[2016] UKFTT 0594 (TC)

TC05330

Appeal number: TC/2014/01567

VALUE ADDED TAX – claim to input tax in connection with purchase of cars – whether provisions of art 7(2E) and 7(2G) Value Added Tax (Input Tax) Order met? – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ZONE CONTRACTORS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE AMANDA BROWN
PHILIP JOLLY

Sitting in public at Centre City Tower, 5 – 7 Hill Street, Birmingham, B5 4UU on 26 July 2016.

Mr Vaghela of Vaghela & Co (Services) Ltd, representative for the Appellant

Mr B Sellers, presenting officer of HM Revenue and Customs, for the Respondents.

DECISION

1. This matter concerns an appeal bought by Zone Contractors Limited ("Zone") against a decision of the Commissioners of HM Revenue & Customs ("HMRC") to issue an assessment in the sum of £27151 to recover input tax on the purchase of several cars which had been purchased in periods 11/10, 05/11, 08/12, 11/12 and 02/13. HMRC disallowed the input tax on the basis that, in their view, Zone had failed to provide sufficient evidence to support its assertion that the cars had been purchased with the intention that they were used exclusively for business purposes and were not made available for private use.

Background

2. Zone is a civil engineering contracting business. Its primary activity is the provision of ground works services. It works to large contractors on substantial infrastructure projects preparing the ground for development, particularly road construction.

3. In March and April 2013 HMRC undertook a routine control visit to audit Zone's VAT returns. During the course of that visit HMRC identified that it appeared that Zone had claimed input tax in connection with the purchase of 6 motor cars (motor cars are distinguished from commercial vehicles in that the VAT on commercial vehicles will, subject to the normal rules be recoverable whereas the VAT on motor cars is, as a general rule, not recoverable).

4. HMRC invited Zone to produce evidence to substantiate that the claims to input tax were justified in light of the statutory restriction on recovery of input tax in respect of motor cars available for private use (see paragraph 30 below).

5. Through their representative Zone claimed that the motor cars were intended for use solely for business purposes and that any private use was prohibited. Over time, various documentation was provided to HMRC in support of the assertion that private use was prohibited including the terms of employment pursuant to which all employees were employed and which explicitly included an absolute prohibition of any private use of company vehicles. Zone also claimed that the motor cars were kept either on site or at the company offices overnight and therefore not available for private use. It would be right to acknowledge that the documentation was produced over a period exceeding one year and not, in any regard, in a timeous way.

6. Despite further correspondence HMRC took the view that Zone had failed to evidence that the use of the cars was monitored or controlled in any way with the consequence that Zone were unable to show that they met the statutory condition for recovery of the input tax incurred.

7. On 10 February 2014 HMRC issued assessments in respect of input tax considered to have been over claimed on the supply to Zone of 6 motor cars (taking account of output tax over declared on the sale of two of the motor cars in question).

Evidence and facts

8. The Tribunal were provided with a substantial file of documentation including the witness statements of Mrs Buffery (an officer of HMRC), Mr Newlands (Financial Controller of Zone), Mr Munnerlly (director of Zone) and Mr Allen (director of Zone). All four witnesses also gave oral testimony.

9. The Tribunal found the evidence of Mrs Buffery and Mr Newlands credible and straightforward, it accepts their evidence in full. For the reasons set out below the Tribunal have some concerns regarding the credibility of some of the evidence given by Mr Munnerlly and Mr Allen with the consequence that unless their evidence was corroborated by Mr Newlands their evidence was not taken into account by the Tribunal.

10. Paragraphs 11 – 29 set out the facts found by the Tribunal by reference to the evidence received.

11. Entirely consistent across the testimony of all the Zone witnesses the Tribunal established that Zone undertakes ground works on large infrastructure projects across the country. The 'site' of such projects is generally not confined and may be spread over many miles. Zone involvement in the projects occurred at a phase where the terrain of the site will mean that only construction machinery and 4x4 vehicles will be able to move around the site. The project life for Zone will be of the order of 2 – 3 years per project. The projects are often disparately spread.

12. Zone have two offices, one in Birmingham and one in London. Both the directors and Mr Newlands are based in Birmingham together with a person providing office administration. The directors will spend the majority of their working week attending one of the sites on which their workforce are situated. Their evidence was that they would drive from home to the Birmingham office where the company vehicles were parked over night, they would collect such equipment as was necessary and using one of the 4x4 vehicles (both Toyota Land Cruisers) they would drive to site. The Land Cruisers were necessary to get about the site when they got there and to transport the equipment necessary. The directors referred to using the vehicles to tow trailers or larger pieces of equipment as necessary. When on site the vehicles would be used not just by the directors but also frequently by foremen and supervisors to get about the site.

13. Mr Newland's evidence concerning the storage and use of all of the motor cars (Land Cruisers and the saloon) was that the keys were generally kept in the Birmingham Office. On occasions he understood that the vehicles may be left in London and/or on site. However, when they were in Birmingham on most occasions he would be present when the cars were returned and that the keys would be stored on hooks in the office. Occasionally the vehicles would be returned after he left and on these occasions the keys would just be put through the letterbox. To the best of Mr Newland's knowledge the cars were returned to one of the offices every evening. Mr Newlands was aware that each of the directors owned their own private car and these were used to commute to and from the office. Mr Newlands also confirmed that the

saloon car (it had been a Mercedes and at another time it had been a Volvo) was kept at the Birmingham office. This car was used to travel to meetings with main contractors when those meetings took place at the offices of the main contractor rather than on site.

14. The Tribunal were told that Mr Munnerlly privately drives a 2010 Volvo that he uses to commute to and from the office. The Tribunal were shown the insurance certificate for that car. Mr Munnerlly also has a second Volvo which is his wife's car. The Tribunal finds that Mr and Mrs Munnerlly each have a private car for their own use.

15. The Tribunal were told that Mr Allen had his own private car, a Mercedes, and that his wife too drove a Mercedes. The Tribunal was shown the insurance information for Mrs Allen's car but not Mr Allen's. Nevertheless, the Tribunal finds that Mr and Mrs Allen did each have a private car for their own use.

16. By reference to the evidence of Mr Newlands the Tribunal finds that prior to the visit by HMRC Zone maintained no record of use of any of the vehicles it operates. The only monitoring undertaken by Zone was of fuel claims. The employees would give all fuel receipts to one or other of the directors who would thereby assess what use had been made of the company vehicles (including commercial vehicles). The Tribunal finds that the collection and review of fuel receipts may represent an effective management of cash utilised for fuel but is not an appropriate means of monitoring use of the vehicles per se. The Tribunal understands that Zone now requires all use of any company vehicle to be recorded in a log.

17. By letter dated 24 June 2015 from Zone's representative HMRC were provided with a volume of new material not provided previously to them. Included in this material were mileage logs apparently prepared by each of the directors of covering the period 4 September 2011 to 3 March 2013. Despite instruction not to do so Mr Vaghela led his witnesses regarding these documents. Neither witness was clear as to why they kept the records but were led to the answer that they kept them for income tax purposes. The records show only business mileage. There may be an income tax purpose for maintaining such records so as to mitigate any assertion that there was private mileage which would then have been taxable as a benefit in kind. The Tribunal were not told by either Zone or HMRC what position HMRC had taken vis a vis the documents in connection with the personal taxation of the directors.

18. The Tribunal has some reservations regarding the provenance of the records. Such concepts arise from their late disclosure and each of the directors' inability to talk to the documents in evidence. HMRC undertook limited cross examination regarding the documents. HMRC asked the witnesses why the documents had not been produced earlier given that they purportedly evidenced the use of the vehicles. The witnesses, encouraged by Mr Vaghela, both indicated that as they had been produced for income tax purposes their relevance to the company was not appreciated. HMRC did not explicitly put to the witnesses that the documents were false. From the evidence of Mr Newlands it is clear that he was not aware of the documents until they were produced.

19. The Tribunal has given careful consideration to all the evidence given in relation to these mileage logs. The evidence given was not, in the Tribunal's view, sufficient to conclude that they had been fabricated though they raised concerns regarding the credibility of both Mr Allen and Mr Munnerlly's evidence. The Tribunal determined to ignore the documents in determining the outcome of the appeal.

20. The Tribunal explored with the witnesses what use was made of the directors own cars and the use of the company cars, including how far the directors lived from the Birmingham office. The Tribunal is satisfied that the use made of the company owned vehicles was business use.

21. By reference to the accounts as at 31 March 2011 Zone was a company with a turnover of £7m and employed 155 staff. The Tribunal was told by Mr Newlands that a significant majority of the staff have been with Zone a number of years; he said that that all commuting was done by the directors in their private cars. The Tribunal was also satisfied there was no substantial turnover of staff; however, Zone did employ labourers who worked only on one site and for the period of the contract, these staff often did not move on to another project.

22. The employees are predominantly labourers within the hierarchy one would normal expect for a contracting company i.e. including foremen and supervisors. The company employs a health and safety officer.

23. The Tribunal was told by each one of the Zone witnesses that whenever a new employee joins onto a project one of the directors will attend the project site. Before the employee can undertake any work they are inducted first by Zone and, on the same day, by the main site contractor. During the induction by one of Zone's directors the employee will be required to provide paperwork confirming his identity (passport etc), CSCS and CPCS documentation and will be asked to sign the company's standard employment contract.

24. The Tribunal were provided a copy of the standard employment contract. The contract sets out the employee details, principal statement of terms and conditions of service and a declaration. The principal terms include:

> "**Company vehicles** – the use of Company vehicles is strictly for the purpose of performing the Employers trade or business by the Employee. It is hereby strictly forbidden for the Employee to use the Company vehicle for any personal use inside/outside their employment hours. Any Employee found to be contravening this will be subject to Disciplinary Procedures. The Company vehicle must be returned to the nominated address after use as instructed by the Director"

The declaration provides: "UNDER NO CIRCUMSTANCES MUST I DRIVE, OPERATE/ATTEMPT TO DRIVE OR OPERATE ANY VEHICLE, PLANT OR MACHINERY WITHOUT TRAINING, APPROPRIATE CERTIFICATION AND AUTHORISATION TO DO SO"

25. All of the Zone witnesses said that all employees signed the contract at the commencement of their employment. The Tribunal were informed that it was necessary because of the declaration. Mr Newlands in particular, whose role is to manage the accounts and financial records of the company, stated that to the best of his knowledge and belief every employee signed the contract. This was corroborated by the process for signature which was articulated by all three witnesses.

26. HMRC did not cross examine any of the witnesses about the process of induction nor was it challenged that all employees (including the directors) had signed the contract. In submissions HMRC sought to assert that on the basis that only an unsigned contract had been provided it was in fact the case that the employees did not sign it. Based on HMRC's complete failure to cross examine and put to the Zone witnesses the case it then proposed to make, combined with the open and compete evidence given by Mr Newlands the Tribunal has no evidence other than to conclude that the employees do sign the contract of employment.

27. The Tribunal were provided with a copy of Zone's 2013 insurance renewal report. The Employer's liability insurance is subject to a number of endorsements including Construction Plant Hire Association Conditions and Personal Protective Equipment Conditions. It appears to the Tribunal that the declaration is likely to be relevant to the insurance and lends additional credibility to the fact that the contract will be signed.

28. The 2013 renewal review also makes explicitly clear that the company vehicles are insured for business use and social, domestic and pleasure. The Tribunal were also provided with a letter from Adler Insurance Group addressed to Mr Allen concerning the "Fleet Rated Commercial Motor Policy". It states "I can confirm that Social, Domestic and Pleasure use is standard cover under your fleet policy and as such cannot be removed. Furthermore, there is no premium charged for the cover. The matter can be managed internally by stating within your driver handbook that driving is restricted to business use only". HMRC submitted that this letter concerned the commercial fleet rather than the company car fleet but again did not put that submission to any of the Zone witnesses, nor was it submitted that the answer would have been different had it concerned company cars. The Tribunal finds that social, domestic and pleasure insurance appears to represent base cover to which business use is additional. Of itself it does not therefore indicate anything about the use to which company cars are be put because as confirmed by Adler it cannot be removed from an insurance policy.

29. Finally, it is clear, and the Tribunal understands that it was not disputed, that when Zone disposed of cars in which it had claimed input tax it had declared VAT on the full selling price. Zone had therefore acted entirely consistently with the assertion that the cars were used for business purposes and subject to input tax recovery.

Legislation

30. Section 24 Value Added Taxes Act 1994 ("VATA") provides:

(1) Subject to the following provisions of this section "input tax" in relation to a taxable person, means the following tax, that is to say:

(a) VAT on the supply to him of any goods or services;

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

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

32. So far as is relevant, Article 7 of the Value Added Tax (Input Tax) Order 1992 ("the Order") provides:

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

(2) Paragraph 1 above does not apply where:

(a) the motor car is:

(i) a qualifying motor car

(ii) supplied … to … a taxable person; and

(iii) the relevant condition is satisfied.

…

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

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

Review of relevant case law

33. The Tribunal was referred to 3 principal judgments by the representative for HMRC: *Upton (trading as Fagomatic) v CEC [2001] STC 912, CEC v Robbins [2004] EWHC 3373* and *CEC v Elm Milk Ltd [2006] EWCA Civ 164*. The first two cases were ones in which HMRC had been successful in defending a decision to refuse to allow recovery of input tax in relation to the purchase of cars. *Elm Milk* was determined in favour of the taxpayer. The Court of Appeal in *Elm Milk* however, considered the judgement in Upton at some length.

34. The Tribunal considers that *Elm Milk* provides a comprehensive overview of the approach taken by the courts in relation to cases concerning the recovery of VAT on cars intended to be used for business purposes.

35. It serves to rehearse the case at some length.

36. In short the salient facts of the case were:

(1) The taxpayer was a private single family owned company of which there was one director. The company had three business areas: landlord of farm properties, consultant to the dairy industry and consultant to the leisure industry. Immediately prior to the purchase of a car for the use of the director the company passed a resolution noting the intention to purchase the car, that it was intended to be used solely for business purposes and that any private use would be a breach of the employee's terms of employment. The tribunal in that case had accepted the evidence of the witness that he intended to be bound by the resolution.

(2) The insurance policy was for social, domestic, pleasure and business use and had been issued in the name of the director, his wife and other members of the family.

(3) The car was kept overnight near the company's premises but these were situated only 50 yards from the directors home. The keys were however kept in the office. The director had access to the keys at all times.

37. Arden LJ gave the leading judgment. She prefaces her judgement with three observations on the provisions of Article 7 of the Order:

(1) The provision is convoluted with Parliament's starting point being an exclusion from the general rule of deductibility followed by an exception to the exclusion and then a further exception to the exception.

(2) The exception in Article 7(2E) is based around intention to use the car and not the use itself. It was noted that the relationship between actual use and intended use may lie in the corroboration of the stated intention.

(3) The exception to the exception in Article 7(2G) is also based on intention but differentiating it from 7(2E) this intention is that of making the car available for use.

38. On the facts the tribunal had found in the taxpayer's favour and that judgment was upheld by the High Court. The Judge had determined that the physical circumstances of where the car was kept did not mean that the company intended to make it available for private use. The tribunal had considered that the board resolution was genuine and the judge considered it had been properly taken into account. The Court considered that there was a clear difference between a sole trader and an employee/employer situation with employment restrictions regarding the use of the car being relevant. The Court had framed the test as "The important point was not whether it was possible to imagine any exceptional circumstances in which the car

might be used for private purposes. The question was whether when the employer purchased the car he intended to make it available for private use".

39. HMRC's appeal to the Court of Appeal in that case was heavily focused on the Court of Appeal judgment in *Upton* (as was the present appeal). Arden LJ recited excerpts of the *Upton* judgment. At para 21 Peter Gibson LJ had stated "The fact that a car is available or is made available to a person for private use subsequent to the acquisition is not determinative. However, that fact may be highly relevant to an inference that the taxable person has the intention to make the car available to himself for private use."

40. Arden LJ also referred to the distinction drawn by Buxton LJ between intention to use and intention to make available; an intention to use for business purposes was not considered to be the same as an intention not to make the car available for private use. Both intentions must be separately established in order for the VAT to be recoverable as input tax.

41. Paragraphs 35 – 41 set out Arden LJ's principal reasons for rejecting HMRC's appeal:

> [35] A purposive approach was to be adopted to the interpretation of Article 7 to ensure that the provision achieved what the legislature intended.
>
> [36] The scheme of Article 7 is to exclude the right to deduct VAT on cars, subject to the exception in 7(2E) and the exception to the exception in 7(2G). In this regard "The taxpayer has a high threshold to cross if he wishes to bring himself within the first exception and then within the exception to the exception". The taxpayer must show "not that he does not intend to use the car for private use but it is not his intention even to make it available for private use". By reference to the structure of the legislation Arden LJ regarded Parliamentary intention as the exception rather than the rule and something "subject to rigorous scrutiny and the satisfaction of tough conditions."
>
> [37] Careful scrutiny is required of cases of deduction where there is a close connection between the user of the car and the taxpayer, and relief is to be restricted where it can be demonstrated to be wholly justified. However, on consideration of "availability" Arden LJ noted: "… if 'available' meant only 'physically available' there would undoubtedly be fewer cases where VAT paid on the purchase of a car could be deducted, that itself is not the object of the provision. The object is to prevent claims to deduct tax on cars purchased for business use save where the possibility of private use is excluded. That purpose can equally well be achieved if the concept of availability is not restricted to physical availability but includes also cases of unavailability due to the imposition of legal restraints".
>
> [38] Unavailability for private use could be achieved by appropriate contractual restrictions.

[39] "Parliament has not in art 7(2G) said that to show there is no intention to make a car available for private use the taxpayer has to show that it is not physically so available. Parliament has neither that any particular circumstance constitutes making "available", nor has it excluded any evidence from the determination of whether a car is or is not made available. It is therefore, a question of fact for the tribunal as to whether in all the circumstances the taxpayer intended not to make the car available for private use by whatever means. There is no thus reason why a car cannot be made unavailable for private use by suitable contractual restraints, that is effective restraints".

[40] Based on the facts of the case as found by the tribunal the prohibition contained in the resolution together with the arrangements for the location of the keys were sufficient to meet the requirements of Article 7. This was so despite the ability of the director to alter the resolution.

[41] The terms of the insurance "did not mean that an intention not to make the car available for private use could not be shown".

Parties' submissions

42. The Appellants submissions were made without reference to the relevant case law and were simply that they intended to use the cars for business purposes and, by reference to the employment contracts, mileage logs, and the fact that the directors have other cars, the cars were not made or made available for private use.

43. HMRC submitted that the case which represented the most appropriate comparator was *Upton*. It was contended that *Elm Milk* presented very different circumstances to the present case because of the resolution and the other measures taken by the business to prevent private use. It was contended that Zone had no equivalent to the board resolution. As set out above HMRC contended that there was no evidence that the employees had signed or were bound by the employment contract with the consequence that there was no legal restriction on the availability of the cars. Absent mileage logs or some other adequate enforcement and monitoring of use the Tribunal were invited to conclude that there was no intention to prevent the making available for private use.

44. It was HMRC's contention that in order to remove the private use the owner must take effective steps to exclude the private use and there must be some way to control and ensure that prevention is enforced. HMRC also articulated the scope of private use to examples such as stopping at a shop to buy cigarettes or lunch. They contended that the terms of the administrative procedures adopted by Zone, rendered the terms of the contract unenforceable and therefore irrelevant for the purposes of determining input tax recovery.

Evaluation

45. The Tribunal is acutely aware, following the Court of Appeal guidance in *Elm Milk*, that the intention of Parliament in enacting the convoluted provisions of Article 7 was to restrict the recovery of input tax in connection with cars to a situation where

the taxpayer both intended to use the car for business purposes ***and*** intended that the cars not be made available for private use. In essence a positive intent (to use for business purposes) backed by a negative intent (to prevent private use). As indicated by the Court of Appeal however, in order for the exception to have any application at all it must be the case that the exception and the exception to the exception cannot be so onerous to achieve in terms of the evidence that HMRC will accept that it becomes virtually impossible or excessively difficult to comply.

46. That said the Tribunal also recognises that for a taxpayer meeting the requirements is a high threshold the evidence for which should be subject to rigorous scrutiny.

47. All of the Zone witnesses asserted both the necessary positive and negative intent. The challenge for the Tribunal is to assess the evidence in light of the approach set out in *Elm Milk.*

48. Critical to the decision of the Tribunal in this case is the terms of the employment contract. The Tribunal considers that the terms of the contract are explicit and binding. Pursuant to the clause set out in paragraph 24 above employees are prohibited from using company vehicles for private purposes, they are told they will be subject to disciplinary procedures. The clause also requires that the cars be delivered at the end of the day to an address nominated by the directors.

49. All of the Zone witnesses stated that all members of staff signed the contract terms. Both directors confirmed that they were subject to the same terms and conditions. That evidence was not challenged by HMRC. Whilst the Tribunals has some concerns regarding the mileage logs and thereby the credibility of the evidence of the directors there were no such concerns about the evidence of Mr Newlands. Mr Newlands evidence was that he had signed to contract and that as far as he was aware so had all other members of staff. Absent any challenge or evidence to contradict that clear statement the Tribunal must accept it. The Tribunal therefore finds that the staff of Zone were subject to a legal restriction on the private use of any company vehicle. The contractual restriction also required the vehicles to be parked overnight by reference to the instruction of the directors.

50. As to the evidence of where the cars were parked overnight. The cars in question were over time Land Cruisers, a Volvo and two Mercedes. Mr Allen privately owns a Mercedes; Mr Munnerlly privately owns a Volvo (and his wife has a newer model). Both of their private cars of are of the same specification as the saloon cars which Zone owned. The Tribunal finds that there was no need for either director to use the saloon cars for private purposes

51. The Land Cruisers served a specific purpose of giving access to otherwise inaccessible infrastructure construction sites. The Land Cruisers were stated to be used by the directors and by staff on site. The vehicles were used to tow and transport equipment and to drive around all terrain sites. They clearly had a business purpose

52. It was stated that all the cars were, by and large returned to either the London or the Birmingham office overnight where the keys were stored. Alternatively they were on site. Mr Newlands gave evidence that he frequently stored the keys and that he also put away keys that had been put through the letterbox. The Tribunal finds that the cars were intended to be stored overnight such that they were not available for the most common form of private use – travel to and from work. Overnight storage in this way would have prevented, in a logistical sense, the making available for the cars for such private use.

53. HMRC's case was that unless a taxpayer maintains mileage logs to evidence that there is, as a matter of ex post fact, no actual private use recovery of input tax recovery is not possible. By reference to the analysis in *Elm Milk* that simply is not an accurate reflection of the case law. Absent some legal restriction on use, and where a taxpayer relies only on the physical restrictions to use, it may be the case that mileage logs are either the best form of evidence or potentially even critical. However, the Court of Appeal has made clear that legal restrictions are sufficient, particularly if supported by physical restrictions, such as requiring the cars to be stored overnight at company premises.

54. Over the period from 2013 through to the hearing of the tribunal HMRC insisted that mileage logs or some other means of monitoring use were the only means of securing input tax recovery in accordance with Article 7. The correspondence makes plain that this is what the guidance requires and therefore that is the evidence that must be produced. Every piece of correspondence requires production of this narrow set of documentation if input tax is to be recoverable. In light of *Elm Milk* such insistence is, in the Tribunal's view incorrect in cases where there is evidence of a legal restriction. In such a case it may well be necessary to probe and test whether the taxpayer can and does enforce the legal restriction. However, in the present case HMRC did not do so save to insist on the production of mileage logs.

55. As indicated above in paragraph 17, eventually in 2015 after 2 years of HMRC insisting that mileage logs were the only evidence acceptable to support an input tax claim, mileage logs appeared. HMRC did not cross examine effectively in connection with these logs and the evidence of the directors was consistent. Mr Newlands however, had been completely unaware of them. Had the Tribunal concluded that the mileage logs were crucial to evidencing the necessary restrictions it would have had concerns regarding the delay in their production, the stated private decision taken by the directors to use the same format of log from diaries that were not produced. However, the Tribunal takes the view that contemporaneous mileage logs will always represent substantive evidence to support a claim but they are not the only evidence which can do so and on that basis the Tribunal determined to entirely ignore the logs produced.

56. As regards private use, the Tribunal cannot accept HMRC's assertion that private use would include buying cigarettes or lunch whilst out on a business journey, or even going off site to collect lunch. Such use must be entirely de minimis such as to conclude that it is non-business use at all. Further if the legislation rendered it a requirement that if such use were to be both prevented, enforced and monitored it

would render the ability to recover one which was entirely hollow as no entity could comply. That such a conclusion is a reasonable one to draw is, in the Tribunal's view implicit in the drafting of the legislation and in the articulation of its purpose. The legislation requires that it not be the intention of the taxpayer to make the cars available for private use. It is an intention which, certainly in the case of an emergency, and periodically otherwise, may not be one that is fulfilled so long as there is some form of enforcement, legal or physical, to the breach or abuse of such an intention.

57. HMRC relied upon the insurance cover and asserted that the documents prevented recovery. With respect the Tribunal rejects any reliance on the insurance documentation. It is not clear whether the letter from Adler concerned the cars or not. It seems perfectly possible that the commercial fleet included the cars, certainly the 2013 Cobra review of renewal covered all vehicles. Further, as the director in *Elm Milk* established when contacting his insurance company the answer was the same. Social, domestic and pleasure is the lowest level of insurance cover for cars. Business use is in addition to social, domestic and pleasure. It does not appear possible to have a policy limited to business cover. To require it as evidence of a real intention to limit private use would be to render it impossible to comply with. The tribunal and subsequent courts in *Elm Milk* did not consider it a factor preventing recovery of input tax and neither does this Tribunal.

58. HMRC submitted that the facts of the present appeal were entirely different to those in *Elm Milk*. With respect the tribunal finds to the contrary:

Elm Milk	Zone
Board resolution of a family company with sole director	No such resolution
No contract of employment for the director	Contracts of employment for all staff restricting private use
Office where car stored overnight and home 50 yards apart	Directors living some distance away from the office where cars were stored over night
No evidence of an alternative car	Both directors had alternative transport for commuting and private use
Insurance for private use and in the name of director and his family	Private use insurance for company employees only.

59. On the basis of the above comparison the facts as presented to the Tribunal, following the full tribunal procedure for challenge of evidence, it appears to the Tribunal that, if anything, the facts of the present case are stronger than those in *Elm Milk*.

60. For the reasons set out in paragraphs 45-59 the Tribunal allows the appeal and concludes that Zone was entitled to the input tax it sought to recover and that the assessments raised on 10 February 2014 £27,151.00 together with interest and penalties be withdrawn.

61. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 17 AUGUST 2016