[2016] UKFTT 0379 (TC)

TC05133

Appeal number: TC/2014/06479
TC/2015/02414

VALUE ADDED TAX – Input tax recovered in relation to further taxable supplies – whether there was sufficient evidence to justify VAT recovered – no – Sections 24(1), 25(2) and 26(2) Value Added Tax Act 1994 – Appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FASKALLY CARE HOME LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RUTHVEN GEMMELL WS
IAN G SHEARER

Sitting in public at Edinburgh on 21 and 22 April 2016

Philip Simpson, QC, for the Appellant

Elisabeth Roxburgh, Advocate, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2016

DECISION

1. Faskally Care Home Limited ("FC") appealed against a decision by HMRC by letter dated 24 June 2014 upheld on review by letter dated 29 October 2014, (the "Review Decision") that FC was liable to VAT on over-claimed input tax in the sum of £173,017.03 in respect of VAT periods 12/10 to 09/13, and a penalty assessment dated 27 February 2015 for a sum of £31,142.88 arising from defaults stated in the Review Decision. A further appeal TC/2015/03378 in respect of an alternative decision by HMRC was withdrawn at the request of the FC and HMRC. These appeals were considered alongside appeals by FC's parent company, Balhousie Holdings Limited ("BH") TC/2014/06398 and TC/2015/02424 which are the subject of a separate judgement.

2. FC had originally operated a care home which was then sold to Balhousie Care Limited ("BC"), another subsidiary of BH. During the period to which this appeal relates, FC was subsequently utilised to provide project management services including the managing of the design and build process of new buildings as well as dealing with repairs, extensions and/or refurbishment of existing buildings. FC was, based on professional advice, used for this purpose in order to recover input VAT incurred on professional fees which would have been heavily restricted if BH or BC or any company within BH's VAT group had sought to recover it because they were partly exempt for VAT purposes. FC was not part of the BH VAT group.

3. The Tribunal had before them seven bundles of productions, including agreements between FC and contractors submitted on the day of the hearing (the "new documents") and skeleton arguments. HMRC objected to the submission of the "new documents" which were accepted by the Tribunal but viewed in the context of that objection as having been unseen previously by HMRC. Within the bundles were witness statements of Anthony (Tony) Banks ("TB"), Chief Executive and Proprietor of BH, Scott Whittet ("SW"), consultant to and then initially the sole employee of FC, and John Shearer ("JS"), a Higher Officer of HMRC in the Tax Avoidance and Partial Exemption Team, all of whom gave evidence and were examined and cross-examined; and witness statements from, and confirmed by, Kirsty Drummond, a Higher Officer of HMRC, on which there was no examination or cross-examination. All the witnesses were credible.

Legislation

4. See Appendix 1.

Cases and Authorities referred to

5. See Appendix 2.

The Facts

6. TB founded the Balhousie Care Group in 1991 and has been actively involved in its management and growth. About 2010 BH decided to construct three new care

homes; Monkbarns in Arbroath, St Ronan's in Dundee and at Deveron Way, in Huntly. The land and subsequently the new home at Huntly belonged to FC and after its completion it was acquired by BC. In view of the difficulties, at that time, of obtaining bank finance a previously used mechanism of selling properties and leasing them back ("sale and lease back") was adopted for Monkbarns, St Ronan's and Huntly. This funding model was said to provide funding for growth and to allow BH to focus on its core capabilities of providing care.

7. This arrangement was entered into in March 2013 in respect of all three homes, which by that time were owned by BH's subsidiary BC, with Target Healthcare REIT Ltd ("Target") and missives were concluded by means of an offer on behalf of Target dated 8 March 2013 and accepted on an unqualified basis by BC on the same day. The consideration for the sale was £14,184,427 made up as follows:- the Monkbarns, Arbroath property £5,049,590; the St Ronan's, Dundee property £5,127,276 and the Huntly property £4,007,561.

8. On 9 July 2013, Kirsty Drummond carried out a visit to FC's principal place of business in Perth to examine the records for VAT purposes including those for the VAT period 03/13 as part of a pre-repayment credibility event. At that meeting the structure and organisation of the business was discussed with BH's financial controller who did not have a full understanding of the setup of the contracts and work done by FC. Kirsty Drummond's examination of the records identified "more questions than answers".

9. Following the visit Kirsty Drummond contacted JS who subsequently visited FC on 1 October 2013 and then wrote a letter of 7 October 2013 which stated that in order to hold an entitlement to be registered for VAT, a person must satisfy HMRC that they:– a) make taxable supplies; or (b) are carrying on a business and intend to make taxable supplies in the course or furtherance of that business. It was noted that HMRC understood from the discussions during the visit that FC made no charge to BH or any other party for the services provided by them; that BH reimbursed FC for the costs incurred in the development of new and existing care home premises; and that FC was a wholly-owned subsidiary of BH. HMRC noted that FC was set up "on the advice of your adviser, in order to recover VAT on the professional fees incurred in the development process; and FC had no other economic activities". The letter attached a rough diagram showing HMRC's understanding of each development process and the role of FC and BH at each stage.

10. On 29 November 2013 HMRC wrote stating that despite subsequent telephone calls and assurances that a response would be forthcoming, they had received no further information and documents. They issued a statutory notice to make a further request for FC to provide satisfactory evidence of any entitlement to be registered for VAT. Some information was then provided on 6 December 2013.

11. Grant Thornton, by now appointed by FC on their behalf, wrote on 10 January 2014 to HMRC setting out FC's involvement with BH in relation to design and build arrangements. The letter enclosed a number of documents and extract bank statements for FC. The "new documents" submitted to the Tribunal on

the day of the hearing gave evidence of the confirmation of professional advisers' fee proposals and scopes of services in relation to the property at Huntly and to the other properties in Arbroath and Dundee.

12. On 15 January 2014 JS carried out an analysis of the Huntly development information provided by Grant Thornton which noted the sale of Huntly to Target and the lease back to the "Balhousie Care Group", which the Tribunal noted was used from time to time as a generic name for BH and its subsidiary companies. This analysis noted that BH funded FC through an intercompany loan account and that the Huntly building, used as an example, was also funded through this account. As the sale was zero-rated there was no requirement for VAT invoices to have been created and it was confirmed at the hearing that none was. Although a VAT invoice was not required JS noted that any supply should be accounted for in the VAT records.

13. The analysis stated that FC were the contractor under the design/build agreement and contracted with/bought in professional construction services on its own account; that Muirfield Construction became the main contractor and agreements with other contractors were novated to Muirfield; that FC entered into its own design/build contract with Muirfield; that FC was VAT registered and recovered input tax, and zero-rated the sale of the new buildings to BH; and that FC employed a surveyor SW, who oversaw contractual arrangements and project delivery.

14. On 6 February 2014 HMRC wrote to Grant Thornton requesting further information about all the supplies said to have been made by FC including evidence as to the first grant of a major interest in the three new properties. The letter also stated "you have advised that the values in the statutory accounts filed to Companies House for the years ending 30 April 2011 and 2012 cannot be relied upon as they do not represent the true trading position of FC. In order to establish the true current position and as you have stated that the finalised accounts are not yet available, please provide draft accounts for the year ended 30 April 2013".

15. The letter continued "As you are aware, HMRC has previously been provided with conflicting explanations as to the supplies made between these connected parties and it is important that information requested above is provided in full in order to evidence the actual position".

16. The Tribunal had before them a note from JS's notebook in relation to a meeting on 28 February 2014 in the presence of SW, representatives of Grant Thornton and the chief financial officer of BH. The note of meeting stated that only one of the three buildings was owned by FC being the Huntly property. The planning process was completed by FC. An additional management charge was added to pay SW's salary who was employed by FC. FC agreed a design and build contract with Muirfield Construction with the cost being paid by FC at completion funded by an intercompany loan for which there was no loan agreement nor "most likely" an interest charge and nothing was written in the accounts but should have been.

17. The note stated that Stuart Brodie of Grant Thornton "effectively inferred Deloittes' [the auditors of FC's accounts] accounts to be incorrect".

18. On 5 March 2014 HMRC wrote to Grant Thornton stating that they had allayed their concerns that FC was ineligible for VAT registration, as they accepted there was at least one taxable supply namely the eventual supply of the Huntly property to BH, but disputed the tax that should be chargeable in the absence of the necessary zero-rating certificate (which was subsequently provided). HMRC then referred to the statutory accounts and noted that FC had no trading turnover for the year ended 30 April 2012. HMRC had received no evidence to the contrary and therefore relied on these accounts. HMRC also had sight of the previous year's accounts ending 30 April 2011 which showed turnover which they considered to be in relation to FC's previous activities as a care home operator and not in relation to construction services. HMRC also noted that this declared turnover in the 30 April 2011 accounts period predated FC's effective date of VAT registration of 20 October 2010.

19. HMRC noted that the statutory accounts for 2011 and 2012 showed no cost of sales value in relation to the provision of construction services by FC to any party. FC's VAT Return declarations showed that, since VAT registration, there had been reported outputs, net of VAT, of £810,126 whereas the inputs declared in the corresponding period equated to £1,846,753. HMRC continued "The costs incurred by FC have been said to be construction costs from external third parties which are then recharged in full to BH, however these VAT declarations do not appear to bear this out. Additionally the inputs declared do not appear sufficient to cover the full extent of the construction services provided by external parties in the development of new care homes".

20. HMRC continued to comment that although they had received information that there were intra-company loans provided by BH, so that all suppliers could be paid from this funding, there were no formal loan agreements drawn up, no interest payable, and no evidence that the loans were reflected in FC's statutory accounts.

21. HMRC also raised the issue of the recharges for the time of SW to BH which were said to be included within the supply of construction services by FC to BH. HMRC commented that no evidence had been provided to evidence any recharge of this type of any management or similar charges. HMRC's PAYE system showed that SW was first employed by FC in the tax year 2012 and received a salary of approximately £55,000 in 2012 and 2013. HMRC concluded that, in the absence of any evidenced explanation to support the VAT treatment of services from FC to BH, HMRC would treat these as "non-business" and that any input tax recovered to date in relation to them must be disallowed.

22. At a meeting on 11 April 2014, as recorded by JS in his notebook, Grant Thornton advised HMRC that the auditors were at FC's offices "overviewing previously submitted accounts to see if these require to be restated". HMRC indicated that they may have to move to a decision. They were told that FC's potential liability could be "a business ending issue – although they have no assets".

23. On 29 April 2014 HMRC wrote to Grant Thornton setting out HMRC's view that, despite the declarations made by FC, FC were never engaged in the provision of construction services to the BH VAT group and consequently that HMRC must

consider raising VAT assessments to FC to disallow the input tax recovered to date in relation to the provision of these services.

24. On 5 June 2014, Grant Thornton sent HMRC "two schedules which outline the costs and input VAT recovered by FC. These have been split by property by VAT quarter. I am aware that the numbers are slightly different to those in the submitted VAT returns". Each property was summarised along with the type of work undertaken. "From this, it can be seen that £402,057.65 of input VAT recovered relates to zero-rated supplies; £77,432.61 relates to a piece of land where future taxable supplies are anticipated; £666 are directly attributable to an onward taxable supply; and £15,065.10 relates to 'head office' costs. The remaining £32,134.51, of which only £16,191.93 was recovered through VAT returns, possibly should not have been."

25. On 24 June 2014 HMRC issued its decision letter confirming their view that, despite FC's VAT declarations, they were never engaged in providing construction services to BH. "Despite requests, no information or documents have been provided to HMRC to dispute that this is correct and your latest letter remains silent on this point. You have, however, provided a breakdown of the VAT bearing costs incurred by your client." HMRC were prepared to allow recovery of input tax on some of the stated costs, but set out the amounts of input tax that they disallowed on the basis of their being no evidence of a link between those costs and any onward taxable supplies. HMRC also issued corresponding formal notices of VAT assessment and over-declarations.

26. On 29 October 2014 HMRC issued a review letter which upheld the June decision and assessments. The review officer added as an aside, "In fact, it should be noted that it is my view that the assessments raised may have understated your liability".

27. On 27 February 2015 a notice of penalty assessment was issued to FC for the tax periods 20 October 2010 to 30 September 2013, for inaccuracy penalties totalling £31,142.88.

28. Giving evidence at the hearing, TB confirmed that FC's role was to liaise with consultants, architects quantity surveyors and generally to act as the company's expert representative on construction and repair projects. He confirmed that funds were transferred from FC to BH but he was not aware of the amounts or whether there was a formal contract between FC and BH. TB also confirmed that a purpose in "reconstituting" FC as an "arm's length" supplier, which was, "as far as he knew", not within the BH VAT group, was to increase the amount of input tax that could be recovered but that that was not the only reason. TB said he was unaware at a practical level of how invoices might have been passed from FC to BH and assumed BH would fund FC but he did not know. Similarly TB was unaware of the actual payments made to FC and generally relied on BH's financial controller, from whom he had expected a lot of things to be done which it transpired did not happen, and on BH's other professional advisers. He assumed that any transfers to FC were to pay FC's suppliers, but did not know if BH might also have paid some of those suppliers

directly, or whether FC were also paid by BH for FC's own services to BH. Asked who paid SW, TB said it was FC, but he assumed with funds from BH.

29. TB was unclear why the accounts for the company to 2012, which he signed, showed nil turnover or cost of sales, but understood that the balance sheet adjustments accounted for group undertakings and transactions. He assumed that the 'work in progress' figure for stocks, of £1,075,000 represented the ongoing costs incurred by FC for planning, and for engaging professionals etc, in association with the property developments; and that the "amounts owed by group undertakings" figure for debtors, of £453,000, was also for the work done by FC for BH.

30. FC's accounts for the 17-month period ending 30 September 2013 showed a turnover of £8.68m. Asked when FC's contractors were paid for their costs associated with the three new properties, TB said he believed, but was not sure, that it was only when BH received the proceeds of sale from Target.

31. SW gave evidence. He was employed by FC – their only employee – as Director of Property in 2011, having previously done more or less the same role (providing quantity surveying and project management services) on a consultancy basis. He spoke to the new documents being the offers and acceptances of professional services and fee quotations in relation to the properties at Arbroath, Dundee and Huntly. He was aware of the practical arrangements for the Huntly design and build contract but was unaware as to the financial arrangements of FC and simply checked and passed invoices for payment, rather than processed them himself. He assumed that either FC paid invoices either from their own funds or that BH paid them directly.

32. SW said he was unaware whether FC was in the same VAT group as BH or not and confirmed that he carried out work instructed by BH, although without formal contracts between BH and FC, on existing properties including repairs and refurbishment as well as new build properties. SW stated that he had not seen any invoices between FC and BH concerning the inter-company transfers. He understood that his own costs were also met.

33. SW stated that he was present for only one half of the meeting on 28 February 2014 with JS and BH's financial controller, Mr McCabe, and not seen the note of the meeting prepared by JS prior to the hearing. SW confirmed that FC was used as a client in order to recover VAT on professional fees and confirmed "by and large" the process as set out diagrammatically by HMRC.

34. In his evidence, JS confirmed that SW had advised him that FC received no fee income or any other income for the services provided to BH. FC simply received bills for development costs which were paid in full by BH either directly to the supplier or by transferring the funds to FC's bank account, with FC then forwarding payment to the contractor. JS was unclear from his visit whether the activities described constituted supplies for VAT purposes, taxable or otherwise, and confirmed the contents of the correspondence referred to above. JS took from the correspondence that, in FC's view, FC were making supplies of two distinct types; zero-rated sale of

completed buildings and the provision of construction services said to be zero-rated; and that all supplies were said to be made to FC's ultimate owner BH.

35. Despite repeated requests JS did not receive "sufficient evidence of taxable economic activity" and such evidence that had been provided, related solely to the Huntly care home and was therefore disregarded as irrelevant to the provision of construction services in relation to other BH-owned properties.

36. JS had asked SW and Mr McCabe (who left BH not long afterwards) whether the developments were funded in the manner of construction costs in the name of FC but with funding by BH and they confirmed this and advised that the accounting processes were set up in this way in order for FC to recover input tax on costs, since such recovery would have been heavily restricted for BH as a partly exempt VAT group. JS did not have sufficient evidence to make a judgement on how SW was paid and the limited bank statements provided showed no salary payments. He likewise found no evidence of any payments for any construction services received by BH from FC.

37. JS considered that there was no evidence provided to establish whether FC's activities were pursued with any reasonable or recognisable continuity and they had no degree of substance as, from the limited evidence made available, JS could not identify any charges made to or any payments received from BH or any other party in relation to any supply of goods or services. JS could not consider FC to have been conducting its activities in a regular manner or on sound and recognised business principles. It did not appear credible to JS than one employee SW could have undertaken all the activities to operate a business said to have incurred such significant costs over several different developments.

38. JS confirmed that although lack of profitability did not preclude an activity from being a business, FC had never been profitable as a construction business nor did there appear to have been any intended activity other than acting as a conduit for payments between BH and contractors in order to maximise input tax recovery through FC by its parent company.

39. JS considered that the key question was whether FC's activities were predominantly concerned with the making of taxable supplies for a consideration and based on the information HMRC had in its possession, he concluded that this was not the case. There was no evidence provided to show that a supply had been made by FC, no invoices to view, no evidence of charges made and no turnover identified in relation to fees charged to BH.

40. From the limited evidence provided to JS he considered that all costs incurred to FC were funded by corresponding payments from BH's bank account with no value added by FC. Furthermore until the production of the "new documents" JS had received no information except in relation to the Cleppington Road and Huntly projects. JS expected a taxpayer making supplies to be able to evidence them by producing invoices, contracts, loan agreements and other evidence of payment.

41. JS confirmed that it was not unusual nor contrary to the *Halifax* case, concerning artificiality and the abuse of the VAT system, for companies to have subsidiaries in different VAT groups for the purposes considered relevant for FC.

42. JS was cross-examined in relation to his analysis of the FC accounts for the period to 30 April 2012 and confirmed his understanding that the notional change in relation to work in progress on costs incurred by the company, and the movements in the figures for debtors, were consistent with FC contracting but JS confirmed that he did not know what activities the figures related to and had been provided with no evidence. If there was activity where were the invoices? He said that the queries which had arisen about the accounts for the period to 30 April 2012, which FC had accepted were misleading, had never been resolved.

FC's Submissions

43. FC says that they were engaged in economic activity and that the issue is one of fact, in particular, did SW carry out any tasks that counted as supplies by FC to BH VAT group?

44. FC say that SW was an employee of FC and that he carried out activities in relation to projects, other than Huntly, based principally on the evidence of the "new documents". FC say it is clear that these activities involved services to BH VAT group and accordingly there is no basis for HMRC's decision that FC did not carry out any economic activity save in relation to Huntly.

45. FC say that if as HMRC conceded there was input tax, what else could have happened to the supply other than it being passed to BH. It was intended that FC should operate outside the BH VAT group; that the trade should be project management and related activities; and that the reason for this was to improve input tax recovery which is usual for companies with partial exemptions.

46. FC say that based on the oral evidence of SW and a note of the meeting and the "new documents" which say that FC is the client for the new projects there was economic activity and that it was for onward transmission to the BH VAT group.

47. As a matter of fact the supplies were made to BH, apart from the Huntly property, and both TB and SW were credible and reliable witnesses who were candid about what they knew and did not know, particularly SW in relation to Balhousie Care Group's financial arrangements. FC say that SW was initially a consultant and this enabled him to sign agreements on behalf of the company, a number of which, included in the "new documents", were signed by him prior to his becoming an employee in March 2011. No evidence of any such authority to sign on behalf of FC was submitted in evidence.

48. FC say that SW did work other than on Huntly; that there were three design projects; that there is evidence that FC did contract with external consultants which in turn is consistent with FC providing services to BH who paid for them and inconsistent with HMRC's view that FC did not supply services to BH.

49. FC say that the oral evidence is clear that the St Ronan's and Monkbarns project costs were paid for by FC and that FC charged BH all the costs for these services. There is no need to have been a profit for there to be a supply which can be at cost. FC was the principal. FC supplying services is they say corroborated by all the evidence and FC refer to the accounts to the year 30 April 2012 which although showing no turnover or cost of sales do show an adjustment to work in progress. FC's services provided by contractors, Muirfield Construction, were not paid until the sale and lease back and completed on 8 March 2013, the following accounting year. In those next year's accounts the total turnover £8.6 million as against cost of sales of £8.6 million merely confirms that there was no profit element and that the costs were passed on directly.

50. FC say that in any event the accounts for the 17 months to 30 September 2013 were not available to HMRC at the time of their Review Decision.

51. FC say that during the VAT periods 12/10 to 09/13 inclusive, FC supplied construction services to the BH VAT group in addition to those supplied in relation to Huntly and accordingly the appeals should be allowed and the penalties cancelled.

52. HMRC say that FC was not carrying on a business and that there was not a direct and immediate link to those outputs. FC says that they do not need invoices to make a direct and immediate link of services and all they need is to make a supply and as a matter of fact they did make a supply. Invoices were not given and were not issued between FC and BH because the supplies were zero-rated and it was therefore not necessary.

HMRC's Submissions

53. HMRC say that tax paid on the receipt of goods and services (input tax) can be set off against tax charged on goods and services (output tax) to the extent that the goods and services received are used, or are to be used, for the purposes of a business carried on by the taxpayer. For input tax to be set off in this way there must be a direct and immediate link between the inputs in question and the taxable transactions carried out by a taxable person claiming a right to deduct. Sections 24, 25 and 26 of VATA refer.

54. HMRC referred to the six factors to be considered in deciding whether a particular activity constitutes a business, as set out in *Customs and Excise Commissioners v Lord Fisher* [1981] STC 238. These are whether the activity is a serious undertaking which is earnestly pursued; whether the activity was pursued with reasonable or recognisable continuity; whether the activity has a certain measure of substance; whether the activity was conducted in a regular manner and on sound business principles; whether the activity is predominantly concerned with the making of taxable supplies for a consideration; and whether the taxable supplies are of a kind which are commonly made by those who seek to profit from them.

55. HMRC referred to a Court of Justice of the European Communities VAT case, *BLP Group plc v Commissioners of Customs and Excise*, where the taxpayer sought to deduct input tax on professional fees incurred in relation to the sale of shares. The

court held that the right to deduct tax arose only in respect of goods and services which had a direct and immediate link with the taxable transactions; the ultimate aim pursued by the taxable person was irrelevant.

56. Consequently HMRC say that for FC to succeed they need to show they were carrying on a business; carrying out taxable transactions in the course of that business and that the input tax had a direct and immediate link to those transactions. HMRC say that FC have failed to do so and that the documentary evidence is "not impressive".

57. HMRC say FC have been selective in the documents they have put before the Tribunal in relation to the transactions they say have taken place; there is no evidence from the individuals best placed to explain the FC and BH relationships, being primarily the financial controller, especially given that TB was unclear as to the exact nature of the group structure; that the witness statements are vague and unspecific about the services carried out by FC other than in relation to Huntly; there are no details about specific contractors; no details on payments of inputs or outputs; generally limited information; and very little information on what charges are made in relation to outputs.

58. They say that TB and SW assumed that certain things were done but could not confirm so, and neither knew the terms on which BH made payments to FC. TB said that he relied on professional staff and advisers and yet none were asked to provide evidence. In general the Tribunal and HMRC have not been provided with the best evidence which FC were obliged by law to keep.

59. Importantly no explanation has been given to the Tribunal or HMRC, despite numerous requests by the latter, as to why the documentation cannot be provided. No invoices, or other books and records which FC were obliged to keep, no extensive bank statements and no bank reconciliations had been provided. Amongst the "new documents" some of the offers were made to the "Balhousie Care Group" and not FC. Documentation in relation to the Huntly project was lodged and HMRC question why it was not lodged for the others, other than the fact that FC owned the Huntly property. Similarly the reference to the standard security provided as evidence of the leeway or credit provided by Muirfield Construction was only exhibited in relation to Huntly because that was the only property owned by FC, and FC could not provide standard securities over the other properties.

60. HMRC say that given the Huntly property is not relevant, the documentation provided in relation to it and its relationship with FC and BH is of limited value.

61. HMRC say that FC has not provided adequate evidence that it was making taxable supplies to BH and that FC has not shown that the input tax which it sought to set off was directly linked to taxable supplies which it made in the course of its business.

Decision

62. The Tribunal, based on the evidence before it, did not consider that FC was carrying out a particular activity which constituted a business, (apart from the work on

Huntly, as to which most of the relevant evidence before it related, and which property was owned by FC), in relation to the construction of the other two of the three properties and in relation to repairs, extensions or refurbishments all of which it claimed to have carried out on behalf of BH.

63. There was insufficient evidence that the activity had been earnestly pursued, that it was pursued with reasonable or recognisable continuity, that it had a certain measure of substance; that it was conducted in a regular manner and conducted on sound business principles.

64. The "new documents" submitted on the date of the hearing, before HMRC had had opportunity to consider them, were unconvincing as evidence that the fee proposals and scopes of service related to FC, other than those relating to Huntly. Although the acceptance letters purported to come from FC, the offers were addressed to the Balhousie Care Group or SW of the Balhousie Care Group, and SW's correspondence showed his email address as "Scott.Whittet@balhousiecare.co.uk".

65. The Tribunal considered that whereas there may have been an intention that FC was used as a vehicle in order to recover input VAT incurred on professional fees which would have been heavily restricted if BH or BC or any company within BH's VAT group had sought to recover it; there was no evidence that this intention had been manifested as a matter of fact. The Tribunal concurred with HMRC's view that the documentary evidence was "not impressive".

66. FC could provide no explanation as to why further evidence of the non-Huntly activities which were the subject of the dispute between HMRC and FC could not be provided either to the Tribunal, or to HMRC.

67. FC's accounts for the year ending 30 April 2012 showed no trading turnover and no costs. FC say that the adjustment in work in progress reflects cost but following normal accounting practices those costs should still have been shown in the accounts in the profit and loss account. If as the accounts say the work in progress figure represents "costs incurred by the company in relation to evaluating and progressing new care home facilities on behalf of the group", it was unclear why there was no documentary evidence to back this up, which evidence the independent auditor must have, or should have, seen. The Tribunal did not consider that this submission was credible.

68. FC says that the remuneration of £55,000 received by SW was recovered by being added to invoices to BH. No invoices could be provided and the bank statements were of limited use in providing evidence of this. The Tribunal was provided with no evidence of any recharge or any management or similar charges made by FC to BH. The work on Huntly which was owned by FC was solely for FC, and Huntly was not sold until the building was completed.

69. FC say they are funded through inter-company loans provided by BH or by their invoices being met by BH. No formal loan agreements were shown to the Tribunal and no interest was payable on the loans and no invoices duly "marked up" were

produced. If these loans existed they should also have been shown in the statutory accounts to the year to 30 April 2012. TB had signed these accounts on 27 March 2013 stating that "there is no relevant audit information of which the company's auditor is unaware", and the independent auditor's report stated that TB was responsible for the preparation of the financial statements and for being satisfied that they gave a true and fair view – an opinion endorsed by the auditors.

70. The Tribunal considered that there was no credible evidence that the transactions had taken place and noted that the individuals best placed to explain the FC and BH relationships being primarily the financial controller did not give evidence. There were no details about specific contractors, no details of payments of inputs or outputs and generally limited information. SW clearly worked for FC in relation to Huntly but beyond that the evidence was insufficient. None of the professional firms who submitted fee quotations and scopes of services provided any evidence that they were dealing with FC and the documentation in relation to Huntly was of limited value. The Tribunal did not consider, on the balance of probabilities, that FC had proved that it was making taxable supplies to BH; nor that FC had shown that the input tax which it sought to set off was directly linked to taxable supplies which it made in the course of a business.

71. The Appeal is dismissed.

72. 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.

W RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

RELEASE DATE: 27 MAY 2016

Appendix 1 - Legislation

Value Added Tax Act 1994

Section 24

Input tax and output tax

(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

(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 25

Payment by reference to accounting periods and credit for input tax against output tax

(1) A taxable person shall -

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods, account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

Section 26

Input tax allowable under Section 25

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on

supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business -

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.

Appendix 2 - Cases and Authorities referred to

Customs and Excise Commissioners v Lord Fisher [1981] STC 238

BLP Group plc v Commissioners of Customs and Exercise (Case C-/94) (1995) STC