TC04877

Appeal number: LON/2009/0539

VALUE ADDED TAX — supplies between companies associated but not in same VAT group — appellant procuring construction of mobile home bases on its own land — associated company selling mobile homes for placement on bases and paying cost of base plus commission on sale price to appellant — whether expense incurred in construction of base a cost component of any supply by appellant to associated company — whether appellant entitled to credit for input tax incurred in construction of bases — no — appeal dismissed in principle

PENALTY — misdeclaration penalty — whether properly imposed — yes — whether reasonable excuse — no — whether mitigation appropriate — no — appeal dismissed in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

KINGS LEISURE LIMITED **Appellant**

- and –

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

Tribunal: Judge Colin Bishopp

Sitting in public in London on 25 to 27 November 2015

Roger Thomas QC, instructed by BDO LLP, for the appellant

Christiaan Zwart, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

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DECISION

Introduction

1. This is an appeal against a number of assessments designed to recover input tax of, in all, £717,045 for which the appellant, Kings Leisure Limited ("KLL"), claimed credit in the accounting periods from 04/06 to 03/08. KLL has in addition been assessed to misdeclaration penalties, for the same periods, amounting to £136,461. The issues are exactly the same for each period assessed and for that reason I have not thought it necessary to set out the detail of the tax assessments or penalties period by period. It may be, for reasons I explain below, that some adjustment of the assessments and penalties is necessary; I return to this point in my conclusions.

2. KLL submitted appeals as the assessments and penalty notifications were received, but it was not clear that it had done so in respect of every one. The parties agreed, however, that all of the tax and penalties in dispute should be considered by the tribunal and, to the extent that it may be necessary, I direct that the extant appeals be amended or extended so as to include any relevant tax or penalty assessment for which a notice of appeal has not been submitted.

3. The underlying question is whether the supplies to KLL in respect of which it incurred the input tax formed a cost component of onward taxable supplies by KLL to an associated company, Autoclassic Limited ("Autoclassic"). Although the companies are, or were, associated they have never been in the same VAT group. The respondents, HMRC, have based the assessments on their conclusion that KLL did not make any such supplies, or at least that it made no relevant supplies. KLL's primary case is that HMRC have misunderstood or misconstrued the arrangements between it and Autoclassic, and that the assessments are misconceived. If it was mistaken about the tax treatment of the transactions, it adds, it has a reasonable excuse for that mistake and the penalties should be discharged or at least substantially mitigated.

4. KLL was represented before me by Mr Roger Thomas QC and HMRC by Mr Christiaan Zwart. I had fairly extensive documentary evidence, though it was by no means complete, and the written and oral evidence of four witnesses, in this order: Mr Ray Marson, who was the finance director of both KLL and Autoclassic at the relevant time but not a shareholder of either; Mr Barry Lewis, a partner in the accountancy firm which acted for many years as the accountants and auditors of both companies; Mr Jeffrey King, a director and shareholder of both companies; and Mr John Goodwin, the assessing officer.

5. When the hearing began it appeared that there was a good deal in issue, both factually and in the application of the law to the facts as I might find them to be. That apparent position was due, in part, to the absence of complete documentation—some was missing altogether, and some was incomplete in that it was unsigned or undated, or in draft form only. There were also some inconsistencies between documents. In addition, the arrangements between KLL and Autoclassic were a little unusual, a factor which had led to a

measure of confusion between the parties in the course of the correspondence which took place between them before the appeal was brought and, I think it is fair to say, led to a misunderstanding by each party of the other's case.

6. I am, however, satisfied that such documentation as there is, coupled with the oral evidence which I heard, is sufficient for me to make findings of fact with confidence and, indeed, in his closing submissions Mr Zwart argued, as I shall record below, that the essential structure of the arrangements between the two companies was extremely simple. It also became clear as matters progressed that the only question which needs to be resolved, at least as far as the tax assessments are concerned, is of limited compass, although I need to explain some aspects of the background in detail in order to put it into context.

7. What follows represents my findings of fact. Since some of the evidence before me, as I shall explain, turned out to relate to peripheral or irrelevant matters I have not thought it necessary to describe it all, though I shall of course mention those parts of it which are material. Similarly, I have not identified, unless necessary for clarity, the source of those facts which are uncontroversial, but have dealt with the fairly limited areas of disagreement in more detail.

The facts

8. At the relevant time, the directors (with the exception of Mr Marson) and shareholders of the two companies were all members of the same family. Mr H W King, generally known as Jack, was the majority (90%) shareholder of KLL, and his three surviving children—Mr Jeffrey King, his brother Graham and sister Susan—held the remaining 10% equally. For simplicity, and without intending any disrespect, I shall refer to the family members by their forenames below. Jack is of an advanced age and took little or no part in the day-to-day management of KLL for most, if not all, of the relevant time; the active directors were Jeffrey, Graham, Susan and Mr Marson. As majority shareholder Jack nevertheless had a continuing interest in the profits of the company, and I understand that until about 2007 or 2008 he lived in a house on the company's land, about which I shall have more to say later.

9. The shareholders of Autoclassic, at the material times, were Jeffrey, Graham, Susan and a pension scheme of which they were the beneficiaries; each held 25%. In the past, Autoclassic had been engaged in selling second-hand cars and caravans, and in the management of nightclubs, but at the time with which I am concerned its business activities consisted of the sale of caravans and mobile homes. Its directors were also Jeffrey, Graham, Susan and Mr Marson.

10. I should interpose that, although they are to some extent interchangeable, the term "caravan" is generally understood to relate to a temporary dwelling, either one designed for touring (that is, to be towed from place to place by a motor vehicle) or for static use (that is, left in one place but occupied only intermittently, usually for holidays), while "mobile home" designates a permanent or semi-permanent structure designed, usually, for year-round occupation. It is mobile only in the sense that it can be removed from the site

on which it stands and then placed on another site, but in practice a move of that kind is unusual.

11. In about 1958 KLL became the owner of a large area of land now known as Kings Park at Canvey Island, Essex ("the site"). Some further adjoining land was acquired later. The house in which Jack lived was, as I have said, on the site, but the greater part of it was used for the placement of holiday caravans, both touring and static, and some chalets used for holiday accommodation. It appeared at one stage that the detail of the history of the site and of the planning permissions relating to it might be of importance, and for that reason I had a good deal of evidence, and heard some argument, on those topics. Mr Zwart made the point in his skeleton argument that the planning history and the description of the development of the site offered by KLL over the years diverged, a fact which cast some doubt on KLL's case. I accept that there might be some scope for doubt whether KLL had complied in every respect with the subsisting planning consents but it does not seem to me to have any relevance to the VAT treatment of the transactions with which I am concerned. The evidence about the detail of the transactions came primarily from Jeffrey, but was confirmed by Mr Marson and Mr Lewis, and I accept it.

12. Over the years, and more rapidly since 2000, the use of the site has changed. Progressively, the touring and static caravans and the chalets have been removed and have been replaced by mobile homes. KLL sold its business (including the site) at arm's length, as a going concern, in 2008 (a factor which accounts, at least in part, for the incomplete nature of the available documentation) but I understand that the site was by then and remains predominantly, if not exclusively, a mobile home park. It has, or in 2008 had, as well as estate roads and services of water, gas, electricity and drainage, communal amenity areas and other facilities such as a community centre, a bar, a swimming pool and a sports ground for the benefit of its residents. There was also a shop, run by a third party from premises on the site leased from KLL.

13. The site was developed in stages, an area at a time. Plans were drawn up of the layout of each area as it was to be developed, showing its division into plots, or pitches, in a manner which respected the statutory requirements which govern the space which must be provided for each mobile home—essentially the distance between each mobile home and its neighbours—and any relevant planning requirements. Before a mobile home could be placed on the site it was necessary to provide a sound and stable foundation for it, in the form of a substantial concrete base. In some cases, as I understand it, the land used for a pitch was either virgin ground or had been used for the placement of touring caravans only, while in others it had been occupied by a base on which a static caravan or chalet had stood. Those bases, I was told, were insufficiently substantial to accommodate a mobile home, and had to be removed. The new bases incorporated apertures, or conduits, through which the pipes and wires necessary for service supplies could be laid and connected to the mobile home to be placed on that base. Once the mobile home was in position further work was done, to provide a brick skirting wall round it and a small brick-built storage building for the owner's use.

14. KLL did not itself construct the bases or undertake the brickwork; that was done by contractors at arm's length to it. It is the VAT charged by those contractors to KLL which is the subject-matter of the present dispute. It may be that some of that VAT was not properly charged, because Item 2(b) of Group 5 of Sch 8 to the Value Added Tax Act 1994 ("VATA") provides for the zero-rating of certain services relating to "any civil engineering work necessary for the development of a permanent park for residential caravans". I am not asked to determine that point in the context of this appeal, though I shall need to deal at a later stage with some observations Mr Thomas made on the matter.

15. KLL entered into arrangements with owners who wished to place their mobile homes on the site; I shall come to the detail of those arrangements shortly. It did not, however, sell the mobile homes. Most, if not all, of the sales to their occupants in the relevant period were made by Autoclassic, which had a display area and sales office on the site from which it conducted its business.

16. An intending purchaser attending the sales office was provided with various brochures, some relating to the range of mobile homes which Autoclassic was able to offer, others to the benefits of living in a mobile home on the site, and to the monthly charges made for the right to keep the mobile home the purchaser might acquire on a pitch on the site, for use of the various facilities I have described, and for the site maintenance services which KLL provided. Some brochures dealt with both topics. It seems to have been a mutual assumption that if the customer bought a mobile home it would be placed on the site (as I understand it Autoclassic did not sell mobile homes for placement elsewhere), and Autoclassic's staff showed prospective purchasers not only the range of mobile homes which it could supply, but also the pitches which were available at the time. As Mr Zwart emphasised, the brochures did not make it clear which of KLL and Autoclassic would provide the various benefits and an intending purchaser would not know at that stage, unless he made further enquiry, that if he proceeded Autoclassic would provide the mobile home and KLL the pitch and the facilities to which I have referred.

17. Once the decision to purchase was made, however, the position changed. The specimen documents with which I was provided included, first, an invoice for the mobile home, addressed to the purchaser. It was headed with Autoclassic's name, which was repeated with its registered office address at the foot, and identified the agreed price for the mobile home, the deposit paid and the balance due when the mobile home was supplied, and gave a description—by reference to manufacturer and model—of the mobile home. It also identified the pitch on KLL's site on which it was to be placed, and the amount of the monthly fee (which, as was also stated, was revised annually). It was to be signed by the purchaser and by a single authorised signatory "on behalf of Autoclassic Ltd/Kings Park Homes Ltd" (the latter being the name by which KLL was known at the time). KLL was not otherwise identified on the invoice.

18. That document too would not have made it clear to the purchaser which of the two companies was supplying the mobile home and which the pitch, but a

second, contemporaneous, document, an agreement between Autoclassic, KLL and the purchaser, did so. The specimen of that tripartite agreement which I was shown made it clear that Autoclassic was to provide the mobile home in exchange for the agreed price, and that KLL was to enter into a separate agreement with the purchaser, described as a licence agreement, which provided for the purchaser's use of the pitch and for security of tenure.

19. I was shown two versions of the licence agreement. Neither of them describes itself as a licence agreement, but instead is headed "Written statement under Mobile Homes Act 1983". That Act imposes various conditions on lettings of pitches, designed to protect the interests, particularly security of tenure, of owners and occupiers of mobile homes, and provides that it is not possible to contract out of the conditions. It seems that of the two versions provided to me, one preceded and the other followed some amendments to the 1983 Act, amendments which do not have any significance for present purposes. Indeed, so far as they are relevant to this appeal, both versions of the agreement are in substantially the same form. Although described as a statement they are in the form of an agreement and provide for the occupation of an identified pitch by the purchaser, for security of tenure save in the case of certain breaches of the terms of occupation, for the payment of monthly fees, and for the performance by KLL of various obligations, such as site maintenance. As one might expect there are several other terms, some reflecting the statutory requirements and some included for other reasons, but they are of no immediate relevance. Autoclassic was not a party to the agreement, and indeed it is not mentioned in either version.

20. In my view these documents would have made it clear beyond doubt to a purchaser who had taken the trouble to read them that his contract for the purchase of the mobile home was with Autoclassic alone, and his contract for the occupation of the pitch was with KLL alone.

21. The purchaser, of course, knew nothing of the arrangements between KLL and Autoclassic. The fact that these arrangements were between companies controlled by the same family, albeit the shareholdings differed, had the consequence that much of the documentation was informal or incomplete and, as Jeffrey agreed as he gave his oral evidence, the companies did not always document their relationships correctly, if at all. It was for that reason that some documents were left unsigned or undated and, when the term of an agreement expired, the parties often carried on as before without any record, such as a board minute, to the effect that they had agreed to do so. Nevertheless, the essential structure of the arrangements seems to me to be fairly straightforward.

22. The arrangements were the subject of largely undocumented agreements between the two companies. I was told that the original agreement dated from about 2000, but I did not have a copy of any written agreement or board meeting minute of that date. It may be that the agreement was not then reduced to writing. It is, however, referred to in rather elliptical terms in a minute of a KLL board meeting on an unspecified day in 2002. I was provided with a copy of a draft agreement between the companies, apparently drawn up (as Mr Marson recalled, by local solicitors) in the same year, but it is not clear

whether it was prepared before or after the board meeting or whether it was ever finalised. Mr Thomas nevertheless relied on it, and in particular on clause 5.2, with the detail of which I shall deal later. The evident primary purpose of the draft agreement was the grant by KLL to Autoclassic of the right to sell mobile homes for placement on the site. It is in my view clear from the wording adopted, and assuming that the draft represents what was actually agreed, that Autoclassic was to sell mobile homes as principal.

23. The agreement provided for Autoclassic to make two kinds of payment to KLL. I am satisfied that this part of the agreement can be taken at face value, because of Jeffrey's evidence. The first, for which cl 5.2 (set out at para 31 below) provided, related to the installation of the bases. Autoclassic was required to pay to KLL "Base Costs" calculated, as cl 2.8 of the 2002 draft agreement specified, by reference to the cost of construction of bases incurred by KLL, in contractors' and materials suppliers' charges, during the year, divided by the number of bases, plus a 10% mark-up said to represent a contribution to overheads. It seems that KLL issued periodic invoices to Autoclassic, of which I saw some examples; the payments were recorded in the companies' accounts. The invoices related to all the bases installed on the site for which Autoclassic had not yet paid, and Autoclassic was required to pay the invoiced base costs whether or not a mobile home had been placed on the base or indeed even if no sale of a mobile home destined for the base had been concluded.

24. The agreement did not impose any obligation on KLL to construct, or arrange for the construction of, the bases and, similarly, there was no obligation on it to construct enough bases to satisfy customers' demands. However, as it was in KLL's interests, because of the commission arrangements to which I come next, to maximise Autoclassic's sales of mobile homes, formal obligations to that effect were probably unnecessary—and, no doubt, unnecessary as long as the two companies were controlled by the same family. I should add that Mr Thomas accepted that the bases, once constructed, formed part of KLL's land.

25. The second payment, for which cl 5.3 provided, was commission on the sale price of each mobile home. That amounted initially to 80% and later to 60% of the gross proceeds of each sale, after deduction of four other amounts: the cost of the mobile home paid to the manufacturer; a "distribution cost" of £2,000, which seems to be a sum which Autoclassic could retain regardless of the profit achieved; a "contribution cost" representing the cost, if incurred, of procuring the agreement of another site owner to accept a caravan displaced from the site; and the "base cost". At first sight even the lower commission percentage seems remarkably high, as does the mark-up on the price paid by Autoclassic to the manufacturer of the mobile home; typically, Mr Marson told me, the mark-up was in the region of 200%. It has, however, to be remembered that the purchaser was not required to pay a separate lump sum for the right to place the mobile home on the pitch, and that the monthly fee represented a share of the expenses incurred by KLL in maintaining the site and, as I understand the matter, included little by way of rent—Jeffrey described it as a ground rent. He added that purchasers were attracted by the arrangement by which, for a relatively large initial payment, they acquired a

home and were left thereafter to pay only modest recurring fees. I should add for completeness that it is accepted by KLL that the monthly fee was the consideration for an exempt supply.

26. I should mention at this point what seems to me to be an oddity in this agreement. As I have said, clause 5.2 required Autoclassic to pay base costs, while clause 5.3 allowed it to take credit for the same thing— that is, what it had already paid. Although the (if I may say so, rather poorly drafted) agreement does not make it very clear, it seems that while Autoclassic was expected to pay periodically for several bases at a time, and frequently in advance of its effecting a sale, it was entitled to credit for the proportionate cost of the base attributable to the mobile home in respect of which it was making a commission payment. The net effect, however, was that Autoclassic made a payment which was reimbursed to it by way of credit against the commission. It seems to me, therefore, that it was not actually paying for the bases at all but, perhaps, making short-term interest-free loans to KLL. However, neither party addressed me on this point (unless, perhaps, Mr Zwart's reference to mere accounting entries, a reference he did not develop, was intended to do so) and as it is not critical to my decision I shall say no more about it.

27. I was also shown a minute of a further meeting of KLL's board—attended only by Jeffrey and Mr Marson—on (according to the minute) 7 November 2006 at which the change in the rate of commission to which I have referred was recorded. The commission was said to be payable by KLL to Autoclassic, and the rationale for the change was described as Autoclassic's success in assisting KLL in its (KLL's) sales of mobile homes. The increase was said to be conditional on Autoclassic's agreement that it would continue to sell KLL's mobile homes. The terms of that minute are, as Mr Thomas accepted, inconsistent with the draft agreement and with the 2002 minute.

28. The 2006 board minute is also inconsistent with the oral evidence Jeffrey gave. He told me that it was Autoclassic's staff who negotiated the sales of mobile homes with prospective customers, that it was Autoclassic which placed the orders with the manufacturers and which (as the invoices I have described indicate) entered into the contract for the sale and purchase of the mobile home with the customer. It was Autoclassic which received the entirety of the price from the customer, which paid the manufacturer, and which handed over the commission and other sums to KLL. Autoclassic also arranged for the installation of the mobile home on its base though the work of installation was usually carried out by the manufacturer. The base was so designed that the service supplies fed through it lined up with the plumbing and electrical installations within the mobile home. As the layout of the mobile home differed from model to model there must have been some coordination between Autoclassic and the contractors constructing the bases in order to ensure that the apertures and conduits were correctly positioned.

29. Jeffrey gave some further evidence about the arrangements between the two companies—in substance between his father on the one hand and him and his siblings on the other. His description of his discussion with his father which led to the change in the rate of commission was of his persuading his father to

accept a smaller share of the proceeds of sale of each mobile home, and not of his convincing his father to pay more to Autoclassic. It may be that, because of inter-company loans or for similar reasons, the payments actually made were adjusted, but Jeffrey's evidence was consistent only with the proposition that Autoclassic was paying commission to KLL, and not the reverse. Mr Marson agreed that this was the position, and it is reflected in the manner in which the companies' annual accounts were drawn up by Mr Lewis's firm.

30. From the totality of the evidence I am satisfied, in summary, that the true position is that Autoclassic dealt, as principal, with the purchasers of the mobile homes, and that it was Autoclassic which paid commission to KLL. In other words, I accept the version of the arrangements and of events offered by the 2002 agreement and the witnesses, and reject the 2006 board minute as an accurate record of the commission arrangement. I accept too Jeffrey's evidence to the effect that although the agreements and minutes referred to arrangements between KLL and Autoclassic intended to endure for a prescribed period of time the parties had simply carried on dealing with each other in the same way (save for the variation in the commission rate) when the arrangements expired. I also find, in case there remains any residual doubt about it (and HMRC initially argued that there was), that sales took place, in significant volumes, during each of the relevant years, and that the payments which were required to be made were in fact made.

The parties' arguments

31. Mr Thomas began by identifying what he said were the important features of the draft agreement of 2002 on which, as he emphasised, KLL and Autoclassic had acted even if it was not formally completed. KLL was identified in it as the Principal, and Autoclassic as the Distributor. Mr Thomas emphasised its rationale, set out in a recital, that Autoclassic wished to sell mobile homes for installation on the site for the parties' mutual benefit, and that there was an express grant by KLL to Autoclassic of the right to do so. Clause 5 set out the Distributor's obligations; sub-clause 2 was in these terms:

> "To purchase and pay to the Principal for the Bases for the placing of the Product on the Property the sum of the Base Cost together with VAT payable thereon for each individual Base required."

32. The "product" was, of course, a mobile home. Mr Thomas accepted that, as I have said, there was no corresponding express obligation imposed on KLL to construct the bases and that it had to be implied but it was, he said, clear from cl 4.1 of the agreement, which imposed upon KLL the obligation "to support [Autoclassic] in its effort to promote the dealings in the Product" that the parties both understood that KLL was to arrange for the installation of the bases. The effect of cl 5.2 was that Autoclassic was purchasing the bases once they had been installed, and that the Base Cost was the consideration.

33. In this context Mr Thomas made the point that, as I have already observed, the contractors who constructed the bases had charged VAT at the standard rate even though their services were probably zero-rated. KLL has paid the VAT wrongly charged and the contractors have, one assumes, accounted for it to HMRC. Thus HMRC have received a windfall, of tax which was never

properly due, yet the purpose of the disputed assessments is to recover from KLL the credit for that tax which it has claimed. Mr Thomas also drew my attention to an extra-statutory concession, or ESC, by which HMRC agree to treat as input tax VAT (or more accurately purported VAT) charged to a taxable person, acting in good faith, by a person who is not, or who is not required to be, registered for VAT. There was, said Mr Thomas, a close analogy with this case and, he said, KLL was in the process of seeking to persuade HMRC to apply the ESC to this case. Mr Thomas recognised that it is not within this tribunal's jurisdiction to deal with a point of this kind and, no doubt for that reason, Mr Zwart did not address it. I record it in case the matter should go further, but say no more about it.

34. Mr Thomas also argued that the commission paid to KLL by Autoclassic was the consideration for KLL's taxable supply to Autoclassic of the right to sell mobile homes; the right so granted encompassed both the use of the facilities provided for Autoclassic on the site, and also the ability to offer a pitch to a prospective customer on which the mobile home he bought could be placed. KLL had accounted to HMRC for VAT on its commission receipts, and HMRC had not suggested that no taxable supply for which the commission was the consideration took place and that, in consequence, the VAT for which KLL had accounted should be returned to it.

35. A proper analysis of the transactions shows, said Mr Thomas, that in substance KLL supplied Autoclassic with finished bases on which Autoclassic's customers were able to locate the mobile homes they bought from Autoclassic. The advantage to the customer was that he received a composite supply of a mobile home and a completed pitch, appropriately configured for the mobile home; he did not have to find a base once he had decided to buy the mobile home, or acquire a base and then find a mobile home which was suitable for the base. The composite supply was what Autoclassic offered, and it was critical to its ability to do so that it was able to assure a prospective customer that he would be able to place his mobile home on the base which KLL had supplied, or was obliged to supply, to it. Two discrete contracts would be of limited value to the purchaser, in that he would not be able to use the mobile home he had purchased if he had no pitch to place it on, and the pitch would be of no utility without the mobile home. It is apparent, Mr Thomas argued, even though the agreements did not spell it out, that what Autoclassic did was procure for the purchaser the letting to him by KLL of a pitch chosen by the purchaser from those available at the time.

36. The legal niceties about the ownership of the base and the land on which it had been laid were immaterial; the customer required the composite supply which Autoclassic was able to provide because of KLL's supply to it of the bases. That one should focus on the substance of a series of transactions rather than on legal niceties was, in essence, the conclusion of this tribunal in *Goslings Leisure v Revenue and Customs Commissioners* [2012] UKFTT 170 (TC), in which the question was whether the taxpayer was able to recover input tax it had incurred in capital expenditure on land over which it had no legal interest. The taxpayer used the land for its own activities but was dependent on an informal arrangement with its parent, which had a long lease of the land, for its ability to do so. The tribunal put it this way:

> "[52] … the Respondents' [HMRC's] concentration upon strict property law and licence matters has occasioned irrelevant confusion in this case and … those matters have very little bearing on the key issue of whether the input tax suffered by the Appellant was attributable, or 'directly and immediately linked' to the supplies that the Appellant made.…
>
> [61] … The critical point … is that all of that expenditure was designed to facilitate use, activity and revenues solely for the Appellant, and not [the head-lessee], let alone [the freeholder] ….
>
> [62] … This case involves the Appellant directly and immediately incurring costs in creating facilities, for no other reason than to render services from and with those facilities, and to earn and own the whole of the gross turnover referable to those activities."

37. By similar reasoning, said Mr Thomas, the fact that Autoclassic did not acquire title to the bases or the land on which they stood was irrelevant; the arrangements between it and KLL allowed it to offer the composite supply to its customers. In substance, if not in form, it received a supply of the bases for that purpose.

38. In *UAB "Sveda" v Valstybinè mokesčių inspekcija prie Lietuvos Republikos finansų ministerijos* (Case C-126/14) the Court of Justice had been required to determine whether a landowner could recover the input tax it incurred in creating a recreational footpath over its land. Members of the public could use the footpath free of charge, but they could also use it to access facilities at which the landowner sold taxable goods. The court concluded that even though the path could be used free of charge the input tax would be deductible if it was also used as a means of enabling taxable transactions to be carried out, provided only that a sufficient link could be established between the expenditure incurred and the taxable activity, a point which it was for the national court to determine. Here, said Mr Thomas, the link was clear: the expense incurred in constructing the base was directly linked to Autoclassic's ability to offer the customer an installed mobile home.

39. An alternative view, if it was determined that there was no supply of the bases, was that KLL was making a supply of construction services to Autoclassic, facilitating its ability to make the composite supply to the customer. The 2002 draft agreement made it clear, even if only by necessary implication, that KLL was under an obligation to Autoclassic to provide completed bases. That view was borne out by an examination of the position in which Autoclassic would find itself if it had provisionally sold a mobile home to a customer intending to place it on a particular pitch but who then decided not to proceed. There could be no real doubt in that case that Autoclassic could offer the same pitch to a different intending purchaser. If it was able to do so there must have been some kind of supply to it.

40. In the further alternative, though it was Mr Thomas's secondary case, he argued that KLL used the bases in making two supplies, one taxable and the other exempt. This hypothesis assumed that Autoclassic relinquished its interest in the base once the mobile home was installed on it and the customer entered into the licence agreement with KLL. If this was the correct view KLL would be able to treat the disputed input tax as residual. It would be in a similar position to that of the taxpayer in *Garsington Opera v Revenue and*

Customs Commissioners [2009] UKFTT 77 (TC), in which this tribunal found that the costs of the taxpayer's productions were residual as they were linked not only to its exempt supplies of admission tickets but also to its taxable supplies of sponsorship and merchandise sales.

41. KLL was in a similar position: it exploited the bases in making exempt supplies to the occupants of the mobile homes in return for the monthly payments, a relatively trivial supply at least in value terms, but more importantly in earning the commission it received from Autoclassic. That commission, and its scale, reflected the value to Autoclassic of its ability to sell mobile homes more profitably than would have been possible had it not been in a position to offer bases.

42. KLL's primary case was based on reg 101(2)(b) of the Value Added Tax Regulations 1995, but if its alternative case was preferred, it was nevertheless entitled to a substantial measure of input tax credit by virtue of reg 101(2)(d). So far as material, and as it was in force at the relevant time, the regulation was as follows:

> "(1) … the amount of input tax which a taxable person shall be entitled to deduct provisionally shall be that amount which is attributable to taxable supplies in accordance with this regulation.
>
> (2) In respect of each prescribed accounting period—
>
> (a) goods imported or acquired by, and goods or services supplied to, the taxable person in the period shall be identified,
>
> (b) there shall be attributed to taxable supplies the whole of the input tax on such of those goods or services as are used or to be used by him exclusively in making taxable supplies,
>
> (c) …
>
> (d) there shall be attributed to taxable supplies such proportion of the input tax on such of those goods or services as are used or to be used by him in making both taxable and exempt supplies as bears the same ratio to the total of such input tax as the value of taxable supplies made by him bears to the value of all supplies made by him in the period."

43. Although there might be some scope for disagreement about whether the input tax incurred by KLL was wholly or only partially attributable to taxable supplies there could be no doubt, Mr Thomas maintained, that at least some of it was attributable to its taxable supplies to Autoclassic. In *Customs and Excise Commissioners v Redrow Group plc* [1999] STC 161 Lord Hope, in a passage with which the other Law Lords agreed, said that

> "The word 'services' is given such a wide meaning for the purposes of VAT that it is capable of embracing everything which a taxable person does in the course or furtherance of a business carried on by him which is done for a consideration. The name or description which one might apply to the service is immaterial, because the concept does not call for that kind of analysis. The service is that which is done in return for the consideration."

44. It was plain, Mr Thomas continued, that what KLL did for the benefit of Autoclassic, and for which the payments made to it by Autoclassic were the

consideration, was undertaken in the course of its business, and that it was properly to be regarded as a service, whether of making bases available or of permitting Autoclassic to conduct sales of which the bases were an essential component. There was accordingly a clear analogy with *Redrow* and no warrant for the excessively restrictive approach which HMRC had adopted in refusing credit for any part of the disputed input tax.

45. Mr Thomas concluded with a criticism of Mr Goodwin's approach to the assessment. There could be no doubt, he said, that some of the input tax which KLL had incurred must be attributable to the taxable supplies of maintaining the roads on the site since they were used by the occupants to access the shop (albeit KLL had not opted tax its lease to the shopkeeper), the bar and other facilities where taxable supplies were made. Mr Goodwin had not attempted to agree a partial exemption calculation with KLL but had simply disallowed the entirety of the input tax for which KLL had claimed credit. That approach could not possibly be correct. In addition, he said, the base cost invoiced by KLL to Autoclassic should have been treated as wholly zero-rated because it fell within Item 2(b) of Group 5 of Sch 8, to which I have referred above. Oddly (as Mr Thomas accepted), and for no evident reason, KLL had treated only the 10% mark up as taxable, but the VAT for which it had accounted on that 10% should have been taken into account in making the assessment.

46. Mr Zwart began with a criticism of the quality of the evidence, a topic with which I have already dealt and about which I do not think I need to say any more. In his closing submissions he made the point that it had nevertheless become clear (as indeed Jeffrey said in his evidence) that KLL paid for the bases and then Autoclassic put mobile homes on them: the essence of the arrangements between the two companies was as simple as that. When that straightforward analysis is coupled with the fact that the bases when constructed formed part of KLL's land it becomes clear that KLL did not, because it could not, make a supply of those bases to Autoclassic. All that KLL did was to improve its own land by the installation of the bases, enabling it to make a supply of the base to the eventual occupant of the mobile home placed upon it.

47. The supply to the occupiers was an exempt supply falling within Item 1 of Group 1 of Sch 9 to VATA, which includes, among other supplies, any licence to occupy land. In his skeleton argument Mr Zwart referred me to several cases which dealt with the meaning of "a licence to occupy land" but as Mr Thomas did not argue that the occupiers of the mobile homes had any other interest (and in my view it is plain that they did have such a licence) it does not seem to me to be necessary to explore those authorities. The essential point is that if KLL's supply of the base was exclusively to the occupier of the mobile home, it followed that all of the input tax incurred in the construction of the base was attributable to an exempt supply, and therefore could not be recovered.

48. Mr Zwart sought to distinguish the tribunal decisions in *Gosling Leisure* and *Garsington Opera*, the former primarily because, he said, it was wrongly decided and the second because, he said, there was a clear and unbroken causal chain and therefore a direct and immediate link between the costs

incurred in putting on the productions and the grant of sponsorship rights. I agree that these cases are to be distinguished, but think it more convenient to explain why in the discussion which follows, rather than in the context of a description of Mr Zwart's arguments.

49. The fact that Autoclassic had defrayed the cost of installing the bases, Mr Zwart continued, did not demonstrate that KLL made a supply of the bases to it; the arrangement was no more than an accounting exercise. It could also not be said that the construction of the bases represented a cost component of any supply KLL may have made to Autoclassic of the right to sell mobile homes from the site. Again, although the construction of the bases might have made it easier for Autoclassic to sell mobile homes, in that it was put in a position to state, whether as KLL's agent or in some other capacity, to an intending purchaser that a pitch on the site would be made available if the mobile home was purchased, it was not an arrangement which amounted to a supply of the base by KLL to Autoclassic. The reality was that Autoclassic could do no more than tell a prospective purchaser that KLL would make a supply of the base to him. There was thus no identifiable taxable supply by KLL to Autoclassic which gave rise to an entitlement to credit for the input tax it had incurred in the construction of the bases.

50. Mr Zwart resisted Mr Thomas's alternative argument, that there was a duality of supply by KLL, to the occupier and to Autoclassic, on the simple premise that there was in reality only the one supply, to the occupier.

Discussion

51. Despite Mr Thomas's careful and forceful arguments, I am not persuaded that KLL made any supply of the bases to Autoclassic. The draft agreement of 2002, reflecting, as I have accepted, the substance of the arrangements between KLL and Autoclassic, goes no further than to say that (disregarding the subsequent credit to which I have referred) Autoclassic is to defray the cost of construction and in addition make a contribution to overheads of a further 10%. I see nothing in that agreement which could be read as a grant to Autoclassic of any kind of right over the base, or the land on which it has been constructed.

52. On the contrary, the tripartite agreement to which I have referred made it perfectly clear, as I have already said, that the customer was contracting with Autoclassic, exclusively, for the supply of the mobile home, and with KLL, exclusively, for the right to occupy the land. That interpretation is borne out by the licence agreement (even though it was not so entitled) between KLL and the purchaser, an agreement to which, as I have also said, Autoclassic was not a party and in which it was not mentioned. In short, I see no basis on which it could possibly be argued that KLL made a supply of the base, or of any interest in it, to Autoclassic, or that there was any understanding between KLL and Autoclassic that such a supply was to be made.

53. At first sight, there is a similarity between this case and *Redrow* but on closer examination I do not think it is sufficient. First, the House of Lords was required to consider the position from Redrow's perspective whereas here KLL was in the position of the estate agent. It is Autoclassic's position which

matches that of Redrow. Second, and rather more important, I think, is the nature of what was supplied—in *Redrow*, the service of selling the intending customer's home, here the tangible base. While one can readily conceive of a supply of services which benefits two recipients, that concept does not, in my judgment, so readily extend to a supply of goods plainly made available to one recipient—here, the occupier of the mobile home—but not so clearly, if at all, to the other putative recipient. Indeed, I find it difficult to understand how a person in the position of Autoclassic, with no right to take possession of the goods or to direct that they be delivered to another (however one views the arrangements between KLL and Autoclassic, Autoclassic had no right to compel KLL to let a particular pitch to a customer), can be said to be a recipient of a supply at all.

54. I am fortified in that conclusion by the judgment of Brooke J in *Customs and Excise Commissioners v Harpcombe Ltd* [1996] STC 726 to which, as it happens, Mr Thomas referred me. That case also related to supplies of pitches and mobile homes, but differed from this case in that the taxpayer made both of the supplies. It argued (albeit only before the tribunal: it was not represented on the further appeal) that the input tax it incurred in constructing bases was attributable to its taxable supplies of mobile homes. The judge rejected that argument, deciding that the input tax was wholly attributable to the exempt supply of the licence to occupy the land.

55. I also do not accept the argument that KLL's work of constructing the bases could in some way be regarded as a cost component of the supply made to Autoclassic of the right to sell mobile homes from the site. I do not doubt that its ability to indicate to prospective purchasers that a pitch on the site could be made available helped Autoclassic to make sales; in particular I accept the argument that the purchaser is unlikely to have required a mobile home without a pitch, or a pitch without a mobile home. But, for the same reasons as I have set out above, the reality is that Autoclassic was not offering the pitch to the customer; I agree with Mr Zwart that all it could do was indicate that KLL would offer a pitch. Mr Thomas's proposition boils down to a claim that, but for KLL's willingness to supply pitches, it would have been unable to make sales of mobile homes, or at least to make as many sales as it did. That contention seems to me, however, and not merely because of the use of the same phrase, to resemble very closely the "but for" argument which was rejected by the Court of Appeal in *Customs and Excise Commissioners v Southern Primary Housing Association Ltd* [2004] STC 209 as one capable of establishing a sufficient link. The fact that two transactions were commercially linked was not enough: there must be a direct link between the expense and the onward supply. Translating that case to this, it can be seen that while the construction of the base may have made it easier to sell a mobile home it was not essential, and it cannot be regarded as a cost component of the sale of the mobile home. I agree with Mr Zwart that KLL and Autoclassic had entered into a kind of joint venture arrangement, but it was no more than that.

56. It does not seem to me that there is anything in *Sveda* which changes that conclusion. The question there was whether expenses incurred by the taxpayer on the footpath could be recoverable because the footpath led some of its users to the facilities at which the taxpayer made taxable supplies. The court said it

might, but only if the national court was satisfied there was a direct and immediate link between the two. Here, Autoclassic did not incur any expense of its own in constructing the bases; it merely reimbursed (again, ignoring the subsequent credit) the expense KLL had incurred in putting itself into a position to make the exempt supply of the licence. In my judgment there is no direct and immediate link in such circumstances.

57. Similarly, although I accept that there is, superficially, some similarity between this case and *Gosling Leisure*, there are nevertheless some differences which, in my view, make any real comparison between the two cases impossible. In *Gosling Leisure*, as in *Sveda*, it was quite clear that the taxpayer had itself expended money on improving the land which it then used for its own purposes. Here, Autoclassic did not spend any money improving the land; its position is different because (again disregarding the later credit) it merely met the cost of improvement as part of a composite financial arrangement between it and KLL. In addition, while the taxpayer in *Gosling Leisure* made use of the improved land, Autoclassic did not do so but (if the remainder of my analysis is correct) merely made it possible for KLL to do so by the grant of the licence. I do not see how it can be said that Autoclassic used the bases in any meaningful sense.

58. In addition, I do not derive any assistance from *Garsington Opera*. There, the question was whether input tax incurred by the taxpayer was attributable to supplies which it undoubtedly made. That question was essentially one of fact, and for that reason the answer at which the tribunal arrived offers little assistance in the context of a completely different factual matrix. Moreover, the question here is not whether the input tax is attributable to one or other of KLL's onward supplies, but whether KLL was making an onward supply to Autoclassic at all.

59. For very similar reasons I reject the argument that KLL was making a supply of construction services to Autoclassic. In the ordinary case of the supply of construction services the recipient will have at the end a completed construction, but Autoclassic did not have that. Rather, as in *Harpcombe*, the recipient of the supply was KLL which in turn made a single supply to the occupier.

60. I do not accept the argument that Autoclassic's ability to offer a base to a second prospective purchaser if the first withdrew is indicative of a supply to Autoclassic of the base. It merely shows that KLL had authorised Autoclassic to offer bases, in respect of which it was willing to grant an occupational licence to the purchaser, on its behalf.

61. In my judgment the proper analysis of the arrangements in this case is that KLL and Autoclassic cooperated with each other with a view to maximising the sales of mobile homes and the use of the site. The only identifiable supply by KLL to Autoclassic, in my view, was of the right to sell mobile homes from the site. The character of that supply was in no way affected by KLL's construction of the bases. As I have said, their construction no doubt made it easier for Autoclassic to sell mobile homes, but I do not see how it can be said that the construction of the bases or, indeed, the availability of pitches could be said to form a cost component of Autoclassic's sales or of KLL's supply to

it of the right to sell. The cost of constructing the bases was, in my view and exactly as in *Harpcombe*, wholly consumed by the onward exempt supply of the letting of the pitch to the eventual customer.

62. For those reasons KLL's appeal against the assessments is dismissed.

The misdeclaration penalties

63. The penalties were imposed pursuant to s 63 of VATA, which has since been repealed and replaced. At the material time, and so far as relevant, it read as follows:

> "(1) In any case where, for a prescribed accounting period—
>
> (a) a return is made which understates a person's liability to VAT or overstates his entitlement to a VAT credit …
>
> and the circumstances are as set out in subsection (2) below, the person concerned shall be liable, subject to subsections (10) and (11) below, to a penalty equal to 15 per cent of the VAT which would have been lost if the inaccuracy had not been discovered.
>
> (2) The circumstances referred to in subsection (1) above are that the VAT for the period concerned which would have been lost if the inaccuracy had not been discovered equals or exceeds whichever is the lesser of £1,000,000 and 30 per cent of the relevant amount for that period.…
>
> (10) Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this section if—
>
> (a) the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for the conduct…."

64. KLL accepts that if the appeals against the assessments are decided against it the objective criteria for the imposition of the penalties are satisfied and the only question therefore is whether it has a reasonable excuse for what it did, or there should be some mitigation of the penalty (for which s 70 of VATA provided).

65. Mr Thomas's argument was, in essence, that it was a matter for some surprise that HMRC should consider it appropriate to impose penalties in a case of this kind. The misdeclaration, on the hypothesis that it was a misdeclaration, was attributable to an understandable error and should be excused. The question whether any of the disputed input tax is recoverable was difficult, and was not occasioned by a failure on KLL's part to acquaint itself with relevant, accessible law. The law relevant to this case is manifestly difficult. HMRC had changed their statement of case from one extending to 26 paragraphs over nine pages to one running to 135 paragraphs over 31 pages. The sheer length of the amended statement of case made it clear that this could not possibly be described as a straightforward dispute. The arguments relating to the substantive case had occupied almost three days of tribunal time. Contrary to HMRC's position, as it was set out in correspondence, the fact that KLL had sought accountancy advice counted in its favour because it demonstrated that it was doing his best to account correctly for the transactions.

66. Moreover, paragraph 3.5 of Notice 701/20 clearly states HMRC's view that a commission received by the site owner from a caravan dealer—and by parity of reasoning a mobile home dealer—represents the consideration for a standard-rated supply. The Notice also indicates, at paragraph 3.3, that charges made for the delivery, unloading and positioning of a caravan follow the liability of the supply of the caravan itself, regardless of whether the additional supplies are made by the manufacturer, the dealer or the site owner. That statement suggests, Mr Thomas argued, that the supply of a concrete base and, following the positioning of the mobile home, the brick constructions to which I have referred should be treated as taxable, albeit zero-rated, supplies, in common with the mobile home.

67. In substance KLL's offence, if it should be so described, was merely to disagree with HMRC about a matter of some legal difficulty. It was not the function of the misdeclaration penalty to punish mere disagreement; it was aimed at the taxpayer who carelessly or deliberately misstated his liability when by the exercise of reasonable care he could have made a correct statement. That was not this case.

68. Mr Zwart's response was that, on the contrary, the true position was quite clear, and that the only reason the statement of case had been amended and, when amended, was of such length was that KLL had presented changing arguments over time, making it difficult if not impossible for HMRC to understand properly what its case was. Had KLL undertaken a proper analysis of the arrangements it would have been clear to it that the costs incurred in constructing the bases did not form a cost component of any supply to Autoclassic, but were wholly consumed by its own supplies to the purchasers of mobile homes which were placed on the site. The penalties were therefore properly imposed.

69. Although I agree with Mr Thomas that the purpose of the misdeclaration penalty was not to penalise a taxpayer who simply disagreed with HMRC, I am not persuaded in this case that there was no more than a simple disagreement or that KLL has a reasonable excuse. It requires no unduly complicated analysis of the arrangements which I have described to arrive at the conclusion that KLL constructed the bases in order to enable it to make a supply to a purchaser of a pitch suitable for the placement of a mobile home. It, and Mr Lewis as its accountant, may genuinely have taken the view that there was also a supply of the base to Autoclassic, but in my judgment neither KLL nor Mr Lewis could reasonably have thought that the base was supplied exclusively to Autoclassic and not at all to the purchaser. Its own agreement with the purchaser made it perfectly clear that KLL, and KLL alone, was supplying the pitch and it is not an abstruse point of VAT law that such a supply is exempt. I might be persuaded that it had a reasonable excuse if KLL had attempted an apportionment of the input tax to reflect, on the hypothesis of a duality of onward supplies, that an apportionment was required, but it did not do that; instead, it claimed credit for the entirety of the input tax.

70. I am not, therefore, persuaded that the penalty should be discharged. Nor am I persuaded that there is any material before me which warrants mitigation of the penalty in accordance with s 70(1) of VATA. Mr Thomas's argument on

this topic seem to me to amount to little more than a plea for mercy. Accordingly the appeal against the penalty is also dismissed in principle.

71. I am, however, concerned about Mr Thomas's arguments about the quantum of the assessments. Unlike him, I do not think Mr Goodwin is to be criticised for approaching the assessments as he did because it seems to me that he was presented with limited and in some respects conflicting information about the arrangements between the two companies. But I have reached the conclusion, now the evidence has been more fully explored, that Mr Thomas may well be right to say that the assessments are excessive. I intend therefore to issue this decision as one of principle, leaving the parties to agree on the correct amount of the assessments, if they can, and consequently on the correct amount of the penalty (which is arithmetically linked to the value of the assessments) and to return to the tribunal for further argument if they are unable to do so.

72. In his closing skeleton Mr Zwart included an application for costs but the point was not developed in oral argument. The appeals, or at least some of them, were initially brought before the VAT and Duties Tribunal but I have not been made aware whether a direction has been made that the costs provisions which prevailed before that tribunal, or instead rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, should apply. If HMRC wish to pursue the application they should notify the tribunal and the appellant, at the same time serving a costs schedule, within 28 days after the release of this decision.

73. 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.

COLIN BISHOPP
TRIBUNAL JUDGE

RELEASE DATE: 4 FEBRUARY 2016