stated that he was in a confused state and seemed to be receiving correspondence from many official bodies including the courts. As he had been registered with NHBC since 1967 he had a plan to build some new houses, perhaps under the self-build scheme. I informed him that he would not need to be registered to recover VAT on materials used in the construction of a new dwelling if he used the DIY scheme ...'

The Officer concluded that:

> 'In the circumstances, the most appropriate action was the completion of nil returns for the outstanding periods (these were completed and signed by [the Appellant] during the visit) ... If a nil balance is ever achieved then deregistration should be effected.'

11. The Appellant completed nil returns for VAT purposes for all periods from 06/04 to 12/08 inclusive. As can be seen from the above extract from the Visit Report for the visit

on 1 June 2007, the nil returns for periods 12/05 to 03/07 were completed and signed at that time.

12. Thus the Appellant has not made any taxable (including zero-rated) supplies since the period 03/04 (the 3 months ending 31 March 2004). Nor had he made any claims for input tax credit between the periods 06/04 and 12/08. But in the period 03/09, as indicated above, he claimed a repayment of input tax of £10,809.39, and in the period 06/09 he claimed a repayment of input tax of £206.79. Examination of the records supporting these claims has shown that of these amounts £1,987.86 related to supplies made before 1 April 2006, which pursuant to regulation 29(1A) of the VAT Regulations 1995, SI 1995/2518 as in force at the relevant time, were claimed too late to be recoverable in any event.

13. The Appellant's plan to build some new houses, as expressed at Officer Robbins's visit on 1 June 2007 had not come to anything by 10 August 2009, when he was visited again, this time by Officer Jenkins. She queried the claims for input tax credit made in the returns for periods 03/09 and 06/09. The Appellant told her that these were claims arising out of expenses incurred in pursuing the legal case to overturn his insolvency and that (according to her Visit Report) 'his entire time is now spent on these matters and he has no personal life at all'. He also told her (again, according to her Visit Report) that 'he was deemed insolvent but he is hoping for another appeal to be heard. If the appeal is upheld he would like to trade again.'

14. Notwithstanding the fact that the Appellant had made no taxable supplies since the period 03/04, he stated in his Notice of Appeal, completed on 14 September 2009, that he had been conducting an economic activity in pursuing claims against Ernst & Young and others for the benefit of his creditors. In doing so, he had been 'managing assets'.

15. He also stated in his Notice of Appeal that he had a contract to build a new dwelling in Mill Road, Throop, and that 'this will commence shortly'.

16. This was a reference to building work for Ms. Reay within the curtilage of her property at 9 Broadlands Close, Throop, Bournemouth, which abuts Mill Road. The Appellant had stated, with reference to this work, in a message to Officer Jenkins dated 21 August 2009 that 'work is commencing next week'.

17. Most of the oral evidence we heard was concerned with this building project.

18. The relevant planning history is somewhat complicated. An application for permission to erect a dwellinghouse at the property was received by Bournemouth Council on 22 February 2007 and was refused on 18 April 2007.

19. On 21 November 2007 an application for permission for alterations and a single storey extension to the dwellinghouse to form 'dependent relatives accommodation' and the erection of a conservatory was received by the Council. That application was granted on 15 January 2008.

20. On 7 July 2008 an application for permission for the erection of a garage was received. That application was granted on 26 August 2008.

21. This was the position when Officer Jenkins's decisions which have been appealed were made.

22. Subsequently, on 5 November 2009, an application for permission for the erection of a bungalow was received by the Council. That application was refused on 30 December 2009.

23. On 29 April 2010, an application for permission for the erection of a bungalow with parking space was received by the Council. That application was refused on 24 June 2010.

24. Planning consultants (HLF Planning) expressed the view that there were some prospects of success for an appeal against this refusal. However no appeal has been instituted. Both the Appellant and Ms. Reay insisted at the hearing that they would appeal, or perhaps make another similar application for permission.

25. Finally, on 2 December 2010 an application for permission for alterations to the elevation of a dwellinghouse to form an additional doorway was received (it being noted that the existing works were unauthorised). That application was granted on 20 January 2011.

26. From the oral evidence of the Appellant and Ms. Reay we find that Ms. Reay hoped that the planning permission for alterations and a single storey extension to a dwellinghouse to form 'dependent relatives accommodation' and the erection of a conservatory (which was granted) could be improved to allow the erection of a bungalow. However that has not happened.

27. Before 10 August 2009 the Appellant had reached an agreement with Ms. Reay to supply his labour in a building project at the property. The nature of that project remained (even at the time of the hearing in March 2011) uncertain, and dependent on what planning permission might ultimately be obtained. However on 10 August 2009 the 'back stop' position (i.e. the nature of the project if no further and better planning permission was forthcoming) was that it would be carrying out alterations to the property and constructing a single storey extension to form 'dependent relatives accommodation', together with the erection of a conservatory and a garage.

28. Even though the Appellant had stated on 21 August 2009 that the work 'is commencing next week' and on 14 September 2009 in his Notice of Appeal that the work 'will commence shortly', work did not actually commence until June 2010. When work did commence, it was on the alterations and construction of the extension to form 'dependent relatives accommodation'.

29. This was the project which was referred to by Ms. Reay in a letter dated 3 March 2011 with our papers as 'plot 1 bungalow which is now under construction' and in her Witness Statement dated 21 March 2011 as 'the bungalow'.

30. Ms. Reay has known the Appellant since about 1996. She has seen a lot of his building work and is satisfied with its quality.

31. We find that at the time of Officer Jenkins's decision (10 August 2009) the Appellant had an agreement with Ms. Reay to carry out the alterations and construction of the extension to form 'dependent relatives accommodation' in accordance with the planning permission granted on 15 January 2008. He was also to construct a garage (a separate building within the curtilage of the property) in accordance with the planning permission granted on 26 August 2008 if that planning permission could not be improved. However it was hoped that the latter planning permission could be improved so that a second bungalow could be built instead of a garage. The hoped-for second bungalow was referred to by Ms. Reay in her letter dated 3 March 2011 as 'the second bungalow' which would be sold. Ms. Reay was more accurate about this in her Witness Statement, where she referred to the possibility of the garage becoming a bungalow.

32. The agreement between the Appellant and Ms. Reay (which was not in writing) was that Ms. Reay would herself fund the building materials and the Appellant would supply his labour. His reward would be either (a) a payment of £30,000 if the planning permission was not improved and the garage (and not a second bungalow) was built, or, if a second bungalow was built and successfully sold, then (b) one half of what was described as the 'net profit' – presumably the sale price obtained less expenses of sale and the building costs incurred. As Ms. Reay explained, her plan was that a £30,000 payment to the Appellant would be funded by the sale of her parents' property, which would take place in connection with their move into the newly constructed 'dependent relatives accommodation' at the property.

The legal issues arising in the appeal

33. Two legal issues arise in this appeal. The first is whether HMRC should have cancelled the Appellant's VAT registration. The Tribunal has jurisdiction in this matter by virtue of section 83(1)(a) VATA which provides that an appeal shall lie to the Tribunal with respect to the cancellation of registration of any person under the VATA. The Tribunal's jurisdiction is a full appellate jurisdiction – Mr. Singh did not suggest otherwise.

34. The second issue only calls for an answer if the Tribunal decides that HMRC should not have cancelled the Appellant's VAT registration. In that case it would be necessary to decide how much, if any amount, of amount claimed by the Appellant for payment to him by HMRC as input tax was properly so payable.

The first legal issue – whether HMRC should have cancelled the registration

35. Officer Jenkins's reason for cancelling the Appellant's registration was that he was not currently (i.e. in August 2009) trading and had not traded since 2004. All the argument at the hearing and most of the evidence adduced related to this issue – the first legal issue summarised above.

36. HMRC's power to cancel a VAT registration is contained in paragraph 13(2) of Schedule 1, VATA, which provides as follows:

> "Subject to sub-paragraph (5) below, where the Commissioners are satisfied that a registered person has ceased to be registrable, they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him."

37. Sub-paragraph (5) of paragraph 13, Schedule 1, VATA provides:

> "The Commissioners shall not under sub-paragraph (2) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under this Act."

38. From paragraph 13(2) of Schedule 1, VATA it appears that HMRC have power compulsorily to cancel a VAT registration provided that they are satisfied that the registered person has ceased to be liable to be registered (as to which see paragraphs 1 *et seq.* of Schedule 1, VATA) or entitled to be registered (as to which see paragraphs 9 and 10 of Schedule 1, VATA.

39. If HMRC are so satisfied they have power to cancel the registration with effect from the day on which the registered person ceased to be liable or entitled to be registered or from such later date as may be agreed between them and the registered person.

40. Paragraph 13(5) of Schedule 1, VATA appears only to refer to a cancellation with effect from such a later date as is referred to in paragraph 13(1). Such a later date cannot be a time when the person would be liable or entitled to be registered.

41. In this case we of course do not have a situation where HMRC and the Appellant have agreed a date from which cancellation of the Appellant's registration is to take effect. Therefore any cancellation made within the parameters of the power conferred by paragraph 13(2) of Schedule 1, VATA must be a cancellation with effect from the day on which HMRC are satisfied that the Appellant ceased to be liable or entitled to be registered under the VATA.

42. It seems to us therefore that the Appellant can successfully resist the compulsory cancellation of his VAT registration if the evidence shows that 10 August 2009 was not the date when he ceased to be liable or entitled to be registered, even if we were to find that HMRC were justified as at that date in being satisfied that the Appellant had indeed ceased (though not on that date) to be liable or entitled to be registered. Officer Jenkins's decision letter dated 10 August 2009 was in error in that it sought to cancel the Appellant's registration (as we know, from the letter dated 7 September 2009, with effect from 10 August 2009) even though her view was that the Appellant had not traded since 2004.

43. We therefore disagree with Mr. Singh's argument stated at paragraph 21 of his Skeleton that:

> '[b]ecause the Appellant does not make taxable supplies and is not carrying on a business, he has also long "*ceased to be registrable*" for VAT. The Respondents were therefore correct to deregister him from VAT on 10th August 2009, under paragraph 13(2) of Schedule 1 to VATA.'

44. Liability to be registered (paragraphs 1 *et seq.* of Schedule 1, VATA) appears not be in point in this case because it is a condition of such liability that the person concerned is trading at a certain level (annual taxable supplies of £68,000 or more) which the Appellant was not achieving.

45. Entitlement to be registered (paragraph 9 of Schedule 1, VATA) is in point and is the provision on which Officer Jenkins relied in making her decision. It provides:

> "Where a person who is not liable to be registered under this Act and is not already so registered satisfied the Commissioner that he-
>
> (a) makes taxable supplies; or
>
> (b) is carrying on a business and intends to make such supplies in the course or furtherance of that business,
>
> they shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him."

46. As recorded above, we have found that the Appellant has not made any taxable supplies since the period 03/04, his entitlement on 10 August 2009 to be registered therefore depends on whether he was then carrying on a business and intending to make such supplies in the course or furtherance of that business.

47. This was the legal context in which the debate at the hearing about whether or not the Appellant was in business must be viewed.

48. On this aspect of the case we were referred by Mr. Singh to the following authorities: *Customs and Excise Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1, *Customs and Excise Commissioners v Lord Fisher* [1981] STC 238 and *Rompelman v Minister van Financïen* (268/83) [1985] ECR 655, [1985] 3 CMLR 202.

49. *Rompelman* was concerned with the interpretation of 'economic activity specified in paragraph 2' of article 4 of the VAT 6th Directive 77/388/EEC, being a concept integral to the definition of 'taxable person' in article 4 (see, now, article 9 of Directive 2006/112/EEC).

50. In the UK legislation, the definition of 'taxable person' is that it is a person who is, or is required to be registered under VATA (see: section 3(1) VATA). Also, the scope of VAT on taxable supplies is defined by section 4, VATA as any supply of goods or services made in the UK where it is a taxable supply made by a taxable person in the course of furtherance of any business carried on by him.

51. It is clear, therefore, that a business in the course or furtherance of which taxable supplies are made (or intended to be made) must be interpreted in accordance with the meaning which the European Court of Justice has given to 'economic activity specified in paragraph 2' of article 4 of the VAT 6th Directive.

52. In *Rompelman*, at paragraphs [22] and [23] (see: the ECR version) of the Judgment, the Court of Justice decided such economic activities:

> "may consist in several consecutive transactions, as is indeed suggested by the wording of Article 4(2) which refers to 'all activities of producers, traders and persons supplying services'. The preparatory acts, such as the acquisition of assets and therefore the purchase of immovable property, which form part of those transactions must themselves be treated as constituting economic activity.

> [23] In this regard, it is not necessary to distinguish the various legal forms which such preparatory acts may take..."

53. However the Court of Justice went on to decide that the tax administration need not accept the putative taxable person's statement of intention that an activity is a preparatory activity in relation to a proposed economic activity but may require the declared intention to be supported by objective evidence (see: *ibid.* [25]).

54. *Morrison's Academy* and *Lord Fisher* were both cases decided before *Rompelman*, where the Community law meaning of 'economic activity' was not directly considered. The Court of Session in *Morrison's Academy* was, in essence, considering whether an activity carried out by a non-profit-making company could on that account be regarded as not being a 'business' for VAT purposes. It held that it could not. *Morrison's Academy* was considered in some detail by Gibson J in *Lord Fisher* and he held that an activity which is 'not more than activity for pleasure and social enjoyment' was not a 'business' for VAT purposes (*ibid.* at p.250). As to the scope of the VAT concept of 'business', Gibson J did not lay down any hard and fast parameters. He said:

> "The primary meaning of all these words, 'business, trade, profession and vocation', is an occupation by which a person earns a living. It is clear that all ordinary business, trades, professions and vocations can be carried on with differences from this standard and norm in regularity or seriousness of application, in the pursuit or disregard of profit or earnings, and in the use or neglect of ordinary commercial principles of organisation. As the decision in the *Morrison's Academy* case has shown, the absence of one common attribute of ordinary businesses, trades, professions or vocations, such as the pursuit of profits or earnings, does not necessarily mean that the activity is not a business or trade etc. if in other respects the activity is plainly a 'business'." (*ibid.* pp.247-8)

Our conclusion on the first legal issue

55. Applying the facts we have found to the issue raised by paragraph 13(2) of Schedule 1 to the VATA, read together with paragraph 9 of the same Schedule, we hold that HMRC were wrong to cancel the Appellant's registration with effect from 10 August 2009.

56. This is for two reasons. The first is that we hold that the Appellant had not on that date ceased to be registrable for VAT purposes because (assuming he had not been registered on that date) he would have been entitled to be so registered on that date. This is because we are satisfied that the Appellant was on that date carrying on a business and intended to make taxable supplies in the course or furtherance of that business.

57. The second reason is that, even if we are wrong in reaching the conclusion stated in paragraph 56 above, the power provided by paragraph 13(2) of Schedule 1, VATA to cancel a registration with effect from a date not agreed between HMRC and the registered person concerned is limited to a power to cancel the registration 'with effect from the day on which [the person] ... ceased [to be registrable]'. Even if on 10 August 2009 the Appellant was not carrying on a business and intending to make taxable supplies in the course or furtherance of it, we are satisfied on the evidence that he did not cease on that date to carry on a business and to intend to make taxable supplies in the course or furtherance of it.

58. Expanding on our first reason stated in paragraph 56 above, we hold, taking into account all the facts that we have found, that on 10 August 2009 the Appellant's agreement with Ms. Reay to supply his labour in a building project at 9 Broadlands Close, Throop, Bournemouth was in existence and was a preparatory act to the building work of the Appellant which actually commenced at the property in June 2010. That work was on the alterations and construction of the extension to Ms. Reay's property to form 'dependent relatives accommodation'. That work was an economic activity, and, following *Rompelman* (at paragraph 22 of the Judgment), the agreement in existence on 10 August 2009 must be treated as constituting economic activity, and therefore as the carrying on of a business within paragraph 9 of Schedule 1, VATA coupled with the intention to make taxable supplies in the course or furtherance of that business. We hold that the evidence heard by the Tribunal is objective evidence sufficient to support the Appellant's declared intention.

The second legal issue - how much, if any amount, claimed by the Appellant as input tax payable to him by HMRC is properly so payable?

59. We accept Mr. Singh's submission that in order to recover any amount as input tax, the Appellant must show that the amount he seeks to recover is attributable to taxable supplies he has made or will make in the course or furtherance of his business. This is the effect of sections 24(1)(a), 25(2), 25(3), 26(1) and 26(2)(a) VATA.

60. Mr. Singh relied on *Customs and Excise Commissioners v Rosner* [1994] STC 228, a decision of Latham J, for the proposition that the attribution of tax to taxable supplies made or to be made in the course or furtherance of a business requires:

> 'a real connection, a nexus, between the expenditure and the business. It seems to me that the nexus, if it is not to be benefit,

[the Judge had at this point of his judgment already decided that the nexus could not be that the expenditure could be said to be for the benefit of the business]

> must be directly referable to the purpose of the business. By the purpose of the business in this context I mean by reference to an analysis of what the business is in fact doing. It is only by identifying what the nature of the business is in that way that one can determine the extent to which any given expenditure can be said to be for the purposes of that business." (*ibid.* p.230)

61. The Appellant in his Skeleton argument submitted that *Rosner* had been 'superseded in important aspects later higher authorities such as' *Inverstrand BV v Staatsecretaris van Financïen* (Case C-435/05) [2008] STC 518.

62. In *Inverstrand* the Court of Justice reaffirmed settled case law that the existence of a direct and immediate link between a particular input transaction and a particular output transaction giving rise to entitlement to deduct was, in principle, necessary before a taxable person was entitled to deduct input VAT. The Court however also accepted that a taxable person has the right to deduct even where there was no direct and immediate link, where the costs of the services were part of his general costs and were, as such, components of the price of the goods or services which he supplied.

63. The true test therefore appears to be whether an expense (on which recovery of input tax is claimed) is a cost component of the taxable person's taxable outputs.

64. Here the Appellant's taxable ouputs are the supplies he makes in his building business.

65. We have already found that the amount claimed by the Appellant as input tax repayable to him represented tax on utility bills, motoring expenses (in particular, fuel), telephone bills, veterinary bills (in relation to dogs in the yard where the Appellant lives and where he keeps his equipment) and legal expenses. We have also found that £1,987.86 out of the total claimed of £11,016.18 is irrecoverable in any event on account of the claim having been made too late – see: regulation 29(1A) VAT Regulations 1985.

66. We have insufficient evidence about the detail of the expenditure represented by the bills in issue to reach a conclusion as to how much, if any amount, claimed as input tax is properly attributable to the purposes of the Appellant's business.

67. This Decision will therefore be a decision in principle that the Appellant in the periods 03/09 and 06/09 and on 10 August 2009 was carrying on a building business and intended to make taxable supplies in the course or furtherance of that business (and so could not properly be deregistered with effect from 10 August 2009) and that tax paid on expenses which were or are cost components of the Appellant's taxable outputs in his building business (so long as not claimed out of time) is in principle recoverable.

68. We therefore direct the parties to review the amounts of tax claimed as recoverable input tax in the light of this Decision to determine, if possible by agreement, how much, if any, is properly recoverable. If agreement is not possible within 6 months of the date of release of this Decision, the matter should be relisted for a further hearing and the Tribunal's decision.

69. In this connection, however, we make some observations which we hope will be useful.

70. Expenses incurred by the Appellant in relation to his bankruptcy proceedings and attempts to have any bankruptcy order set aside (whether they are legal expenses, fuel expenses, telephone expenses or other expenses) will not be recoverable, because those expenses are not cost components of the Appellant's taxable outputs in his building business. This was the approach effectively followed by the Tribunal in the appeal of *William George Stern* (1985 - VAT Decision 1970) and we respectfully consider that it was correct.

71. In addition, we reject the argument put forward by the Appellant in his Notice of Appeal that the activity of pursuing claims against Ernst & Young and others for the Appellant's benefit or for benefit of the Appellant's creditors or otherwise attempting to claim money or assets said to be held or owed to the Appellant's estate is an economic activity of the management of assets or otherwise an economic activity within the meaning of article 4 of the VAT 6th Directive 77/388/EEC or article 9 of Directive 2006/112/EEC and therefore a business within section 24(1) VATA (meaning of input tax).

72. In particular, any such activity is not 'the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis' such as is

to be considered an economic activity by virtue of article 4(2) of the VAT 6th Directive or article 9(1) of Directive 2006/112/EEC.

73. This is made clear in the Judgment of the Court of Justice in *Inverstrand* where it is said (at [26]):

> "... the steps taken by a taxable person, on his own behalf, to recover a claim or establish the value thereof cannot be treated as [an economic activity within the meaning of the 6th Directive] either. Such steps do not constitute the exploitation of property to produce income on a continuing basis because any resultant gain derives merely from [the taxable person's] status as holder of the claim in question and is not the product of any economic activity within the meaning of the 6th Directive".

Conclusion

74. We decide in principle as stated in paragraph 67 above and make the Directions stated at paragraph 68 above. We grant liberty to either party to apply for further Directions. We also direct that if the parties reach agreement on the issue of the amount, if any, of the input tax claimed for repayment which is properly repayable, then they should report such agreement to the Tribunal to enable the Tribunal to make a final disposal of the appeal. It will be the responsibility of both parties to do this.

Right to apply for permission to appeal

75. 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.

JOHN WALTERS QC
JUDGE OF THE FIRST-TIER TRIBUNAL
RELEASE DATE: 13 July 2011