



TC05415

Appeal number: TC/2016/01310

VAT – entitlement to credit for input tax on motorcar – Article 7 of VAT (Input Tax) Order 1992 (SI 1992/3222) considered – whether intention to make car available for private use – physical or legal restraint as to private use – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**IRELAND GENERATOR AND SPARE
PARTS LTD**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: PATRICIA GORDON**

Sitting in public at The Royal Courts of Justice, Belfast on 7 October 2016

Dr Maurice Laverty of DML Accountants, for the Appellant

Ms Deborah Williams, Officer of HMRC, for the Respondents

DECISION

1. This was an appeal in respect of a disputed decision dated 15 February 2016
5 whereby HMRC disallowed input tax in relation to the purchase of a motor vehicle
(an electric car) (“the car”) in the VAT period 10/15 in the amount of £2,424.16.
That decision was predicated on the basis that the car was available for private use.

Preliminary matters

2. On 21 June 2016, the Tribunal intimated to Dr Laverty that there had been no
10 compliance with Directions and that had been due by 10 June 2016. No list of
documents was provided prior to the hearing. At the beginning of the hearing
Dr Laverty sought to lodge in process a bundle of documents including a corporation
tax return. None had been intimated to HMRC. The only document of any relevance
took the form of what amounted to a submission and which offered new information.
15 I had due regard to Judge Mosedale’s observations in *Masstech Corporation Limited
(In Administration) v HMRC*¹ and I annex at Appendix 1 a copy of the relevant extract
from that decision. The submission was admitted.

3. I explained to Dr Laverty the limitations of the Tribunal’s jurisdiction and, in
particular, that the Tribunal would not be considering HMRC’s conduct of the enquiry
20 prior to the disputed decision being issued.

Legislation

4. Special rules apply to the treatment of input tax on the supplies of cars. The
rules are contained in Article 7 of VAT (Input Tax) Order 1992 SI 1992/3222 (“the
Input Tax Order”). The general rule is that VAT charged on a supply of a car to a
25 taxable person is excluded from credit under Section 25 Value Added Tax Act 1994
(“VATA”). There are, however, a number of exceptions to the general rule in
Article 7. Paragraph 2(a) of Article 7 provides that the VAT is not excluded from
credit where the car is

- (i) a qualifying motor car;
- 30 (ii) supply to a taxable person; and
- (iii) the relevant conditions is satisfied.

5. For the purposes of this appeal, it suffices to say that this was a qualifying
motor car and that the appellant was and is a taxable person.

6. The relevant condition is defined in Article 7(2E) of the Input Tax Order as
35 follows:

“(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 by the

¹ [2011] UKFTT 649

- (i) Exclusively for the purposes of a business carried on by him, but this is subject to paragraph (2G) below; or
...”.

7. Article 7(2)(G) of the Order states that:-

5 “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—

...

10 (b) make it available (other than by letting it on hire) to any person (including, the taxable person as an individual himself, or where the taxable person is a partnership, a partner) for private use, whether or not for a consideration.”

8. The effect of Article 7 of the Input Tax Order is that a taxable person who acquires a car with the intention of using it exclusively for the purposes of the business is entitled to credit for input tax incurred on the car. If, at the time of acquisition, a person intends to make the car available for private use then, whether or not it is so used or intended to be so used, the mere fact of its availability for private use means that it cannot be regarded as intended for use exclusively for the purposes of a business. This provision has been considered in a number of cases.

The authorities

9. HMRC relied on *Customs & Excise Commissioners v Upton (t/a Fagomatic)*² (“Upton”), *Customs & Excise Commissioners v Elm Milk Limited*³ (“Elm Milk”), *Customs & Excise Commissioners v Robins*⁴ and *Customs & Excise Commissioners v Skellett (t/a Vidcom Computer Services)*⁵.

10. Dr Lavery referred us to *Cape Brandy Syndicate v CIR*⁶ which is an uncontroversial case which predates VAT and is of no direct relevance.

25 The evidence

11. HMRC’s decision is wholly unsurprising since the appellants representative had written to HMRC on 7 January 0216 stating:-

30 “The Logans Complex, where Ireland Generator and Spare Parts is registered, has no secure parking facilities and has (*sic*) there have been numerous burglaries around this area with the A26 duelling works that are currently under way. It is for this reason Mr McClafferty parked the vehicle at his **residential address** over the Christmas period.”

² 2002 EWCA (Civ) 520, 2002 STC640

³ 2005 STC 776

⁴ 2004 EWCA 3373 (CH)

⁵ 2004 STC 2001

⁶ 1921 12 TC 358

12. We have highlighted the words “residential address” since HMRC took from that that the director, Mr McClafferty, drove the car to and from home. That would undeniably be private use. The Notice of Appeal, which also was written by the representative, stated *inter alia* “explanations were given as to why Mr McClafferty (Director) kept the car at his residence for safekeeping over Christmas holiday. ... Mr McClafferty does have the keys of the car at all this other people use it (*sic*)”.

13. Mr McClafferty gave evidence which was both clear and credible. Mr McClafferty’s home address is in Ballycastle where he has lived for the last three years. The car has never been kept at that address.

14. The keys for the car are kept at the business premises. It was never intended that the car be used for anything other than business use.

15. The business premises are at Logans Complex and there is no secure parking there. The business closed down over the Christmas period and Mr McClafferty had serious concerns about the safety of the vehicle and parked the car at 203 Glenshesk Road, Armoy. That had been his family home where he had grown up and is in a poor state of repair. It comprises a filling station, shop and a house. The car was only at those premises over the Christmas period and both before and after that period it was kept at Logans Complex.

16. Mr McClafferty drove the car on two occasions over the Christmas period. In each case he drove his own car to Armoy, picked up the vehicle and drove it to the office. There is a charging facility for the vehicle at the office. He went in to the office to check mails etc. He then drove the vehicle back to Armoy in order to keep it safe and secure. There are no charging facilities there. He considered that since it was winter the vehicle did need to be driven over the Christmas period in order to keep it in good condition. That is a wholly understandable opinion.

Discussion

17. The intention that the vehicle would not be used for business purposes only is quite clear and we accepted Mr McClafferty’s evidence. The real issue however is the question of whether or not, in terms of the legislation, the appellant had made the car “available for use”. In *Upton*, Buxton LJ stated at paragraphs 28 and 29 as follows:-

“28. The first issue is, therefore what the draftsman meant by ‘make available for use’. That is an ordinary English expression, deliberately different from ‘use’ itself. An object can be available for use without there being any present intention of actually using it just as, for instance, a person can be available for, say, military service without there being any intention that he should serve or be asked to serve.

29. The question has to be decided as at the moment of acquisition of the car. On the facts of the present case, I see no escape from the conclusion that the car was at that moment, as a matter of fact, available for Mr Upton’s private use, however little he then had an intention of actually so using it. He had sole control over the car. It was not to be disabled or in any other way put beyond use: quite the reverse, since the whole purpose of buying it was so that it could be used, albeit in the business and not privately. A further way of testing this point, if it needs further exposition would be to ask whether the car was available for Mr Upton’s use, generally stated. That question answers itself.”

18. Neuberger J (as he then was) developed the concept of availability and held as follows:-

“40. ... what does the provision mean when it refers to an intention to make a motor car available to a person other than the taxpayer for private use? ...

5 41. If an article is supplied by one person to another with no physical or legal restraint as to a particular use, then it appears to me that, as a matter of ordinary language, the article has been ‘made available’ for that use. The fact that neither the supplier nor the recipient expects, or even intends, the article to be put to the particular use does not prevent the article being ‘available’ for that use, if there is no physical or legal restraint on such use by the recipient.
10 Further, it cannot be said, at any rate as a matter of ordinary language that the supplier does not ‘make’ the article available for that use, simply because he does not expect or intend it to be put to that use. If he supplies the article so that it is, as a matter of fact, available for a particular use, then he has, in normal practice, made it available for that use.”

15 19. This seems to be exactly the position in this case. Mr McClafferty never intended the car to be available for private use but there were no measures put in place to ensure that he or any other employee could not utilise it for private use.

20. In *Elm Milk* Arden LJ made it clear at paragraph 39 that it is possible to ensure that a car is not available for private use and states:-

20 “There is thus no reason why a car cannot be made unavailable for private use by suitable contractual restraints, that is effective restraints.”

25 21. We accept that Mr McClafferty acted in good faith in what he did and was not aware of the relatively complicated law in this area. However, it is a long established principle in our law that ignorance of the law is no excuse. In any event HMRC have produced various publications giving guidance and VIT52100 makes it absolutely explicit that

“most other businesses apart from dealers and manufacturers, will need to show:

- Exclusive business use;
- Non-availability for private use.”

30 22. In summary in order for the input tax on a private vehicle to be claimed it must meet very strict conditions and even if the appellant could establish exclusive private use, and in this case there are no records, the appellant is wholly unable to establish that there were physical or legal restraints such that the car was not available for private use. In other words the appellant cannot show that the car was out of the reach of anyone who could potentially undertake a private journey.

35 23. For all these reasons, the appeal is dismissed.

40 24. 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.

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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 17 OCTOBER 2016

Extract from Judge Mosedal’s analysis on the admission of evidence in
Masstech Corporation Limited (In Administration) v HMRC

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“8 The conclusions I draw from these cases and from general considerations of fair hearings are as follows:

- Only relevant evidence should be admitted;
- 10 • Such evidence should nevertheless be excluded where there is a compelling reason to do so;
- Whether there is a compelling reason to do so will be a balancing exercise the object of which is to achieve a trial that reaches the correct decision by a process fair to all parties;
- 15 • To conduct that balancing exercise the Tribunal must consider the likely probative value of the evidence, any unfair prejudice caused to either party, good case management and any other relevant factor;
- Unfair prejudice includes the factors listed by Lord Bingham which were particularly relevant in that case but in this case, not being a trial by jury, perhaps of less relevance. Unfair prejudice would include a party being ambushed so that it is strategically
- 20 disadvantaged or put in a position that it has no time to bring evidence in rebuttal;
- Considerations of good case management will include the need for a sanction against a party which adduces late evidence particularly where the evidence could have been produced earlier; it will recognise the desirability of adhering to trial dates and avoiding unnecessary costs.”

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