TC01915

Appeal number: TC/2010/01350

VAT – entitlement to credit for input tax on motor cars – article 7 of VAT (Input Tax) Order 1992 (SI 1992/3222) considered – whether intention to make car available for private use – intention to use car primarily for self-drive hire – evidence of entitlement to input tax where documents contradictory or missing - 2007 statement of practice on input tax deduction without valid invoice - jurisdiction of Tribunal to review HMRC's exercise of discretion whether to accept alternative evidence of entitlement to input tax deduction - misdeclaration penalty - appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

SEAN COLLINS (TRADING AS UNIQUE VEHICLES) **Appellant**

- and -

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

TRIBUNAL: JUDGE GREG SINFIELD
MRS S SADEQUE

Sitting in public at 45 Bedford Square, London on 27 February 2012

Mr Muthupandi Ganesan, Counsel, instructed by Harding Mitchell for the Appellant

Mr David Yates, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This appeal concerns whether or not Mr Collins, who carried on a self-drive car hire business and a chauffeuring business, was entitled to credit for input tax on six motor cars. If he was not so entitled then the question of whether or not he is liable to a misdeclaration penalty under section 63 VAT Act 1994 ("VATA94") also arises.

2. Mr Collins was a sole trader trading under the name Unique Vehicles and registered for VAT. The appeal concerns input tax claimed by Mr Collins as follows:

(1) £8,025 in relation to a Mercedes with registration number LF55 YNC ("the Mercedes") in the return for the period 11/05;

(2) £25,200 in relation to a Lamborghini with registration number RX56 AXK ("the Lamborghini") in the return for the period 02/07; and

(3) £23,306 in relation to four cars with registration numbers K6 MLM, KY05 XHO, KW54 YST and KROJ GYY ("the Finance Agreement Cars") in the return for the period 11/05.

3. HMRC took the view that Mr Collins was not entitled to credit for the input tax for the cars. In relation to the Mercedes, HMRC considered that the car was not used by Mr Collins exclusively for the purposes of his business. In the case of the Lamborghini and the Finance Agreement Cars, HMRC questioned whether Mr Collins had the evidence to show that he had paid for the cars and that they were qualifying cars as defined in Article 7 of the VAT (Input Tax) Order 1992 SI 1992/3222 ("the Input Tax Order") so as to permit recovery of input tax on the cars. HMRC issued assessments notified by letters dated 20 March 2008 and 2 June 2008 to recover the amounts claimed by Mr Collins. HMRC also assessed Mr Collins for misdeclaration penalties of £3,780 in relation to the input tax on the Lamborghini and £4,699 in relation to the input tax on the Finance Agreement Cars.

4. In a Notice of Appeal dated 20 January 2010, Mr Collins claimed that the disputed input VAT was correctly claimed for the following reasons:

(1) the Mercedes LF55 YNC was purchased solely for business;

(2) the Lamborghini had been purchased from Euromicro Limited ("Euromicro") and he had paid VAT; and

(3) the purchase invoices in relation to the Finance Agreement Cars had been made out in the name of Mr Collins and he had paid the instalments to the finance companies and, accordingly, the cars were supplied to him.

The Tribunal granted Mr Collins leave to appeal out of time on 19 April 2010.

Legislation

5. Special rules apply to the treatment of input tax on supplies of cars. The rules are contained in Article 7 VAT (Input Tax) Order 1992 SI 1992/3222 ("the Input Tax Order"). The general rule is that VAT charged on a supply (including a letting on hire) of a car to a taxable person is excluded from credit under section 25 VATA94. 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;

(ii) supplied to a taxable person; and

(iii) the relevant condition is satisfied.

6. For the purposes of this appeal, it is sufficient to say that a qualifying motor car is one on which VAT is properly chargeable when the car is supplied. Mr Collins was registered for VAT at all relevant times and so was a taxable person.

7. The relevant condition is defined in Article 7(2E) of the Input Tax Order as 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 either
>
> (a) exclusively for the purposes of a business carried on by him, but this is subject to paragraph (2G) below; or
>
> (b) primarily for a relevant purpose."

8. Article 7(2F) states that relevant purpose in paragraph (2E)(b) includes providing the car for self-drive hire. Self-drive hire is defined in Article 7(3)(b) as

> "… hire where the hirer is the person normally expected to drive the motor car and the period of hire to each hirer, together with the period of hire of any other motor car expected to be hired to him by the taxable person-
>
> (i) will normally be less than 30 consecutive days; and
>
> (ii) will normally be less than 90 days in any period of 12 months."

9. Article 7(2G) provides that:

> "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 (otherwise than by letting it on hire) to any person (including, where the taxable person is an individual, himself …) for private use, whether or not for a consideration."

10. 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 a business carried on by him is entitled to credit for input tax incurred on the car. If 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 but it is only necessary to refer to two.

11. The case of *Customs and Excise Comrs v Upton (t/a Fagomatic)* [2002] EWCA (Civ) 520, [2002] STC 640 concerned a taxable person who was a sole trader and who acquired a car purely for business use. Mr Upton carried on business as a cigarette vending machine operator. His vending machines were installed in nightclubs in London. In 1998 for the purpose of impressing his customers and staying ahead of his competitors, he bought a Lamborghini motor car. When the car was insured, Mr Upton made enquiries as to whether it could be insured for business use only but was told by his agent that all insurance policies covered private use without charge. He conducted his business seven days a week from 8am until midnight or later. When the car was not in use it was parked in a car park. Mr Upton owned no other car for private use but did not need one. He did not use the car for shopping or for social occasions. He claimed the VAT paid on the purchase of the car. Customs & Excise disallowed the claim. Mr Upton appealed to the tribunal which allowed his appeal. HMRC appealed to the High Court which allowed their appeal. Mr Upton appealed to the Court of Appeal which dismissed his appeal.

12. Peter Gibson LJ gave the first judgment and held as follows:-

"21. It is plain that the test for the disqualifying condition of para (2G)(b) is of intention at the time of acquisition. 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. I do not think that the Vice-Chancellor can fairly be criticised as having addressed the fact of the car's availability to Mr Upton for private use rather than his intention to make it so available. On the contrary he makes it clear that the issue is as to the nature of what is intended and that he had to consider whether, given that the car was available for private use, the taxable person intended to make it so.

22. I own to having been troubled at one time that the Vice-Chancellor was construing the language of para (2G)(b) by rewriting the words 'if he intends to ... make it available... to any person... for private use' so as, to mean 'unless he intends to ... take positive steps to make it unavailable... to any person... for private use', and that either such a construction was limited to the case of the individual taxable person intending to make the car available to himself for

personal use, in which case the same words had a different meaning in their application to other taxable persons and other circumstances, or the rewriting applied to all taxable persons, in which case it was hard to justify the rewriting in circumstances other than where the individual taxable person was intending to make the car available to himself for personal use. However, I am persuaded by Mr Paines that the Vice-Chancellor was not attempting any such rewriting nor was he giving a different meaning to the words of para (2G) in differing circumstances. Rather the Vice-Chancellor was recognising that in the case of an individual taxable person who acquires a car there is a particular difficulty in the way of that person if he is to escape from the disqualifying condition that 'he intends to ... make it available... to ... himself... for private use'. The very fact of his deliberate acquisition of the car whereby he makes himself the owner of the car and controller of it means that at least ordinarily he must intend to make it available to himself for private use, even if he never intends to use it privately."

13. Buxton LJ dealt with the issue 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 use, 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. And Mr Upton did not restrict the general nature of that that availability by deciding that he would only use the car for one of the two purposes for which at the time of purchase, it became available."

14. Neuberger J (as he then was) held as follows:

"40. Ignoring, for the moment, the unusual concept of a person making his own property available to himself, what does the provision mean when it refers to an intention to make motor car available to a person other than the taxpayer for private use? In this connection, it is important to bear in mind, as Mr Paines QC, for the commissioners, says, that art 7(2G)(b) does not refer to an intention that the motor car be put to the use in question: the intention must be to make it available for that use. The difference between the two concepts appears to me to be emphasised by the contrast with art 7(2E) which requires the taxpayer to show that he 'intends to use' the motor car exclusively for business purposes.

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. 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. Neuberger J was aware of the particular difficulties that the provision, as interpreted by him, would cause sole traders. He observed at [48] that:

"A point that gives pause for further thought is that the consequence of this conclusion may be to render it very difficult for a sole trader, who acquires a motor car exclusively for his business, thereby satisfying art 7(2E)(b), to avoid falling foul of art 7(2G)(b)"

but concluded that the difficulties for sole traders could not justify a different conclusion.

16. The case of *Customs and Excise Commissioners v Elm Milk Limited* [2006] EWCA (Civ) 164, [2006] STC 792 concerned whether input tax incurred on a car purchased by a company for business use by its director was recoverable. The minutes of the board meeting to ratify the purchase of the car stated that it was to be bought with the intention that it should be used for business purposes only by the director, the company did not intend to make the car available for private use, and any private use would be a breach of an employee's terms of employment. The issue was the meaning of available. Arden LJ held at [39] that:

"In my judgment, Parliament has not in art 7(2G) said that to show that 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 said that any particular circumstance constitutes making a car "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."

17. No doubt it was in anticipation of the difficulties that the restrictive meaning of "exclusively for the purposes of a business carried on by him" would cause a sole trader carrying on a self-drive hire business that led the draftsman to relax the rule in such cases. In the case of a car acquired by a taxable person who intends to use it

primarily for self-drive hire, input tax is deductible even where there is some private use, although there would be an output tax charge on the private use element.

18. Even if the input tax is not excluded from credit by the Input Tax Order, a taxable person can only claim the credit if the general conditions for claiming input tax are met. In order to claim credit for input tax, the following conditions (derived from sections 24-26 VATA94 and Regulation 29 Value Added Tax Regulations 1995 SI 1995/2518 ("the VAT Regulations")) must be met, namely:

> (1) there must have been a supply of goods or services on which VAT was chargeable;
>
> (2) the supply must have been made to the person claiming the credit;
>
> (3) the supplies to which the input tax relates must be attributable to supplies made by the claimant in the course of business which carry a right to deduction eg taxable supplies; and
>
> (4) the claimant must hold satisfactory documentary evidence of his entitlement to input tax credit.

19. Section 24(6)(a) VATA94 states that regulations may provide

> "for VAT on a supply of goods or services to a taxable person … to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases".

Regulation 29(2) VAT Regulations 1995 provides that, at the time of claiming deduction of input tax on a supply from another taxable person, the claimant must hold a VAT invoice or such other evidence as HMRC may direct generally or in particular cases.

20. HMRC have not issued any direction in relation to alternative evidence of entitlement to input tax credit but they issued a statement of practice in March 2007 on input tax deduction without a valid VAT invoice. The statement of practice states that where a supply has taken place, but the invoice to support it is invalid, HMRC may exercise their discretion and allow a claim for input tax credit. Paragraph 19 of the statement of practice states that as long as the claimant can provide satisfactory answers to the questions in Appendix 2 to the statement and to any additional questions that may be asked, input tax deduction will be permitted. Appendix 2 contains the following questions:

> 1. Do you have alternative documentary evidence other than an invoice (e.g. supplier statement)?
>
> 2. Do you have evidence of receipt of a taxable supply on which VAT has been charged?
>
> 3. Do you have evidence of payment?

4. Do you have evidence of how the goods/services have been consumed within your business or their onward supply?

5. How did you know that the supplier existed?

6. How was your relationship with the supplier established? For example:

- How was contact made?
- Do you know where the supplier operates from (have you been there)?
- How do you contact them?
- How do you know they can supply the goods or services?
- If goods, how do you know the goods are not stolen?
- How do you return faulty supplies?

The statement of practice states that the list of questions is not exhaustive and others may be asked in individual circumstances.

21. The issue of the jurisdiction of the First-tier Tribunal in relation to the exercise by HMRC of the discretion under regulation 29 to accept alternative evidence of entitlement to input tax credit has been considered recently by the Upper Tribunal in *Best Buy Supplies Limited v HMRC* [2011] UKUT 497 (TCC). The Upper Tribunal set out the position as follows:

> "48. In *Kohanzad v Customs and Excise Commissioners* [1994] STC 967, Schiemann J said at page 969 that the effect of regulations 12(1) and 62(1) and (1A) of the Value Added Tax (General) Regulations 1985 was that prima facie a taxable person is not entitled to input tax credit unless he holds a tax invoice but that,
>
> > "the Commissioners have a discretion to allow credit for input tax notwithstanding that the registered person does not hold such a tax invoice."
>
> The wording of those provisions was similar to that of regulation 13(1) and regulation 29(2) of the 1995 Regulations. Schiemann J went on to say that when considering a case where the Commissioners have a discretion the Tribunal exercises a supervisory jurisdiction.
>
> 49. Although the jurisdiction of the FTT was appellate since the appeal was against a decision as to the amount of input tax to be credited within section 83(c) and an assessment within section 83(p), it was common ground that the jurisdiction in respect of the decision of the Commissioners under regulation 29(2) not to allow the input tax which was not covered by valid invoices was supervisory in that the FTT could not substitute its own decision but could only

decide whether the discretion had been exercised reasonably. The burden of proof was on the Appellant to satisfy the FTT that the decision was incorrect, see *Kohanzad* [1994] STC 967 at 969. The FTT had no power to substitute its own decision as to the exercise of the discretion, nor did it have power, as in section 16(4)(b) of the Finance Act 1994, to direct the Commissioners to review the original decision.

50. If the appeal had involved issues which did not depend on the exercise of the Commissioners' discretion, the FTT would have had a full appellate jurisdiction. Since the appeal was solely in relation to the exercise of the discretion the FTT could only allow or dismiss the appeal.

51. In *John Dee* [1995] STC 967, which concerned an appeal against a requirement for security, the tribunal concluded that the Commissioners had acted unreasonably in failing to have regard to the possibility of seeking relevant financial information before imposing the requirement but found that it was "most likely" that the decision would have been the same. The Court of Appeal decided that the correct test was whether "the decision would inevitably have been the same" and dismissed the appeal by the Commissioners against the decision of Turner J in favour of the company.

52. We are unable to accept the submission by Mr Brown [for the appellant] that the jurisdiction in the present case is supervisory whereas that in *John Dee* was appellate so that in the present case the Appellant must succeed since the decision to disallow the invoices was not taken reasonably.

53. In the present case the jurisdiction of the FTT arose under section 83 which provided that an appeal shall lie to the Tribunal. The reference in *Kohanzad* to exercising "a supervisory jurisdiction" is shorthand for the fact that the Tribunal cannot substitute its own discretion for that of the Commissioners but can only consider whether the discretion was exercised reasonably; the opening words of the judgment in *Kohanzad* were "This is an appeal."

54. Apart from the labelling used in *John Dee* and *Kohanzad* Mr Brown did not advance any reason why the principle in *John Dee* should not apply in the present case.

55. In *John Dee* Neill LJ said at page 952h,

> "the function and powers of a tribunal in each case will depend in large measure on the nature of the decision appealed against and of course on any special statutory provisions."

Mr Brown did not make any submissions as to why on an appeal involving regulation 29(2) the FTT should not have power to dismiss an appeal where the decision would inevitably have been the same if there had been no unreasonableness. In our judgment there is no logical reason for distinguishing the Tribunal's powers in this appeal from those considered in *John Dee*."

Background

22. Mr Collins produced a witness statement and gave evidence on oath at the hearing. Mr Andy Pavaday of HMRC did likewise. Both parties also produced bundles of documents. From the evidence presented to us, we find the relevant facts to be as follows.

23. Mr Collins began trading as Unique Vehicles Car Hire in 2002. The business provided chauffeur driven luxury cars and, later, high performance cars for self-drive hire. Mr Collins was registered for VAT as a sole trader from 1 October 2002. At that time Mr Collins was operating from his home address but by the end of 2005 he had acquired premises in Kings Road, London SW1 from which the business operated. At that time Mr Collins was advised to establish two companies to carry on the business and he set up Unique Vehicles Chauffeuring Services Limited and Unique Vehicles Performance Car Hire Limited.

24. Ms Kelly D'Silva of HMRC visited Mr Collins at his business premises on 7 February 2008. Following the visit, Ms D'Silva stated, in a letter dated 19 February 2008, that Mr Collins had advised her during the visit that the Mercedes was his personal car and was not used for business purposes. The letter drew Mr Collins' attention to the block on recovery of input tax on cars unless they are intended to be used exclusively for business purposes or primarily for self-drive hire. Ms D'Silva said that, unless Mr Collins could produce evidence to the contrary, she would raise an assessment for the £8,025 input tax claimed in relation to the Mercedes in the VAT return for the quarter 11/05. The letter also raised questions about £25,200 input tax in relation to the Lamborghini claimed in the VAT return for the quarter 02/07. The letter pointed out that the lease document in relation to the Lamborghini from Liberty Leasing Plc did not show any VAT but only a net amount of £162,000. Ms D'Silva said that Mr Collins had not declared any output tax in relation to the Lamborghini and the input tax claimed would be disallowed. The letter also asked for purchase documents to support £4,468 input tax claimed in the VAT return for the quarter 11/05 in relation to car K6 MLM (one of the Finance Agreement Cars). By letter dated 20 March 2008, Ms D'Silva assessed Mr Collins for £33,225 (ie £8,025 plus £25,200).

25. On 22 May 2008, Ms D'Silva and Mr Pavaday visited Mr Collins at his business premises. Both officers made notes. In evidence, Mr Pavaday said that he made the notes of his conversation with Mr Collins not at the time of the meeting but sometime later that day. He confirmed that Mr Collins did not see the notes and was not offered the chance to comment on the notes or sign them.

The Mercedes

26. The documents produced in the appeal in relation to the Mercedes include a receipt from Mercedes Benz Tooting dated 12 July 2005 for a deposit of £2,000 in relation to a Mercedes SLK 55. The receipt was in the name of Mr Collins and a payment slip shows that Mr Collins paid the deposit with his Mastercard. An invoice from Mercedes Benz Tooting to Black Horse Finance Limited shows that the

Mercedes was supplied to the finance company and was to be delivered to Mr Collins on 1 September 2005. A hire purchase agreement with Black Horse Limited dated 30 August 2005 shows that Mr Collins acquired the Mercedes and paid VAT of £8,025.13.

27. The officers' notes show that, during the visit of 22 May 2008, Mr Collins told the officers that the Mercedes was personal but had been hired out on two occasions. Mr Collins also said that a previous HMRC officer had allowed the input tax on the car. Mr Collins denied telling the officers that the car was for his personal use. He said that one of the officers asked him which car did he use to come into the office on that day and he had said the Mercedes. Mr Collins said that the Mercedes was the cheapest car in the business and, consequently, was the one most frequently rented by customers. It was also, therefore, the cheapest to take home. In evidence, Mr Collins acknowledged that he took the Mercedes home if it was available. He said that every time he drove the car home it would have magnetic panels advertising the business on it and so he was always using the car for business. The magnetic panels can be taken off when a customer wishes to hire the car. Mr Collins acknowledged that there was no physical or legal restraint on private use by him of the Mercedes. He said that the same could be said about all the other cars that he took home. Mr Collins said that such a restraint would be impossible in his kind of business as he would often have to take cars home in order to ensure they could be delivered to customers or a garage for repair the following day.

28. Mr Collins did not remember the actual conversation on 22nd May 2008 but, according to the notes, the officers asked him when the car was hired out and Mr Collins said that the car had been hired out perhaps twice that week or that month. When asked where the evidence was that the Mercedes had been rented more often than any other car in the business, Mr Collins said that he did not have it. Mr Collins said that the documents had been seized in 2007 as part of a criminal investigation into an offence of which he was subsequently cleared. He thought that some of the files had probably been lost. Mr Collins said that he had all the documents when other HMRC officers had visited him in June 2006 and the officers had seen all the documents then.

29. Mr Collins produced four documents relating to the hiring out of the Mercedes in 2006, namely:

(1) An agreement, with an indistinct date, showing that the car had been hired by Mr Roman Kouznetsov from 26 February 2006 to 3 March 2006 at £300 per day;

(2) An agreement dated 1 March 2006 showing that the car had been hired by Mr Mehdi Al Hassani from 1 March to 6 March 2006 at £300 per day;

(3) A further agreement with Mr Mehdi Al Hassani dated 7 March 2006 showing that he had hired the car from 7 March to 11 March 2006; and

(4) An invoice dated 11 March 2006 showing that car had been hired by Mr Mehdi Al Hassani for 10 days from 1 March at £300 per day plus VAT.

When asked why the agreement dated 1 March appeared to show the car had been hired to Mr Al Hassani when it was still on hire to Mr Kouznetsov, Mr Collins said that the first hirer could have returned the car early.

30. In evidence, Mr Pavaday pointed out that the invoice was in the name of Unique Vehicle Performance Car Hire Limited and showed that company's VAT number although the company was not incorporated until 14 August 2006 and not VAT registered until later that year. When this was put to him in cross examination, Mr Collins agreed that the VAT number and company did not exist at the time of the original invoice. He said that he had printed the invoice for his lawyer at the beginning of the proceedings and he had printed it out on headed letter paper of Unique Vehicles Performance Car Hire Limited. The information in the invoice was on the computer but not the original document as printed on headed paper. He said that he had probably kept the original of the invoice as he would have sent it to the client but that he did not have that document now. Mr Pavaday said that Mr Collins could only demonstrate that the Mercedes had been hired twice and he did not accept that personal use of the car by Mr Collins was incidental.

The Lamborghini

31. Ms Kelly's notes recorded and Mr Pavaday gave evidence that Mr Collins had stated on 22 May 2008 that he had not paid Euromicro for the Lamborghini but had paid the car owner who was not registered for VAT. Mr Pavaday acknowledged in cross-examination that the conversation with Mr Collins about paying the owner of the Lamborghini was not in his notes.

32. In correspondence following the assessments and at the hearing, Mr Collins submitted that he had purchased the Lamborghini from Euromicro and had paid VAT. Mr Collins said that he would never know the owner of the cars that he bought until the time when he saw their name in the logbook after the deal had been done. He always bought these cars through a broker because they were able to locate exotic cars and often obtained them when they were not generally available. Mr Collins explained that, in the case of the Lamborghini, he had paid a deposit and Liberty Finance Plc would have paid the rest of the purchase price. Mr Collins said that he had only dealt with Euromicro on the one occasion when he purchased the Lamborghini. He said that Euromicro is a dealer in luxury items. If someone wanted to buy a diamond or a house then Euromicro would be able to obtain these items for them. Mr Collins said that he had met Euromicro at a Lamborghini event and they had given him their card. He said that he decided to use Euromicro to purchase the Lamborghini because they were the fastest to respond to a request he sent to a number of brokers for such a car.

33. In his evidence, Mr Pavaday said that he had made enquiries in relation to Euromicro with other HMRC officers who had visited the company's premises. The officers confirmed that Euromicro existed and was engaged in the clothing trade. It did not have a history of car dealership. Mr Collins accepted the Euro Micro was not a car company but said that they were a luxury goods company and he had checked

the company number and that it existed at Companies House when he first dealt with them.

34. The documents produced in the appeal relating to the Lamborghini included a Lease Purchase Agreement between Liberty Leasing Plc and Sean Collins T/A Unique Vehicles dated 6 December 2006. The agreement showed that the Lamborghini had been first registered on 1 October 2006. Under the heading "Cash Price of Goods", the agreement stated the Net as £162,000, the VAT as "£0:00" and the Gross as £162,000. The agreement provided for a payment £45,684 on before 6 December 2006 and monthly rentals of £2,847 commencing on 6 January 2007. In relation to the Liberty Finance Plc Lease Purchase Agreement, Mr Collins acknowledged that it stated there was no VAT. Mr Collins said he always went by the invoice from the people he had bought cars from. Mr Collins said that his accountant had never asked him for any invoices addressed to him from the finance companies. Mr Collins said that his accountant had only ever asked him for invoices from the manufacturer or seller to be used to claim VAT on his VAT returns. He did not accept that he would expect to receive an invoice to be from the finance company.

35. Mr Collins also produced a purchase order dated 15 January 2007 from Unique Vehicles Performance Car Hire Limited to St Augustine New Avenham Centre for a 2006 Lamborghini Gallardo. Mr Collins initially said in evidence that the purchase order did not relate to the Lamborghini RX56 AXK which was the subject of the appeal as it was a purchase order to a different broker from whom he used to buy cars and related to a different Lamborghini. When it was pointed out that the address of Euromicro on its invoice dated 15 January 2007 for the Lamborghini was St Augustine New Avenham Centre, Mr Collins acknowledged that the purchase order was, indeed, the purchase order for the Lamborghini RX56 AXK. The Euromicro invoice was addressed to Sean Collins, Unique Vehicles Performance Car Hire and showed that delivery was not due until 15 February 2007. The invoice showed that the price of the car was £144,000 plus £25,200 VAT. Mr Collins said that he paid a deposit of £7200 to Euro Micro and this accounted for the difference between the amount shown on the Liberty Finance Plc Lease Purchase Agreement and the amount on the Euromicro invoice. No deposit is mentioned on the purchase order or the invoice. Mr Collins accepted in his witness statement that the purchase order and invoice were in the name of the company but stated that it was an error and the company did not claim the VAT. The input tax was claimed by Mr Collins in his VAT return.

36. Mr Collins produced evidence of the hiring of the Lamborghini by a Mr Richard Vedelago. The evidence consisted of a certificate of insurance from AIG providing insurance cover for Mr Vedelago to drive the Lamborghini from 7 December 2006 to 5 November 2007. In addition, there were four documents, each described as a Short Term Rental Agreement/Invoice, addressed to Mr Vedelago and providing for the car to be hired to him for the following periods:

29 November 2006 to 28 February 2007

9 March 2007 to 31 May 2007

1 June 2007 to 31 August 2007

31 August 2007 to 30 November 2007.

37. The Agreement/Invoices all show that Mr Vedelago paid a rent of £3,500 per month but the first three show the word "VAT" (and no figure) written where the amount should go whereas the last shows "INCL" written in the VAT box. The commencement of hiring is shown as 29 November 2006 which was before the vehicle had been purchased or delivered.

38. Mr Collins said that the first agreement was actually a form of receipt for the deposit of £40,000 for the car which was paid by Mr Vedelago. Mr Collins said that he had been advised that every three months he must renew the rental agreement and that is why the first agreement showed the date due back as 28 February 2007. The car was not delivered to Mr Vedelago until 15 February 2007. These were rolling agreements. In fact, the car never came back to the office and Mr Collins or one of his employees would go to Mr Vedelago's home to check the car and to obtain a signature on a new agreement for the following three months. Mr Collins acknowledged that Mr Vedelago's insurance started on 7 December 2006, over 2 months before, according to Mr Collins, the car was delivered to him. Mr Collins did not explain why the deposit was paid on 29 November 2006 if the car was not to be made available to Mr Vedelago until 15 February 2007.

The Finance Agreement Cars

39. Following the visit on 22 May 2008, HMRC assessed Mr Collins for £23,308 input tax in respect of the Finance Agreement Cars on the basis the cars had not been supplied to him. HMRC took this view because the finance agreements for those cars were not solely in Mr Collins' name and Mr Collins did not hold any VAT invoices addressed to him relating to the Finance Agreement Cars. In correspondence following the assessments and at the hearing, Mr Collins submitted that the persons (Mr Muradi and Mr Seintham) shown on the finance agreements for the Finance Agreement Cars were drivers that worked for him who had agreed to take on the finance when the credit companies would no longer extend credit to Mr Collins. Mr Collins said that, in 2005, he landed a contract with a private jet company and he was looking to expand his fleet of cars but could not obtain credit to finance any more vehicle purchases. Two of his drivers decided that they would take out finance to enable him to purchase more cars. Mr Collins said that he paid the amounts including the VAT to the finance companies.

40. The documents relating to the Finance Agreement Cars before the Tribunal were as follows:

> (1) An invoice dated 14 November 2005 from M. B. Direct Kingston on Thames to Black Horse Limited in relation to a Mercedes Benz registration number K6 MLM. The invoice shows that VAT of £4,468.08 was chargeable. It also shows that the car was to be delivered to Mr Khalid Muradi and Mr Collins at different addresses.

(2) An invoice dated 14 November 2005 from M. B. Direct Kingston on Thames to Daimler Chrysler Financial Services UK Limited in relation to a Mercedes Benz registration number KY05 XHO. The invoice shows that VAT of £4,095.60 was chargeable. It also shows that the car was to be delivered to Mr R Seintham and Mr Collins at different addresses.

(3) In relation to a Mercedes Benz registration number KW54 YST, three invoices from M. B. Direct Kingston on Thames to Capital Bank. The invoices are identical in all respects save that one is dated 30 November 2005, one is dated 15 December 2005 and the other is dated 31 December 2005. The invoices show that VAT of £7,893.62 was chargeable. They also show that the car was to be delivered to Mr R Seintham and Mr Collins at Mr Collins' address.

(4) An invoice dated 14 November 2005 from M. B. Direct Kingston on Thames to Daimler Chrysler Financial Services UK Limited in relation to a Mercedes Benz registration number KR05 GYY. The invoice shows that VAT of £6,850.91 was chargeable. It also shows that the car was to be delivered to Mr R Seintham and Mr Collins at different addresses.

(5) A Short Term Rental Agreement/Invoice shows that car registration number KW54 YST was hired by Sangaran Balasundaram of Worcester Park, Surrey between 31 March 2006 and 31 March 2007.

(6) Another Short Term Rental Agreement/Invoice shows that Sangaran Balasundaram of a different address hired car registration number KR05 GYY between 4 April 2006 and 4 April 2007

41. Mr Collins said that he had made a claim for £60,000 input tax on a previous occasion and HMRC had visited and wanted to see the cars. These cars included the Finance Agreement Cars. The HMRC officer said he was very happy about the chauffeur driven cars but wanted to know how many days the self-drive cars had been rented out. He looked at all the files and accepted what Mr Collins had said about hiring out the cars and went away happy. Mr Collins said he received a cheque from HMRC for the £60,000 refund within the next couple of days. In his evidence, Mr Pavaday confirmed that Mr Collins had been visited by an HMRC officer in 2006 and that input tax had been disallowed in relation to two vehicles but had been allowed in relation to a further four vehicles. Mr Pavaday said that he could not be sure whether any of the four vehicles were the subject of the appeal.

Discussion

42. In relation to the Mercedes, there was no dispute that Mr Collins had bought the car and had paid VAT. Mr Collins was only entitled to claim credit for the input tax if, at the time he acquired the Mercedes, he intended to use the car exclusively for the purposes of his business or, alternatively, intended to use the car primarily for self-drive hire. As Peter Gibson LJ observed in *Upton* at [21] quoted above, it is the intention at the time of acquisition that matters. The fact that a car is made available to a person for private use or is so used after its acquisition is not determinative but that fact may be highly relevant in deciding what the taxable person's intention was at the time of acquisition.

43. On behalf of Mr Collins, it was submitted that Mr Collins used the Mercedes exclusively for business purposes and any other use was incidental. In his evidence, Mr Collins acknowledged that there was no physical or legal restraint to prevent him using the Mercedes for private purposes. The passages from *Upton* and *Elm Milk* quoted above make it clear that if there is no physical or legal restraint on private use then a car is made available for such use when it is provided to a person even where there is no intention to use the car for private purposes.

44. In this case, however, there is evidence that Mr Collins actually used the Mercedes for private purposes in that he said in evidence that he took the Mercedes home if it was available. This was consistent with Mr Collins telling the officers that the Mercedes was his personal car and we accept the HMRC evidence that he did so tell them. Although Mr Collins said that he sometimes had to take the Mercedes home in order to deliver it to a customer early the following day, the only examples of the Mercedes being rented out showed that it was taken out between 9:15 am and 11:30 am. There was no evidence to suggest that Mr Collins only took the car home in order to deliver it to a customer the following day and we conclude that, if it happened at all, it was the exception rather than the rule. Mr Collins also stated in evidence that when he drove the car other than for delivery to a customer, it had removable magnetic panels advertising the Unique Vehicles business stuck on it. The fact that the car had the magnetic panels stuck on it does not mean that the use of the car was exclusively for business purposes. In travelling between the business premises and his home or elsewhere, Mr Collins was using the car for private purposes. It was not submitted that Mr Collins had changed his intention in relation to the Mercedes at some point after he had acquired it and there was no evidence of any such change. Accordingly, we conclude that Mr Collins intended to make the Mercedes available to himself for private use when he acquired it.

45. The fact that the Mercedes was made available for private use does not prevent recovery of the input tax if, at the time it was purchased, the Mercedes had been intended for use primarily for self-drive hire. There is no contemporaneous evidence of the intended use of the Mercedes at the time it was purchased. Mr Collins said in evidence that the Mercedes was hired more often than any other car in the business. If the Mercedes had been the most frequently hired car then we would have expected Mr Collins to be able to produce more examples of it being hired out than three invoices all relating to a combined period of two weeks in February and March 2006. Mr Collins bears the burden of proving that, when he bought it, he intended to use the Mercedes primarily for self-drive hire. On the basis of the lack of evidence of regular hiring to customers and in view of the fact that the car (whether with or without magnetic logos) was used by Mr Collins for personal use when available, we find on the balance of probabilities that the Mercedes was not intended for use primarily for self-drive hire when it was acquired by Mr Collins. It follows that the input tax incurred on the Mercedes is excluded from credit by Article 7 of the Input Tax Order.

46. In relation to the Lamborghini, Mr Collins is only entitled to credit for the input tax if VAT was chargeable on the supply of the car to him. Regulation 29 of the VAT Regulations provides that Mr Collins should hold a VAT invoice or other evidence of his entitlement to input tax credit when claiming deduction of such tax. It is not

disputed that the Euromicro invoice was addressed to the company, Unique Vehicles Performance Car Hire rather than to Mr Collins but HMRC do not take the point that the Lamborghini was supplied to the company rather than to Mr Collins. HMRC say that Mr Collins has not established that any VAT was charged in relation to the Lamborghini.

47. The documents produced by Mr Collins in relation to the Lamborghini are contradictory. The Lease Purchase Agreement with Liberty Finance Plc dated 6 December 2006 is addressed, correctly, to Sean Collins t/a Unique Vehicles and clearly shows VAT as "£0:00" under the heading Cash Price of Goods. If it had meant to indicate that the price for the car was inclusive of VAT then we would have expected the VAT box to show "INCL" or be left blank rather than show "£0:00" VAT.

48. The invoice from Euromicro shows VAT but has different net and gross amounts to the Lease Purchase Agreement. Mr Collins sought to explain the differences by reference to a deposit which he paid to Euromicro. No deposit is mentioned on the Euromicro purchase order or invoice. We would have expected a deposit to have been mentioned on the invoice if it had been paid.

49. The insurance certificate for Mr Vedelago in relation to the Lamborghini provides cover from 7 December 2006 which is one day after the date of the Lease Purchase Agreement but over a month before the invoice from Euromicro and two months before Euromicro was due to deliver it. We consider that it is very unlikely that Mr Vedelago would pay for insurance cover for the Lamborghini two months before he was able to drive it. The commencement date of the insurance cover is consistent with the Lamborghini being supplied to Mr Collins before 7 December 2006 which supports the date of supply being the commencement date of the Lease Purchase Agreement ie 6 December 2006. In turn, the insurance certificate and the Lease Purchase Agreement contradict the date of delivery (15 February 2007) shown on the Euromicro invoice.

50. Having considered the contradictory nature of the documents, we have reached the conclusion that the Euromicro invoice is not genuine and the Lease Purchase Agreement is to be preferred. On the basis of the Lease Purchase Agreement, we find that the Lamborghini was supplied to Mr Collins and that no VAT was charged. Accordingly, Mr Collins has no entitlement to credit for the amount shown as VAT on the Euromicro invoice.

51. Finally, in relation to the Finance Agreement Cars, Mr Collins did not hold VAT invoices addressed to him in relation to the cars. He produced invoices issued by the sellers to the finance companies and it is clear that the finance companies were entitled to claim credit for the input tax shown on those invoices. Regulation 29(2) VAT Regulations provides that Mr Collins must hold VAT invoices addressed to him at the time of claiming input tax unless HMRC accept other evidence of his entitlement to input tax credit.

52. In *Kohanzad*, Scheimann J said at p969 that when considering a case where HMRC have a discretion it was established that the jurisdiction of the tribunal was a supervisory one, in which it determines whether HMRC exercised their discretion in a defensible manner on the basis of materials available to them at the time they considered the exercise of their discretion. As a result, in relation to the question of the exercise of the discretion under Regulation 29, we can allow Mr Collins's appeal only if we conclude that HMRC took into consideration irrelevant factors, failed to take into account relevant factors, made a material error of law, or exercised their discretion in a way in which no reasonable body of commissioners would have done based on materials available to them at the time.

53. HMRC did not dispute that the cars existed and that VAT had been properly charged on them by the seller (M. B. Direct Kingston on Thames) to the finance companies. HMRC did not dispute that the cars were used by Mr Collins in his business. The issue for the Tribunal is have HMRC acted reasonably in not accepting documents provided by Mr Collins (ie the invoices to the finance companies showing delivery of the vehicles to Mr Muradi or Mr Seintham together with Mr Collins) as alternative evidence? The burden of proof lies on Mr Collins to satisfy the tribunal that HMRC's decision was incorrect. The test to be applied is whether HMRC have given no weight or insufficient weight to the relevant considerations.

54. There is no evidence that, at the visit on 22 May 2008 or afterwards, HMRC ever considered the 2007 statement of practice on input tax deduction without a valid invoice. Certainly, the letter of 2 June 2008 does not refer to it or ask any of the questions that are set out in Appendix 2 to the statement of practice. It appears from the evidence in relation to the Finance Agreement Cars, that Mr Collins can answer all of the questions set out in Appendix 2. He has alternative documentary evidence in the form of invoices from the sellers to the finance companies which show that VAT was charged by the sellers and the cars were to be delivered to Mr Collins and Mr Muradi or Mr Seintham as recipients of the cars. The finance companies are all well-known companies that Mr Collins used to finance the purchase of other cars. It is inconceivable that the Finance Companies would not have charged VAT on the onward supply of cars. Mr Collins has not produced any evidence of payment by him in relation to the cars but it is, again, inconceivable that the finance companies would not have required payment. There is no dispute that the Finance Agreement Cars were used by Mr Collins in his business. Paragraph 19 of the statement of practice on input tax deduction without a valid VAT invoice says that as long as the taxable person can provide satisfactory answers to the questions in Appendix 2, and any other questions that might be asked, then input tax deduction will be permitted. In our view, the failure to consider whether there was alternative evidence of entitlement to input tax deduction was a serious error by HMRC. As is clear from *Best Buy Supplies*, the Tribunal has no power to direct HMRC how to exercise their discretion whether or not to accept alternative evidence of entitlement to input tax deduction or to make its own its own decision on the evidence. The Tribunal can only allow or dismiss the appeal. We could dismiss the appeal on this point if, notwithstanding HMRC's failure to consider whether there was any alternative evidence, we are satisfied that, had they done so, the decision would inevitably have been the same. We are not so satisfied. It appears to us that there is a very real possibility that the

evidence available would have satisfied HMRC that Mr Collins was entitled to deduct input tax on the Finance Agreement cars. Accordingly, we allow the appeal in relation to the Finance Agreement Cars.

55. In relation to the misdeclaration penalties, the liability stands or falls with the question of input tax deduction as Mr Collins has never put forward any grounds that could provide a reasonable excuse. We accept that Mr Collins has been through a very difficult period since 2007, including a criminal investigation in relation to money laundering of which he was eventually acquitted. Without deciding whether or not they could constitute a reasonable excuse, these difficulties post-dated the claims that are the subject of the appeal and cannot operate as an excuse in this case. In view of our conclusion in relation to the Lamborghini, the misdeclaration penalty of £3,780 is upheld. The misdeclaration penalty of £4,699 in relation to the input tax on the Finance Agreement Cars falls away with the assessment in relation to the input tax on those cars.

Additional claims

56. In his witness statement dated 23 February 2012, Mr Collins stated that he wished to appeal to the Tribunal in relation to two additional claims for input tax which were disallowed by HMRC in December 2006. Mr Collins had claimed input tax of £46,170.22 on an Aston Martin and a Ferrari. In a letter dated 6 December 2006, HMRC stated that the two invoices relied on by Mr Collins were issued by a broker, Lariab, which had not supplied the cars to him. HMRC took the view that the cars had been supplied by their previous owners to Mr Collins and there was no way of knowing whether or not they were qualifying cars on which VAT was properly chargeable. The HMRC letter offered Mr Collins the opportunity to request a reconsideration or to appeal to the VAT and Duties Tribunal. The time limit for appealing was 30 days from the date of the letter ie by 5 January 2007. Mr Collins did not request a reconsideration or make any appeal. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provide that an appeal made after the time limit for appealing has expired must not be admitted unless the Tribunal gives permission for the appeal to be made after that period. Such permission should be requested in the notice of appeal which should set out the reason why the notice of appeal was not provided in time. The witness statement made for the purposes of the present appeal is not a notice of appeal and, further, it contained no explanation why Mr Collins delayed challenging the denial of his claim in 2006 until 2012. A delay of more than five years cannot be excused other than in the most exceptional circumstances and no such circumstances were put forward in this case. Permission to appeal against the disallowance of input tax of £46,170.22 is refused.

Decision

57. In summary, our decision is that the appeal in relation to the input tax on the Mercedes and the Lamborghini is dismissed. The appeal in relation to the input tax on the Finance Agreement Cars is allowed. As to the misdeclaration penalties, the appeal is dismissed in relation to the £3,780 penalty and allowed in relation to the £4,699 penalty.

Costs

58. As this case had not been allocated as a Complex case, the Tribunal does not have any power to make an order in respect of costs under Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 except for wasted costs or where a party has acted unreasonably. As the exceptions do not apply, we can make no order for costs.

Right to apply for permission to appeal

59. 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.

Greg Sinfield

TRIBUNAL JUDGE

RELEASE DATE: 27 March 2012