



TC01761

Appeal number: TC/2010/08804

VALUE ADDED TAX – Claims for Input Tax – Vehicles – Fuel Charge – Miscellaneous - Sections 24 and 56 Value Added Tax Act 1994 – whether expenditure allowable as input tax – whether qualifying motor cars – Article 7, VAT (Input Tax) Order 1992 - Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GRAEME KING

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL JUDGE: W RUTHVEN GEMMELL, WS
Peter R Sheppard, F.C.I.S., F.C.I.B., ATII**

**Sitting in public at George House, 126 George Street, Edinburgh on Monday
28 November 2011**

Ian Leather for the Appellant

Pat Roberts, H M Revenue and Customs for the Respondents

© CROWN COPYRIGHT 2011

DECISION

Introduction

- 5 1. This is an Appeal against a decision by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to refuse a credit to Graeme King ("GK") in a total sum of £9,150.85 for the VAT periods 5 July 2006 to 30 September 2009.
2. The total input tax was made up as follows:
- 10 (a) A Nissan Skyline motor vehicle - £1,563.83 in the period ended 09/08;
- (b) A Nissan Pathfinder motor vehicle - £4,481.79 in the period ended 03/07;
- 15 (c) Fuel scale charges for the Nissan Pathfinder motor vehicle between the periods 06/07 to 09/09 for a total amount of £627.52;
- (d) Fuel scale charge for the Nissan Skyline motor vehicle for the periods 12/08 to 09/09 in the sum of £252.48;
- (e) General input tax in the periods 09/06 – 06/09 in the sum of £900;
- (f) Input tax in relation to a spa/hot tub - £1,117.02;
- 20 (g) Input tax in relation to All Terrain Vehicles ("ATV") - £133.89 and £74.32.
3. HMRC agreed to the Appeal being heard late and consented to GK's application for hardship.

Legislation

- 25 4. **Value Added Tax Act 1994:-**

Section 24

Input tax and output tax.

- 30 (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;
- (b) VAT on the acquisition by him from another member State of any goods; and
- 35 (c) VAT paid or payable by him on the importation of any goods from a place outside the member States,
- being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

Section 56

- 40 **Fuel for private use.**

(1) The provisions of this section apply where, in any prescribed accounting period, fuel which is or has previously been supplied to or imported or manufactured by a taxable person in the course of his business—

5 (a) is provided or to be provided by the taxable person to an individual for private use in his own vehicle or a vehicle allocated to him and is so provided by reason of that individual’s employment; or

(b) where the taxable person is an individual, is appropriated or to be appropriated by him for private use in his own vehicle; or

10 (c) where the taxable person is a partnership, is provided or to be provided to any of the individual partners for private use in his own vehicle.

(2) For the purposes of this section fuel shall not be regarded as provided to any person for his private use if it is supplied at a price which—

15 (a) in the case of fuel supplied to or imported by the taxable person, is not less than the price at which it was so supplied or imported; and

(b) in the case of fuel manufactured by the taxable person, is not less than the aggregate of the cost of the raw material and of manufacturing together with any excise duty thereon.

(3) For the purposes of this section and section 57—

20 (a) “fuel for private use” means fuel which, having been supplied to or imported or manufactured by a taxable person in the course of his business, is or is to be provided or appropriated for private use as mentioned in subsection (1) above;

(b) any reference to fuel supplied to a taxable person shall include a reference to fuel acquired by a taxable person from another member State and any reference to fuel imported by a taxable person shall be confined to a reference to fuel imported by that person from a place outside the member States;

25 (c) any reference to an individual’s own vehicle shall be construed as including any vehicle of which for the time being he has the use, other than a vehicle allocated to him;

30 (d) subject to subsection (9) below, a vehicle shall at any time be taken to be allocated to an individual if at that time it is made available (without any transfer of the property in it) either to the individual himself or to any other person, and is so made available by reason of the individual’s employment and for private use; and

35 (e) fuel provided by an employer to an employee and fuel provided to any person for private use in a vehicle which, by virtue of paragraph (d) above, is for the time being taken to be allocated to the employee shall be taken to be provided to the employee by reason of his employment.

40 (4) Where under section 43 any bodies corporate are treated as members of a group, any provision of fuel by a member of the group to an individual shall be treated for the purposes of this section as provision by the representative member.

45 (5) In relation to the taxable person, tax on the supply, acquisition or importation of fuel for private use shall be treated for the purposes of this Act as input tax, notwithstanding that the fuel is not used or to be used for the purposes of a business carried on by the taxable person (and, accordingly, no

apportionment of VAT shall fall to be made under section 24(5) by reference to fuel for private use).

5 (6) At the time at which fuel for private use is put into the fuel tank of an individual's own vehicle or of a vehicle allocated to him, the fuel shall be treated for the purposes of this Act as supplied to him by the taxable person in the course or furtherance of his business for a consideration determined in accordance with subsection (7) below (and, accordingly, where the fuel is appropriated by the taxable person to his own private use, he shall be treated as supplying it to himself in his private capacity).

10 (7) In any prescribed accounting period of the taxable person in which, by virtue of subsection (6) above, he is treated as supplying fuel for private use to an individual, the consideration for all the supplies made to that individual in that period in respect of any one vehicle shall be that which, by virtue of section 57, is appropriate to a vehicle of that description, and that consideration shall be taken to be inclusive of VAT.

15 (8) In any case where—
(a) in any prescribed accounting period, fuel for private use is, by virtue of subsection (6) above, treated as supplied to an individual in respect of one vehicle for a part of the period and in respect of another vehicle for another part of the period; and

20 (b) at the end of that period one of those vehicles neither belongs to him nor is allocated to him,
subsection (7) above shall have effect as if the supplies made to the individual during those parts of the period were in respect of only one vehicle.

25 (9) In any prescribed accounting period a vehicle shall not be regarded as allocated to an individual by reason of his employment if—

30 (a) in that period it was made available to, and actually used by, more than one of the employees of one or more employers and, in the case of each of them, it was made available to him by reason of his employment but was not in that period ordinarily used by any one of them to the exclusion of the others; and

(b) in the case of each of the employees, any private use of the vehicle made by him in that period was merely incidental to his other use of it in that period; and

35 (c) it was in that period not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the vehicle available to them.

(10) In this section and section 57—

40 • “employment” includes any office; and related expressions shall be construed accordingly;

• “vehicle” means a mechanically propelled road vehicle other than—
(a) a motor cycle as defined in section 185(1) of the Road Traffic Act 1988 or, for Northern Ireland, in Article 37(1)(f) of the Road Traffic (Northern Ireland) Order 1981, or

45 (b) an invalid carriage as defined in that section or, for Northern Ireland, in Article 37(1)(g) of that Order

5. **Value Added Tax (Input Tax) Order 1992:-**

Article 7

(1) Subject to paragraph (2) [to (2H)] below tax charged on—

- 5 (a) the supply [(including a letting on hire)] to a taxable person;
- (b) the acquisition by a taxable person from another member State; or
- (c) the importation by a taxable person,

of a motor car shall be excluded from any credit under section [25] of the Act.

10 [(2) Paragraph (1) above does not apply where—

- (a) the motor car is—
- (i) a qualifying motor car;
- (ii) [supplied (including on a letting on hire) to], or acquired from another member State or imported by, a taxable person; and
- 15 (iii) the relevant condition is satisfied;

[(aa) the motor car forms part of the stock in trade of a motor manufacturer or a motor dealer;]

(b) the supply is a letting on hire of a motor car which is not a qualifying motor car [(other than a supply on a letting on hire of a motor car which is not a qualifying motor car by virtue only of the application of paragraph (2C) below, to a person whose supply on a letting on hire prior to 1st August 1995 resulted in the application of that paragraph)];

20

(c) the motor car is unused and is supplied to a taxable person whose only taxable supplies are concerned with the letting of motor cars on hire to another taxable person whose business consists predominantly of making supplies of a description falling within item 14 of Group 12 of Schedule 8 to the Act; or

25

(d) the motor car is unused and is supplied on a letting on hire to a taxable person whose business consists predominantly of making supplies of a description falling within item 14 of Group 12 of Schedule 8 to the Act, by a taxable person whose only taxable supplies are concerned with the letting on hire of motor cars to such a taxable person.]

30

[(2A) Subject to paragraph (2B) and (2C) below, for the purposes of paragraph (2)(a) [and (b)] above a motor car is a qualifying motor car if—

- 35 (a) it has never been supplied, acquired from another member State, or imported in circumstances in which the VAT on that supply, acquisition or

importation was wholly excluded from credit as input tax by virtue of paragraph (1) above; or

(b) a taxable person has elected for it to be treated as such.

5 (2B) A taxable person may only elect for a motor car to be treated as a qualifying motor car if it—

(a) is first registered on or after 1st August 1995;

10 (b) was supplied to, or acquired from another member State or imported by, him prior to that date in circumstances in which the VAT on that supply, acquisition or importation was wholly excluded from credit as input tax by virtue of paragraph (1) above; and

(c) had not been supplied on a letting on hire by him prior to 1st August 1995.

15 (2C) A motor car that is supplied, acquired from another member State or imported on or after 1st August 1995 and which would, apart from this paragraph, be a qualifying motor car by virtue of sub-paragraph (a) of paragraph (2A) above shall not be such a car if it was supplied on a letting on hire prior to that date by the person to whom it is supplied or by whom it is acquired or imported (as the case may be).

20 (2D) References in this article to registration of a motor car mean registration in accordance with section 21 of the Vehicle Excise and Registration Act 1994.

(2E) For the purposes of paragraph (2)(a) above the relevant condition is that the letting on hire, supply, acquisition or importation (as the case may be) is to a taxable person who intends to use the motor car either—

25 (a) exclusively for the purposes of a business carried on by him, but this is subject to paragraph (2G) below; or

(b) primarily for a relevant purpose.

30 (2F) For the purposes of paragraph (2E) above a relevant purpose, in relation to a motor car which is let on hire or supplied to, or acquired or imported by, a taxable person (as the case may be), is any of the following purposes—

(a) to provide it on hire with the services of a driver for the purpose of carrying passengers;

(b) to provide it for self-drive hire; or

35 (c) to use it as a vehicle in which instruction in the driving of a motor car is to be given by him.

(2G) 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—

5 (a) let it on hire to any person either for no consideration or for a consideration which is less than that which would be payable in money if it were a commercial transaction conducted at arms length; or

10 (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.

(2H) Where paragraph (1) above applies to a supply of a motor car on a letting on hire it shall apply to the tax charged on that supply as if for the word “tax” there were substituted “one half of the tax”.]

(3) In this article—

15 (a) . . .

(b) “self-drive hire” means hire where the hirer is the person normally expected to drive the motor car and the period of hire to each hirer, together with the period of hire of any other motor car expected to be hired to him by the taxable person—

20 (i) will normally be less than 30 consecutive days; and

(ii) will normally be less than 90 days in any period of 12 months

6. VAT Notice 700/64

Cases Referred To

25 *Customs and Excise Commissioners v Skellett* [2004] BVC417

William Beattie v The Commissioners of Customs & Excise [2005] VAT Decision 18979

Commissioners of Customs and Excise v Elm Milk Ltd [2006] EWCA Civ 164

The Facts

30

7. GK is the sole proprietor trading as Executive Cars and Limos in Kirkcaldy in Fife. The nature of the business is of car and limousine hire and was registered for VAT on 5 July 2006.

35 8. Evidence was given by GK and by Kirsty Drummond and Brian Coyle of HMRC for HMRC. The witnesses were all were cross-examined.

9. HMRC visited GK on 26 October 2009 to carry out a pre repayment credibility check for the VAT period ended 30 September 2009 and identified errors in the VAT treatment of motor cars, fuel scale charges and general and miscellaneous items.
10. On 28 October 2009, HMRC advised GK of the nature of the errors and asked for further information advising that the refund claim would not be paid until the queries were answered.
11. On 18 January 2010, HMRC telephoned GK because they had not received a reply to their letter. GK said he had not received the letter, and on the same day HMRC wrote to GK but received no reply and a pre-assessment letter was issued on 20 April 2010.
12. The pre-assessment letter dated 28 April 2010 set out the breakdown of the total disallowed tax of £9,150.85.
13. On 11 May 2010, GK telephoned to complain about the disallowance of tax and consequently HMRC issued a Decision letter on 28 May 2010.
14. On 4 June 2010, GK telephoned HMRC to say that he did not understand why input tax had been disallowed on the purchase of the Nissan Pathfinder and said he had written to HMRC. HMRC stated they had not received any such correspondence from GK.
15. Again, on 18 June 2010, GK telephoned HMRC complaining that his correspondence had not been answered.
16. HMRC confirmed that they had not received any correspondence but on 22 June 2010 wrote with copies of their letters of 28 October 2009, 18 January 2010 and 28 April 2010 so as to provide an explanation of the disputed sums.
17. On 8 July 2010, GK wrote to HMRC stating that he now believed the supplies made driving the Nissan Pathfinder were standard rated. He had previously thought they were zero rated and, accordingly, thought he may now be entitled to a refund of VAT and said the Nissan Skyline was used for advertising purposes only, disputed the fuel scale charges and contended the vehicles were only ever used for business purposes.
18. GK stated that as regards miscellaneous items, all clothing displayed the company logo and that the spa/hot tub was fitted into a limousine that had been modified for that purpose and that it was used solely for the business but that from time to time it was kept in the back garden of his home and was used by his family and him. He accepted that some of the smaller sums claimed had been claimed "in error".
19. On 26 July 2010, HMRC stated that as both the Nissan Pathfinder and Nissan Skyline were available for private use, input tax was not deductible and that the fuel scale charges applied because the vehicles were also available for private use.

20. GK telephoned HMRC on 28 July 2010 stating that the vehicles were garaged at separate business premises and were only insured for business use, that he did not agree with the sum of £75 being disallowed for private items and furthermore that he had installed the spa/hot tub in a vehicle for hire and would provide photographs of the vehicle with the spa/hot tub fitted.

21. HMRC visited GK on 29 July 2010 and copies of the insurance documents for the Nissan vehicles were produced which also showed cover for social, domestic and pleasure use as well as business use.

22. CO2 emissions information for the vehicles was requested by HMRC but was not provided. Subsequently, the cubic capacity of each vehicle was provided and it was on the basis of this that HMRC reached their calculation of the fuel charge.

23. No further information was provided by GK in response to an email sent by HMRC on 30 July 2010 and on 2 August 2010, the case was sent to the Respondent's review team and their conclusion letter was issued on 8 September 2010.

24. GK's representative at the Hearing stated that GK took a reasonably simplistic view of VAT which was that he could claim VAT back on all items of expenditure, and his advisors subsequently would screen all invoices to remove those which were considered to have private use or on which no claim of input tax could be made.

25. GK believed that the figure of £75 per quarter was excessive and HMRC asked GK to provide further information relating to earlier periods if he did not agree with the disallowance.

26. No photographs of the spa/hot tub fitted inside the vehicle were provided but GK made reference to the vehicle with the hot tub fitted, featured with female models, had been photographed by and appeared in the News of the World newspaper.

General Input Tax

27. The VAT inspection identified items which HMRC said did not qualify for a valid claim for input tax including compact discs, computer games, hair care products, children's clothing and women's clothing.

28. GK stated that all company clothing was embroidered with the company's logo and on 26 July 2010, HMRC confirmed that such clothing would be allowed. There was no evidence that the clothing was so embroidered during the period under appeal.

29. GK had claimed for meals which he stated were related to sustenance in the course of work or for business entertaining and confirmed that this would have included him having meals with the owners of nightclubs to whom he was delivering customers in one of his limousines and was for the purpose of marketing and obtaining new business as well as feeding himself. GK stated that this type of entertaining could take place four times a month. HMRC stated that many of the claims for meals were in the Kirkcaldy area and not accordingly "out of town" and itemised in the receipts were entries for children's meals.

30. GK stated in his evidence that he kept no diary of his journeys and could therefore not clarify whether a meal was in relation to a journey that was out of town and that eating in local establishments was often as a result of arriving home late from journeys and not wishing to disturb his family at his home.

5 31. As regards VAT receipts showing claims for women's clothing bought at River Island and Next, GK claimed that his wife would often drive his personally owned Jaguar car as a second car for weddings even although this car was not put through the business and consequently needed to be appropriately dressed.

10 32. HMRC had found receipts for hair care products, gardening and pet food. Receipts for hair care products including shampoo were explained by GK as being used to wash cars as a far cheaper alternative to more proprietary products for these purposes.

Hot Tub

15 33. The hot tub had been observed during an HMRC visit at GK's home and GK stated that it was retained there when it was not in use in the vehicle.

20 34. HMRC had contacted the supplier of the hot tub to ascertain whether this was an appropriate hot tub to put in a vehicle. The one supplied to GK was a heavier type model and HMRC stated that the hot tub was surrounded by wooden panels and when it was in situ at GK's home had steps attached to it so that it could be utilised by him and his family.

25 35. GK confirmed that it was utilised from time to time by his family and him and that the hot tub had been a very popular feature of his limousine hire when it had first been installed but had subsequently waned in popularity.

36. GK explained that he had previously had a lightweight model in a limousine but it had not been sufficiently robust for usage and, accordingly, a heavier model had been obtained.

30 37. HMRC were told by the suppliers that it would take six individuals to move the hot tub whereas GK said that he had moved it with two individuals.

38. HMRC could find no photographs or images with the hot tub installed on GK's website nor was special mention made of it as a feature and none were provided by GK.

35 39. GK said that HMRC had allowed a claim for the chemicals to be used which were necessary for the operation of the hot tub which meant they accepted its business use.

40 40. GK said that the hot tub was removed from time to time, especially when the space, which it occupied, was required for luggage during a run to the airport. GK estimated that in the two and a half years in which it had been owned it had been used on average in the vehicle for four and a half months a year.

Nissan Skyline Vehicle

41. The Skyline vehicle had been registered in 2003 and purchased by GK in 2008 and was, therefore, not a new car and, therefore, not a qualifying vehicle being second
5 hand. GK had signed a declaration that input tax had not and will not be reclaimed.

42. GK had purchased this vehicle primarily for advertising his business and the livery of the vehicle was similar to a police car, without police lights and the word "Police".

43. This vehicle had been kept at GK's home as a temporary measure because he
10 said he was reviewing his premises as they were too small. This followed on the purchase of an Audi 2.7 and was for a period, GK claimed, of six weeks.

44. This vehicle had been parked on a semi permanent basis in Sainsbury's for advertising purposes. GK confirmed that on occasions it was used for taking home shopping and GK had not kept any records of passenger usage nor any records of fuel
15 usage. There was no evidence that it had been used as passenger transport and it was insured for social and domestic purposes and for pleasure and there was no indication this was a pooled car.

Pathfinder Vehicle

20 45. The Pathfinder vehicle was purchased new and was a qualifying vehicle but HMRC said it was not used for relevant purposes and not exclusively for business purposes. GK could not remember whether this vehicle was available on his website for hire nor could GK remember how many times it was hired prior to September 2009.

25 46. GK said that no records had been kept of the dates on which the vehicle had been used and there were no mileage or fuel records. GK admitted that there was private use of this vehicle for him and his family and that it was used to tow a trailer for advertising and to visit business clients. There was no evidence it was used for passenger transport although this had been the intention when the vehicle was
30 purchased.

47. GK said that the keys to both the Skyline and Pathfinder vehicles were kept in his house and that there was no firm's policy about the prohibition of private use for anyone working within the business.

Fuel Scale Charges

35 48. GK said that there was private use of both the Skyline and Pathfinder vehicles but no records were kept of private mileage for private and business use.

49. As no records as to the CO2 levels were given, HMRC based their assessment on the size of engine given by GK.

All Terrain Vehicles

50. Input tax had been reclaimed of approximately £1,600. These vehicles were for GK's children. GK accepted this tax had been claimed in error.

5 **GK's Submissions**

51. GK says that the insurance obtained for both the Pathfinder and Skyline vehicles which included social and domestic and pleasure use as well as business use does not mean that the vehicles are not used solely for business use and that it was almost impossible to obtain business use only insurance.

52. GK says that the Nissan Pathfinder motor vehicle was purchased for the purposes of hiring with a driver but as a result of economic conditions this had not been for a long period and that this vehicle was used in the business, was available for business use and was kept at a separate garage in Kirkcaldy.

53. GK says the vehicle also acts as a service vehicle which is used to deliver spare wheels and tyres or to rescue vehicles trapped in snow and ice, and that it has been used for passenger hire as it can hold six passengers and is used for airport runs.

54. GK says that there was a verbal contract with SKY to carry their staff.

55. GK says the Nissan Skyline was purchased as an advertising vehicle for the business and that advice from the VAT Helpline was obtained which said that the car bought for this purpose was allowable for the purposes of reclaiming VAT.

Vehicles

56. GK says that the Pathfinder vehicle is a qualifying vehicle because it is new and used primarily for business use.

57. GK referred to the *Skellett* case where Lord Osborne said "it appears to us that, where a motor vehicle is acquired by a sole trader who intends to use the motor car....(a) exclusively for the purposes of a business carried on by him nevertheless that vehicle will have been made available to that person for private use unless effective steps are taken to render the vehicle incapable of such use by that person".

58. Following that case, GK says that Article 7(G) allows incidental or occasional private use and accordingly Article 7 is not absolute in its prohibition of private use.

59. GK says that actions taken by him meant the vehicle was not available to him and that any usage was incidental to business use.

60. GK says that both the Pathfinder and Skyline vehicles were primarily stored at his business premises and were available for business use with occasional private use.

61. GK says both are pooled vehicles used as and when required.

62. GK referred to the *Elm Milk* Decision as authority for the proposition that it is not possible to insure a car solely for business purposes which was accepted by the Court of Appeal in that case in England.

5 63. The case was also referred to as authority for the proposition that as there was no intention to make the vehicle available to GK for private use, as it was garaged separately, private use was prohibited and as the keys were not available, VAT was recoverable.

10 64. GK says that the fuel charge should be restricted for the Pathfinder vehicle and not applied to the Skyline vehicle for the short period (six weeks) when it was at GK's personal premises.

Fuel Charge

15 65. GK says that whilst accepting that better records should be kept of business and private use, the Pathfinder was primarily used for business purposes and that the Skyline vehicle was never used for private use.

General Input Tax

20 66. GK says that no input VAT had been claimed for hair care and pet expenses and the only claim for garden expenses was for items to maintain the ground immediately adjacent to the industrial unit used to garage the vehicles.

25 67. GK says that all clothing and meals were business related with the latter related to work away from Kirkcaldy with only few exceptions and that the adjustment should be restricted to account for VAT claimed on business entertainment meals and reduced substantially.

68. GK says that the charge of £75 per month is not proportionate as some quarters had greater charges than others whereas the adjustment of £75 had been applied to all quarterly periods.

The Hot Tub

30 69. GK says that he does not agree with the information given to HMRC by the supplier of the hot tub, admits the dual use for business use and private use of that tub but says the tub was bought primarily for business use and any private use was incidental.

35 70. GK claims that the adjustment for the hot tub should be restricted to 50%.

HMRC's Submissions

40 71. HMRC say that the Pathfinder vehicle is a qualifying vehicle but in terms of Article 7 fails the business test as GK has acknowledged that there is private use, the insurance covers private use as well as business use and the vehicle was kept at GK's home from time to time.

72. HMRC say that the SKY contract amounted to a one week contract in a two year period and failed to satisfy the requirement that it was primarily used for hire with a driver as passenger transport.

5 73. HMRC say that the Skyline vehicle was a second hand or used car and, therefore, a claim for input tax had been blocked.

74. HMRC say that the vehicle also has insurance for private purposes as well as business purposes and in terms of the *Skellett* decision no steps were taken to render the vehicle incapable of private use.

10 75. HMRC refer to the *Beattie* case where it was stated that “it is virtually impossible in the Tribunal’s view for a sole trader to satisfy the exclusive test where there has been evidence of private use and insurance allows private use”.

76. HMRC refer to the *Elm Milk* Decision and seek to distinguish it by saying that it related to a limited company and not to a private trader and is not applicable.

15 77. HMRC say that the fuel scale charges apply because no records were kept of private use whilst there was an admission that there was private use.

78. In terms of Section 56(1) (a) of the VAT Act 1994, HMRC say that they acted in the best judgement based on the cubic capacity of the cars.

20 79. HMRC say that there is no evidence that the purchase of the hot tub was for furtherance of the business, that there was private use whilst it was installed at GK's home, that there was no photographic evidence that this service was available and this was not advertised on GK’s business website.

80. HMRC stated that the ATVs were purchased for GK’s children and were not used for business use.

25 81. HMRC say that they used their best judgement in ascertaining the amount of £75 in each quarter because clothing was not liveried as identifiable to GK’s business during the period under appeal, that there are repeated instances of private expenditure being included in the VAT claims including clothing for children, children’s meals and computer games and business entertaining which cannot be reclaimed.

30 **Reasons for the Decision**

Nissan Skyline

35 82. The Nissan Skyline vehicle was not a new car and therefore not a qualifying vehicle.

83. There was no evidence that it had been used solely for business purposes, or for the purpose of carrying passengers nor that it was a pooled car and it was confirmed that it had been used on occasions for private use.

84. The claim for input tax on this vehicle was correctly disallowed.

Nissan Pathfinder

5 85. The Nissan Pathfinder was a qualifying motor car in terms of Article 7 VAT (Input Tax) Order 1992, paragraph 7(2) (i) but the relevant condition allowing this had not been satisfied. It was not used solely for business purposes nor was it used for the purpose of carrying passengers and there was private use.

86. The claim for input tax on the purchase of this vehicle was correctly disallowed.

Fuel Scale Charges

10

86. In relation to both the Skyline and Pathfinder vehicles, there was evidence of private use as well as business use.

15 87. No mileage records for either vehicle were kept to distinguish between private and business use and, accordingly, the fuel scale charge applies. The charge was correctly applied in the absence of details of CO2 omissions based on engine cubic capacity.

88. The charge was correctly made.

20 89. There was no evidence that the vehicles were pooled and the Tribunal do not accept, as submitted by GK, that the fuel charge should be disallowed to the Skyline vehicle other than for the six week period when the vehicle was, GK claims, garaged at his premises.

General Input Tax

25 90. The Tribunal's view was that GK's view of treating all expenditure as likely to be reclaimable and then leaving his accountant to estimate which invoices were allowable, had resulted in a number of claims being made, which by GK's own admission, were invalid.

30 91. The Tribunal were not sufficiently persuaded that the explanations for meals, particularly children's meals, in the local Kirkcaldy area or the explanation for meals being taken in the Kirkcaldy area to avoid waking the household at night, were sufficiently credible to justify a claim for tax.

92. In relation to other items, and, in particular, fashion clothing, greater records would need to have been placed before the Tribunal before any of these claims could be considered as allowable.

35 93. The Tribunal's view was that the charge of £75 per quarter was proportionate.

Hot Tub

94. There was insufficient evidence in relation to the claim for the hot tub that it had actually been used for a business purpose.

5 95. It was unclear why no photographic evidence, particularly if it had appeared in a national newspaper, was submitted to the Tribunal.

96. There was no evidence of the hot tub being mentioned on the website but there was evidence that the hot tub was installed at GK's home.

10 97. The Tribunal did not accept that there was sufficient evidence to restrict the claim by 50% as GK submitted.

98. The Tribunal found that the refusal to allow input tax on the hot tub was correct.

99. In relation to the claim for input tax on ATVs which had been purchased for GK's children, this was correctly disallowed.

100. For the reasons stated above the Appeal is dismissed.

15 101. 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
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

25

**W RUTHVEN GEMMELL, WS
TRIBUNAL JUDGE**

RELEASE DATE: 20 January 2012

30

Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 on 19 April 2012

35