[2021] UKFTT 163 (TC)

TC08132

VAT – Assessments for overpaid input tax reclaims – HMRC argued that input tax had been incurred on goods of which there was no onward taxable supply – Appellant relied on HMRC guidance in relation to gifts – held that there was no direct and immediate link between the purchase and any onward taxable supply in the course of business or economic activity – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/05855

BETWEEN

THE DOOR SPECIALIST LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
MICHAEL BELL

The hearing took place on 10 May 2021. With the consent of the parties, the form of the hearing was a remote video hearing on the Tribunal video platform. A face to face hearing was not held because on the ongoing restrictions resulting from the COVID-19 pandemic. The documents to which we were referred are described in the decision notice.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Rhys Thomas, TM Sterling, for the Appellant

Gordon Hume, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Door Specialist Limited ("TDS") appealed against assessments totalling £80,096 which had been raised by HMRC to recover VAT which had been claimed as input tax and paid to TDS for the periods 5/15 to 5/17 and 11/17. TDS had claimed the recovery of input tax incurred on the purchase of doors and advertising costs. HMRC concluded that that these amounts were not recoverable as they were not used by the business in the making of onward taxable supplies.

2. At the hearing Mr Thomas explained that TDS no longer disputed the amounts assessed which related to amounts claimed as input tax incurred on advertising costs. The appeal only related to that part of the assessments which related to amounts claimed by TDS as input tax on the purchase of doors. It was agreed by Mr Hume that HMRC had sufficient information to distinguish between these amounts and the Tribunal stated that, if necessary, the Tribunal would make a decision in principle and the parties could agree quantum separately.

3. For the reasons set out below, we have dismissed the appeal. The VAT incurred by TDS on purchasing doors is not recoverable input tax as the doors were not used for the purpose of any economic activity or business carried on by TDS.

PRELIMINARY MATTERS

4. By the time of the hearing there were three matters which the Tribunal wished to address with the parties:

   (1) whether permission should be given for the making of a late appeal to the Tribunal;

   (2) an explanation of TDS's grounds of appeal, given the absence of a skeleton argument; and

   (3) whether to accept late evidence sought to be admitted on behalf of TDS.

5. In considering these matters we had regard to The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") and in particular to the overriding objective in rule 2 thereof.

Late appeal

6. HMRC had issued the assessments under appeal to TDS on 1 February 2019, following a review of assessments initially issued by HMRC and their cancellation in the light of the reviewing officer's conclusions. TDS did not notify its appeal to the Tribunal until 2 September 2019. The appeal to the Tribunal was therefore six months late.

7. The Notice of Appeal includes a question "Is the appeal in time?" to which the answer supplied by TDS was "I am not sure." The Notice does go on to set out some information under "Reasons for late appeal" if the appeal were to be considered late, referring to the time taken to obtain copies of correspondence from HMRC.

8. In their statement of case ("SOC") dated 10 January 2020 and in their skeleton argument dated 19 April 2021 HMRC confirmed that "given the circumstances" HMRC had no objection to the appeal being heard late. There was no further explanation as to what such circumstances were or were considered to be. In any event, whether to give permission for an appellant to appeal out of time is a matter at the discretion of the Tribunal.

9. The approach to be taken by this Tribunal in considering whether to give permission for a late appeal was set out by the Upper Tribunal in *Martland v HMRC* [2018] UT 0178 (TCC), and that involves considering the length of the delay, the reasons for the delay and all the circumstances (including prejudice to the parties).

10. The Tribunal does not understand how TDS, given that it had appointed a representative to act for it, who they referred to as a "specialist" can have not known that the appeal was by this time six months late. No good reason has been provided for the delay – it is apparent from the correspondence that TW Sterling sought copies of the correspondence from HMRC (but we consider that they could equally have obtained this from their client or their client's former adviser who had referred the matter to TW Sterling) and in any event the paucity of information in the grounds of appeal indicate that this could have been put together with minimal paperwork to hand.

11. However, the Tribunal concluded that it ought to admit the appeal, and this was primarily for the reasons that:

(1) Fischer Crowne, TDS' accountants, had first appealed to HMRC on 28 February 2019. This was the incorrect approach to take, as an appeal should have been made to the Tribunal or a review sought from HMRC, and prompted HMRC to seek clarification of TDS' position from Fischer Crowne. In addition, TW Sterling were then in touch with HMRC in June 2019 about obtaining copies of the correspondence to date. This meant that HMRC were aware from the end of February that TDS would be seeking to appeal to the Tribunal and the matter was not closed.

(2) The Tribunal did not draw the lateness of the appeal to TDS' attention ahead of the hearing, for example by informing TDS that it needed permission to make a late appeal and that such application would be heard alongside the substantive appeal. The notice of hearing referred only to the substantive appeal against the VAT assessments. We concluded that it would be unfair on TDS, notwithstanding that it was the party which had not complied with the statutory time limits, to require it, on the day of the hearing to make an application for permission (which may well have required different evidence to be available to explain the lateness).

12. We considered that these matters, alongside the lack of objection from HMRC, outweighed the importance of ensuring that statutory time-limits are respected.

Absence of skeleton argument

13. The Tribunal's directions of 9 November 2020 required the parties to provide an outline of their case no later than 21 days before the hearing. HMRC had complied with this direction. By the time of the hearing we still did not have a copy of a skeleton argument from TDS.

14. Mr Thomas explained he had not been aware of the requirement. This was not a good reason. The Tribunal directions had been sent to him in November 2020; and we considered that the need to do something should have been prompted by the service by HMRC of its skeleton argument on 19 April 2021 and the reference by HMRC to the lack of the skeleton argument in an e-mail when HMRC served the authorities bundle on 26 April 2021.

15. This non-compliance with Tribunal directions was particularly notable given that TDS had previously failed to comply with Tribunal directions to provide copies of material they wished to include in the hearing bundle. TDS had provided their list of documents to HMRC but did not provide the documents themselves – HMRC requested copies on 11 June 2020 but did not receive a reply, HMRC drew attention to the lack of these documents on 4 December 2020 when providing listing information to the Tribunal (applying for the direction requiring them to serve a bundle be suspended whilst they awaited receipt), one consequence of which ultimately became that on 30 March 2021 Judge Popplewell directed that TDS would not be able to rely on any witness evidence in this appeal.

16. The lack of a skeleton argument is unhelpful for the Tribunal and prejudicial to HMRC, as HMRC is at risk of not knowing the case which it is required to meet. This risk did then

materialise, as explained under Issues below, as the argument advanced by Mr Thomas was not one that had previously been put forward to HMRC. We deal with the new argument and its admissibility below, but we decided that we should be flexible and hear from Mr Thomas. We considered it would not be in the interests of justice to postpone the hearing to enable such a skeleton to be provided and were mindful of the fact that other breaches (relating to the lack of timely witness evidence) had already been dealt with ahead of the hearing.

Admission of new evidence

17. On 5 May 2021 TWS applied to the Tribunal for permission for additional evidence to be admitted late. That evidence was then sent to the Tribunal (and HMRC) on 5 and 6 May 2021. That evidence comprised:

(1) Sample invoices from Just Doors Ltd, each dated July 2016, for the sale of specified doors (4 pages). Those invoices do not include a VAT registration number.

(2) Sample "invoices" from TDS to Just Doors dated February, April and September 2016, each setting out that specified doors were being transferred to Just Doors for nil consideration (3 pages). The VAT registration number of TDS is set out on those invoices.

18. On 6 May 2021 the Tribunal replied to the parties as follows (without having sought representations from HMRC):

> "The new evidence has been provided to HMRC on 5 May and they will have the opportunity to consider it ahead of the hearing. If HMRC wish to object to its late admission then such objection shall be made (with reasons) at the beginning of the hearing on 10 May 2021, otherwise it shall be admitted. If HMRC do object then the Appellant (and his accountant) will have the opportunity to provide evidence and explanations in relation to the reason for lateness."

19. Mr Hume confirmed that he and Officer Baxter had been able to review the evidence supplied. He did not object to its admission. That new evidence was thus admitted.

HEARING AND EVIDENCE

20. HMRC had prepared a hearing bundle (of 205 pages) and an authorities bundle as well as their skeleton argument. The hearing bundle included a witness statement from Officer Anna Baxter dated 25 November 2011, the caseworker for TDS who had raised the assessments.

21. Officer Baxter attended the hearing and gave evidence and was cross-examined by Mr Thomas. She was a credible witness.

BACKGROUND FACTS

22. There was minimal factual evidence before us, and that which there was did not seem to be in dispute between the parties. On the basis of that evidence, we find as follows.

23. TDS was registered for VAT with effect from 1 April 2004. The director of TDS is Barry McLaughlin.

24. The main activity of TDS is commercial letting. TDS owns commercial properties which are used for a mixture of supplies - two are rented which are opted to tax, some are rented which are not opted and some of the properties are derelict.

25. TDS imported doors from China. It did not sell them itself. It gave these doors to what was described as "Just Doors", and Just Doors then sold the doors to customers. Just Doors is a trade name, and was used to refer to four or five companies, including Just Doors Ltd and Just Doors Liverpool Ltd.

26. TDS and the companies using the trade name "Just Doors" were under common ownership, albeit that we have no information as to what this ownership was.

27. There was no group VAT registration (and we make no finding as to whether they would have been eligible for a group VAT registration), and there was no evidence of continuous VAT registration of the companies to which the doors were transferred by TDS. There was evidence that Just Doors Ltd had been registered for VAT from 23 February 1998 to 1 August 2009 and that Just Doors Liverpool Ltd had been registered for VAT from 1 April 2014 to 20 August 2015 and then from 1 January 2018.

28. TDS itself later applied to be deregistered for VAT, with the proposed date of deregistration being 26 May 2018. The reason for deregistration is stated as turnover below deregistration threshold.

29. On 6 October 2017 TDS had submitted a repayment return for £17,730.14 for the period 8/17. This prompted HMRC to conduct a check into TDS' VAT returns, including the repayment return. The matter was allocated to Officer Baxter. She dealt with Bernard Rooney of Fischer Crowne, TDS' accountant and met with him on 20 March 2018.

30. On the basis of the enquiries made, Officer Baxter issued an assessment on 24 April 2018 for the period 8/17 of £1,489.18 (which disallowed all but £10.82 of the input tax credit which had been claimed). On 11 May 2018 Officer Baxter gave notice of VAT assessment for the periods 5/15 to 11/17, which assessed total VAT due of £91,805. The assessment related to input tax which had been claimed incorrectly on the purchase of doors and advertising costs and output tax which was due in respect to rental income from a property which HMRC believed was opted to tax.

31. On 8 June 2018 Fischer Crowne sent an appeal to HMRC. The basis for that appeal was stated:

> "We disagree on the grounds that we feel that the vast majority of the input VAT claimed by the company was claimed correctly, with HMRC generated documentation to back this up. We feel that if this were to be allowed as claimable then the total owed via assessment would be much lower."

32. That letter said they had now passed the file to an independent VAT specialist.

33. Officer Baxter chased Fischer Crowne to check whether they were seeking a review by another officer or if they wanted to appeal to the Tribunal. On 13 August 2018 Mr Rooney confirmed they wanted a review (but had not ruled out appealing to the Tribunal).

34. HMRC issued their review conclusion letter on 8 November 2018. The outcome was that the decision notified on 24 April 2018 was varied (the net VAT due being reduced from £1,489.18 to £989.18) and the decision notified on 11 May 2018 was cancelled on the basis that the reviewing officer was not satisfied that the tax assessed had been calculated correctly but stating that Officer Baxter would consider issuing a new assessment and if that is the case then TDS would have new appeal/review rights in respect of it. The reviewing officer did state that they agreed with the decision that the business should not be entitled to recover VAT for the doors or advertising costs - the taxable supplies made by TDS are ones of rent from commercial properties they had opted to tax. The reviewing officer had seen nothing to suggest that TDS had used either the doors or advertising costs to make onward supplies and as such agreed with Officer Baxter that this VAT is not input tax.

35. On 1 February 2019 HMRC issued TDS with a notice of assessment for £80,096 to recover VAT claimed incorrectly as input tax. Within HMRC's original assessment which was cancelled at review, HMRC had incorrectly assessed for output tax in respect to a property which had no option to tax. HMRC therefore removed the output tax from their calculations

and assessed only for the VAT which they considered had been incorrectly claimed as input tax.

36. On 28 February 2019 Fischer Crowne appealed to HMRC. The explanation of the grounds is the same as that had been set out in their letter of 8 June 2018, and again refers to the file having been passed to an independent VAT specialist.

37. Again, Officer Baxter sought confirmation whether Fischer Crowne were seeking a new review or to appeal to the Tribunal. On 17 May 2019 Mr Rooney confirmed that they had been told by the specialist VAT practitioner that an appeal to the Tribunal was the next course of action.

38. Mr Thomas then provided HMRC with authority from TDS for TM Sterling Ltd to act on TDS's behalf. This was provided on 3 June 2019.

39. On 2 September 2019 TDS gave Notice of Appeal to the Tribunal.

ISSUES AND SUBMISSIONS OF THE PARTIES

40. HMRC have raised assessments to recover VAT which had been claimed as input tax by TDS in respect of the purchase of doors and advertising costs. Given the withdrawal of TDS's argument regarding advertising costs, the only issue is whether the VAT incurred by TDS on the purchase of doors was recoverable input tax.

41. TDS's grounds of appeal as set out in the Notice of Appeal are.

> "HMRC have raised an assessment on the grounds that the company was making taxable supplies however this is not the case.
>
> HMRC's assessment is incorrect and the caseworker has failed to take into account the explanations provided by the companies accountant.
>
> The Accountant has supplied HMRC with bank statements and explanations of transactions.
>
> A previous assessment to this was raised and upon review by an internal officer, dismissed. HMRC have sought to raise a second assessment in respect of this case and this is the subject of our appeal."

42. Looking back at the correspondence from or on behalf of TDS prior to that date (including the letters from Fischer Crowne dated 8 June 2018 and 28 February 2019) it is unclear as to the grounds on which TDS was seeking to appeal against the assessments. The only matter that is clear is that TDS disagreed.

43. The lack of clarity as to the grounds of appeal is unsatisfactory. A party should set out its argument in order that the other party can know and understand the argument which it needs to meet at the hearing. It is perhaps surprising (at least to the panel) that HMRC did not make any application for TDS to re-formulate its grounds of appeal and instead served its statement of case on 10 January 2020. In that SOC HMRC set out its position that:

> (1) amounts of VAT charged on purchases can only be treated as input tax when these purchases are used or intended to be used in the making of taxable supplies by a taxable person, referring to the definition of "input tax" in s24 VATA 1994;
>
> (2) the only taxable supplies made by TDS are ones of rent from commercial properties which have been opted to tax; and
>
> (3) the doors purchased by TDS are not used to make onward taxable supplies and therefore the VAT incurred is not input tax.

44. There is no material difference between the arguments set out in the SOC and HMRC's subsequent skeleton argument.

45. As referred to above, no skeleton argument had been served by TDS. When asked at the hearing to outline their case, Mr Thomas stated that TDS bought doors but does not advertise and sell them. Instead, it provides them to the various Just Doors companies for nil consideration. Mr Thomas submitted that TDS relies on guidance in HMRC's manuals and VAT Notices relating to the treatment of gifts in support of TDS' entitlement to reclaim the input tax.

46. This immediately created another procedural issue, in that not only had the argument not been set out before, but there had been no request that the sources on which Mr Thomas sought to rely be included in the authorities bundle (and unsurprisingly they were not so included) and they had not been provided to the Tribunal or HMRC as a separate bundle. We adjourned the hearing briefly in order that Mr Thomas could email the material on which he wished to rely to the Tribunal and HMRC, noting that when we re-convened the Tribunal would seek representations from HMRC. The Tribunal considered that this was best done after the material had been sent, as that seemed to be the clearest way of gaining an understanding of the argument which Mr Thomas sought to advance, and this would enable Mr Hume to take instructions and discuss with Officer Baxter the extent to which this might have differed from arguments put previously.

47. Mr Thomas circulated copies of VATSC02110 (from HMRC's manuals), VAT Notice 700 and VAT Notice 700/7. His argument (which is set out more fully in the Discussion) was essentially that as a transfer for no consideration can still be a supply, and HMRC's guidance envisaged that in some circumstances a taxable person making a gift was required to account for output tax, the correct treatment was that TDS was required to account for output tax on the transfer of doors to Just Doors, and could obtain credit for input tax it had incurred, and that HMRC were wrong to seek to assess TDS to recover the input tax which had been claimed and paid; any assessment ought to be for the output tax (and there was no such assessment).

48. Mr Hume submitted that this was a completely new argument, which HMRC had not had the opportunity to consider, and that it was prejudicial for it to be advanced in this manner at such a late stage. We agree – and although we had considerable difficulty trying to discern what was the basis of the original grounds of appeal, we were clear that it was not the argument now put to us.

49. Mr Thomas did not seek to rely on any other argument; if we had refused to hear the argument outlined above, that would effectively have amounted to a dismissal of TDS's appeal. Having regard to the overriding objective in rule 2 of the Tribunal Rules, we considered that it was fair and in the interests of justice that we allow Mr Thomas to set out his argument fully, explaining how he sought to rely on HMRC's guidance, and Mr Hume could offer any immediate response (having liaised with his colleagues, who were also attending). If we considered that we wanted to hear more from HMRC then we could so direct at the end of the hearing. As matters turned out, Mr Hume did reply to this argument as well as setting out HMRC's primary case. We were content to conclude the hearing without directing that the parties provide further written submissions.

RELEVANT LEGISLATION

50. Section 2 of the Value Added Tax Act 1994 ("VATA 1994") states that VAT is chargeable on supplies of goods or services in the UK. Section 3 defines a taxable person for the purposes of VAT as being a person who is required to be registered for VAT. Section 4 determines that VAT is chargeable on a supply of goods or services made in the UK where it is a taxable supply made by a taxable person.

51. Section 24 VATA 1994 defines "input tax" and "output tax":

> "24 Input tax and output tax
>
> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services;
>
> (b) VAT on the acquisition by him from another member State of any goods; and
>
> (c) VAT paid or payable by him on the importation of any goods from a place outside the member States,
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.
>
> (2) Subject to the following provisions of this section, "output tax", in relation to a taxable person, means VAT on supplies which he makes or on the acquisition by him from another member State of goods (including VAT which is also to be counted as input tax by virtue of subsection (1)(b) above)."

52. Section 24(6) allows HMRC to specify that evidence has to be supplied to support any claim for input tax.

53. Section 25(2) VATA 1994 provides that a taxable person may be entitled to credit for input tax and that it may be deducted from output tax that is due. Section 25(3) defines a "VAT credit" as being an amount due where either no output tax was due at the end of the period or if the amount of credit exceeds the output tax due, and s25(6) provides that a claim may not be paid except if it is made in such a manner and time as subject to conditions as specified by HMRC.

54. Section 26 VATA 1994 allows for input tax to be claimed where a taxable person has incurred the input tax in the course or furtherance of the making of taxable supplies in the UK.

DISCUSSION

55. The burden of proof is on TDS to establish, on the balance of probabilities, that they are entitled to recover the input tax which had been claimed and that the assessments are therefore incorrect.

56. The assessments which are under appeal seek repayment of amounts which have been claimed and repaid to TDS as input tax incurred on the purchase of doors. (The assessments also include input tax incurred on advertising costs, but as noted above those amounts are no longer under appeal.) Section 24(1) VATA 1994 provides that input tax includes both VAT on the supply to a taxable person of any goods and VAT paid by a taxable person on the importation of any goods from outside the Member States, being goods used or to be used for the purpose of any business carried on or to be carried on by the taxable person.

57. It was common ground that TDS had opted to tax two commercial properties and received rent from those properties. We do not regard these taxable supplies as being of any relevance to the issue before us – there was no suggestion, evidence or submission that the purchase of doors was related to this letting of commercial property.

58. The doors which were bought by TDS were transferred by TDS to various Just Doors entities for nil consideration. There was no evidence of any economic activity conducted by TDS for which the doors were used. TDS bought doors and gave them away.

59. HMRC referred to two cases which Mr Hume submitted illustrated the need for a direct immediate link between the purchase on which a taxable person incurred input tax and onward taxable supplies:

(1) The decision of the Upper Tribunal in *BAA Ltd v HMRC* [2011] UKUT 258 (TCC):

> **"The professional services supplied to ADIL had no direct and immediate link to any onward taxable supplies made by ADIL**
>
> 72 However, although ADIL could be said to have acquired the BAA shares in the course of an intended economic activity, there are no onward taxable supplies made by ADIL itself (ignoring the application of VATA s 43 for the time being), at the time that ADIL incurred the relevant VAT, to which those professional services have a direct and immediate link. As we have already observed, ADIL was found by the tribunal to have an intention to provide taxable services to BAA only from the time of completion of the BAA takeover (not before, when the VAT was incurred). ADIL was not found to have any such intention prior to then.
>
> …
>
> 86: For these reasons, we find that there is no direct and immediate link between the supplies made to ADIL on which the relevant VAT was incurred by ADIL and any onward taxable supplies either made to ADIL or attributed to ADIL."

(2) The decision of the Upper Tribunal in *JDI International Leasing Ltd v HMRC* [2018] UKUT 214 (TCC):

> "57 In our judgment, the FTT's reasoning and conclusion that there was no direct and immediate link between the acquisition of the UK Tools and the sale of the Spare Parts, despite JDI being offered a package deal, discloses no error of law. The FTT correctly noted at [35] that the mere fact that immediate use does not involve receipt of consideration is not a bar to recovery. The FTT identified at [39] that, in order to succeed, JDI had to demonstrate a direct and immediate link between the acquisition of the UK Tools and JDI's activity of selling Spare Parts. We do not understand that to be disputed by Mr Hill, and in our view it must be correct. The leasing of the Tools was not by itself a taxable transaction, since no consideration was charged.
>
> …
>
> 67 The FTT concluded that whilst the Tools were plainly designed for commercial exploitation, JDI's decision to lease them without charge, in circumstances where the FTT found no objective link between the acquisition of the UK Tools and JDI's taxable activities, meant that it was not acting as a taxable person when it acquired them. In our judgment, this was a conclusion that the FTT was entitled to reach, and indeed bound to reach given its findings on the absence of a link."

60. Mr Thomas did not comment on the principles illustrated by these authorities but referred us to three extracts from HMRC's own publications:

(1) The fourth paragraph at VATSC02110 of HMRC's VAT manual (emphasis added):

> "**Basic principles and underlying law: Supply for VAT purposes**
>
> The first condition that a transaction must meet to fall within the scope of VAT is that it is a supply of goods or services.

Before deciding whether goods or services are being supplied, you must first decide whether a transaction is a supply for VAT purposes.

Under EU and UK law, there is a supply if someone does something or agrees to do something in return for a consideration. Such a supply may be effected by selling something, by hiring or renting something or by someone doing something for someone else (a service).

Additionally, in certain circumstances, there can be a supply even if there is no consideration. There may also be instances where the transaction fails to be a supply or is disregarded for VAT purposes. You should therefore ascertain for a particular transaction:

- whether there is consideration (for example money, but not exclusively money)
- if there is no consideration whether the transaction is deemed by law to be a supply for VAT purposes
- whether the transaction fails to be a supply or is a supply to be disregarded for VAT purposes."

(2) He took us to paragraph 8.9 of VAT Notice 700 (emphasis added):

"8.9 Gifts

8.9.1 General

An article is a gift where the donor is not obliged to give it and the recipient is not obliged to do or give anything in return. Competition prizes are usually treated as gifts.

A gift of goods is normally a taxable supply and VAT is due on the cost of the goods.

…

VAT is not due on certain gifts of goods (see paragraph 8.9.3).

…

8.9.2 Goods and services supplied as inducements

You might offer someone a 'gift' on condition that they:

buy something from you

provide something for you

perform some other action of benefit to you

Goods and services supplied in these circumstances are not true gifts and VAT is due on the basis explained in paragraph 7.4. See Business promotions (VAT Notice 700/7) or the special rules for this kind of supply.

8.9.3 Gifts on which VAT is not due

VAT is not due on certain gifts. For more information see paragraphs 2.2 and 2.3 of Business promotions (VAT Notice 700/7)."

(3) This then took us to VAT Notice 700/7 on Business promotions, as referred to in 8.9.3 above:

"2. Gifts of goods

2.1 Free gifts of goods for no consideration

A free gift means that you receive no consideration in the form of money, (monetary consideration), or non-monetary consideration. For more on this see section 5.

If you give away goods and are entitled to recover VAT on them as input tax and you receive no payment or other consideration for them, you must account for VAT on their cost value. That is unless they can be treated as business gifts under paragraph 2.3.

2.2 Definition of a 'business gift'

A business gift is a gift of goods that is made in the course of promoting your business and for which you were entitled to reclaim the VAT you were charged on its purchase as input tax. By 'gift' we mean a definite, voluntary and unconditional transfer of the goods for no consideration.

Business gifts cover a wide range of items from brochures, posters and advertising matter to expensive goods of the kind given as 'executive presents'.

…

2.3 When to account for VAT on business gifts of goods

You do not have to account for VAT on business gifts made to the same person so long as the total cost of all gifts you make to that person does not exceed £50, excluding VAT, in any 12-month period.

…

2.4 Gifts used for business purposes by the recipient

If you make a gift of goods on which VAT is due, to someone who uses the goods for business purposes, that person can, if they are VAT registered, recover the VAT as input tax subject to the normal rules. You cannot issue a VAT invoice, in order to provide the recipient with acceptable evidence to support a claim for recovery of input tax, you may use your normal invoicing documentation and include the following statement:

'Tax Certificate - No payment is necessary for these goods. Output tax of £XX.XX (insert amount) has been accounted for on the supply.'

2.5 Gifts of goods by a business for non-business purposes

Gifts of goods made for non-business purposes include those applied to personal use, for example a gift to a relative or friend. If the goods were not purchased to be used for business purposes, they are not business assets and any VAT incurred on their purchase is not reclaimable as input tax.

If input tax has been claimed on goods that are diverted to private use and given away, output tax must be accounted for to the same amount and by the same business that claimed the input tax."

61. Mr Thomas' submission was as follows. VATSC02110 makes it clear that the transfer of doors from TDS to Just Doors can be a supply even though there is no consideration. The transfer was a gift within paragraph 8.9.1 of Notice 700 as the donor is not obliged to give it and the recipient is not obliged to do or give anything in return. TDS did not receive anything in return from Just Doors. He then took us to 2.1 in Notice 700/7 noting that this states that if a person gives away goods and is entitled to recover VAT on them as input tax and receives no payment or other consideration for them, that person must account for VAT on their cost value. Mr Thomas submitted this was the correct approach here, and that the exception for business gifts did not apply as the transfer of doors was not promotional – Just Doors made no reference

to TDS when it made onward sales. From this, Mr Thomas submitted that when TDS transferred the doors to Just Doors it was making a taxable supply and was entitled to recover the input tax it incurred on the purchase of the doors. The assessments are incorrect because they refuse a legitimate claim for input tax when they should be dealing only with output tax.

62. We are not persuaded by Mr Thomas' submissions:

(1) It is clear from s24(1) that to qualify as input tax VAT must be incurred on goods or services used or to be used for the purpose of a business carried on or to be carried on by a taxable person. The CJEU has developed the concept of there needing to be a direct and immediate link between the purchase and the making of onward taxable supplies, which principle is illustrated by the decisions of the Upper Tribunal to which we were referred by HMRC. There was no evidence of any link, let alone a direct and immediate link, between the purchase of doors and any onward taxable supplies by TDS in its business.

(2) HMRC guidance cannot override the legislation or authorities. In any event, we do not consider that the material to which we were referred assists with the issue as to the recoverability of input tax and thus whether TDS was overcharged by the assessments:

(a) VATSC02110 is dealing with whether or not a transaction is a supply for VAT purposes, and the paragraph on which Mr Thomas relies explains that there can be a supply even if there is no consideration. That proposition is uncontroversial; but we do not consider that it advances TDS's case either that it makes taxable supplies or that the VAT incurred on the purchase of doors is used in its business.

(b) VAT Notice 700 is a general guide to VAT rules and procedure. Paragraph 8.9.1 states that a gift of goods is normally a taxable supply. However, it is important to read this in context. Section 7 of the notice sets out an introduction to output tax, section 8 covers output tax in particular situations, including eg multiple supplies, packaging, delivery charges as well as gifts, and section 9 then considers business and non-business use of goods. The examples in this part of section 8 appear to proceed on the assumption that there is a business use and look at whether output tax must be accounted for where a business makes gifts of goods. This is not directly analogous to the present situation where TDS, whilst registered for VAT and making taxable supplies in respect of two opted properties, makes gifts of goods as an apparently standalone activity.

(c) VAT Notice 700/7 deals with business promotions. We agree with Mr Thomas that the transfer of the doors is not a business gift. However, we do not consider that the explanation set out here is of any assistance to TDS. The principle being explained by HMRC is that a taxable person who gives away goods and is entitled to recover input tax is required to account for output tax on the cost value of the gift. This does not address the prior question as to whether there is an entitlement to recover input tax.

63. We note that whilst Mr Thomas submitted that the approach set out in HMRC's guidance achieves the required symmetry for VAT purposes, it is readily apparent that on the current facts this is not the case – TDS has reclaimed input tax and HMRC are now out of time to assess output tax for several of the periods in issue. Furthermore, there is no evidence that any of the Just Doors entities have accounted for output tax on the supplies to customers; indeed, the evidence supports the contrary conclusion (based on the invoices and the absence of

continuous VAT registrations for the Just Doors entities). However, this is a mere observation and is not part of our reasoned conclusion.

CONCLUSION

64. TDS has accepted that the assessments are correct so far as they assess input tax which had been claimed on advertising costs incurred by TDS.

65. TDS has not established that it was entitled to recover as input tax VAT incurred on the purchase of doors. Accordingly, it has not established that the assessments are incorrect.

66. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 20 MAY 2021