[2016] UKFTT 0096 (TC)

TC 04886

Appeal number:TC/2014/03651

VAT – fuel scale charge – section 56 VATA 1994 – whether vehicles allocated to individuals – whether private use – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BROADSTEADY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS SONIA GABLE

Sitting in public in Manchester on 21 October 2015

Mrs Patrice Gibbons FCCA of Pareto Consultancy Ltd for the Appellant

Mr Bernard Haley of HM Revenue & Customs for the Respondents

DECISION

Background

1. This appeal concerns assessments to Value Added Tax for accounting periods 03/10 to 12/12 in the sum of £1,386 ("the Assessments"). The Assessments relate to output tax said to be due from the Appellant in relation to the provision of fuel for private use in vehicles allocated by the Appellant to two employees. The Assessments were calculated by reference to what is known as the "fuel scale charge" which we describe in more detail below.

2. Essentially the issues on the appeal are whether the vehicles were allocated to the individuals concerned, and if so whether there was in fact any private mileage in those vehicles.

3. We heard oral evidence from two directors of the Appellant, Mr Anthony Oxley and Mr Geoffrey Howley. We also had a witness statement from one of the Appellant's employees, Mrs Beverley Cox. Before making our findings of fact we set out below the legal basis on which traders must account for output tax on fuel supplied for private use by employees. All references are to the provisions which applied during the period of the Assessments.

The Law

4. Traders are entitled to reclaim input tax incurred on goods or services used or to be used for the purposes of a business carried on by the trader. Where fuel is purchased by a trader and some is used by employees for private use the trader is still entitled to claim input tax credit but must account for output tax by reference to the fuel scale charge.

5. Section 56(5) Value Added Tax Act 1994 ("VATA 1994") provided for the input tax credit as follows:

> "*(5) In relation to the taxable person, tax on the supply … of fuel for private use shall be treated for the purposes of this Act as input tax, notwithstanding that the fuel is not used or to be used for the purposes of a business carried on by the taxable person (and, accordingly, no apportionment of VAT shall fall to be made under section 24(5) by reference to fuel for private use).*"

6. Section 56(6) and (7) provided that in those circumstances the trader should be treated as making a taxable supply for a consideration to be determined in accordance with section 57. Section 56(6) and (7) provided as follows:

> " *(6) At the time at which fuel for private use is put into the fuel tank of an individual's own vehicle or of a vehicle allocated to him, the fuel shall be treated for the purposes of this Act as supplied to him by the taxable person in the course or furtherance of his business for a consideration determined in accordance with subsection (7) below …*

(7) *In any prescribed accounting period of the taxable person in which, by virtue of subsection (6) above, he is treated as supplying fuel for private use to an individual, the consideration for all the supplies made to that individual in that period in respect of any one vehicle shall be that which, by virtue of section 57, is appropriate to a vehicle of that description, and that consideration shall be taken to be inclusive of VAT.*"

7. Against that background, it is necessary to consider in more detail what amounts to a supply of fuel for private use. Section 56(1)(a) provided that the provisions applied where fuel supplied to a taxable person:

"*(a) …*is *provided or to be provided by the taxable person to an individual for private use in his own vehicle or a vehicle allocated to him and is so provided by reason of that individual's employment*"

8. In the present appeal we are not concerned with the employees' own vehicles. Hence the question is whether fuel was provided for private use in a vehicle allocated to an employee by reason of that person's employment.

9. Section 56(3) then provided the following definitions of terms:

"*(a) 'fuel for private use' means fuel which, having been supplied to or imported or manufactured by a taxable person in the course of his business, is or is to be provided or appropriated for private use as mentioned in subsection (1) above …*

(d) subject to subsection (9) below, a vehicle shall at any time be taken to be allocated to an individual if at that time it is made available (without any transfer of the property in it) either to the individual himself or to any other person, and is so made available by reason of the individual's employment and for private use; and

(e) fuel provided by an employer to an employee and fuel provided to any person for private use in a vehicle which, by virtue of paragraph (d) above, is for the time being taken to be allocated to the employee shall be taken to be provided to the employee by reason of his employment."

10. The question of whether a vehicle was allocated to an individual by reason of his employment must take into account section 56(9) which defined certain circumstances where a vehicle was not to be regarded as allocated to an individual by reason of his employment. It provided as follows:

" *(9) In any prescribed accounting period a vehicle shall not be regarded as allocated to an individual by reason of his employment if—*

(a) in that period it was made available to, and actually used by, more than one of the employees of one or more employers and, in the case of each of them, it was made available to him by reason of his employment

but was not in that period ordinarily used by any one of them to the exclusion of the others; and

(b) in the case of each of the employees, any private use of the vehicle made by him in that period was merely incidental to his other use of it in that period; and

(c) it was in that period not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the vehicle available to them."

11. Vehicles which satisfy these three conditions are commonly known as "pool cars" although that is not a term used in the VAT legislation.

12. It is section 57 which sets out the amount of what are known as the "fuel scale charges" on which out tax was to be accounted.

13. During the course of submissions we were referred to two decisions of the VAT & Duties Tribunal – *Timewade Limited (Decision 12786)* and *Rapide Security and Surveillance Limited (Decision 20198)*. Both were decided on their own facts and do not really assist in the present appeal.

14. We were also referred by Mrs Gibbons, who appeared on behalf of the Appellants, to a judgment of the Court of Justice of the European Union to the effect that where a worker has no fixed place of work, time spent travelling to and from home was working time for the purposes of the Working Time Directive (*Federación de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security SL Case C-266/14*). Mr Haley who appeared for the Respondents did not dispute that where an employee's principal place of work is his home, then travel from home to office was not private mileage. The real issue for us, as it was in *Rapide Security*, is whether as a matter of fact the relevant employees were to be regarded as home based workers.

15. We were also referred to HMRC's VAT Notice 700/64 "Motoring Expenses" which describes the treatment of VAT on fuel, including certain concessionary treatments accepted by HMRC. In particular HMRC will accept a system whereby a trader reclaims only that part of the input tax on fuel purchased which is referable to business mileage and does not account for the fuel scale charge. In order to operate that system the trader must keep detailed records of business and private mileage. However the treatment would not have been available in the present case because there were no detailed mileage records.

Findings of Fact and Discussion

16. In the present appeal we are concerned with fuel alleged by HMRC to have been provided by the Appellant and used in two vehicles allocated to two of its employees. In summary we are concerned with whether vehicles owned by the Appellant were allocated to the relevant employees and if so whether there was any

private use of those vehicles. There is no issue that in so far as the vehicles and fuel were provided for private purposes then they were so provided by reason of the individuals' employment. There is also no issue as to the amount of the fuel scale charges if section 57 is engaged.

17. We must first consider whether the conditions in section 56(9)(a), (b) and (c) were satisfied during the period 1 January 2010 to 31 December 2012. If those conditions were satisfied in any period then during that period the vehicle would be treated as a pool car and no fuel scale charge would arise. The employees concerned are Mrs Beverley Cox and Ms Fiona Jones and where appropriate we shall refer to them together as "the Sales Reps". In particular we must consider the following, in relation to each vehicle:

(1) Was either of the vehicles made available to and actually used by both Mrs Cox and Ms Jones but not ordinarily used by any one of them to the exclusion of the other?

(2) Was private use of either vehicle by Mrs Cox and Ms Jones merely incidental to other use by them in the period?

(3) Was either vehicle not normally kept overnight on or in the vicinity of residential premises of Mrs Cox and Ms Jones?

18. Mrs Cox was not available for cross-examination on her witness statement. Mrs Gibbon told us, and we accept, that she did not appreciate the need to have Mrs Cox present to give oral evidence. In the event, the Respondents did not object to the evidence contained in Mrs Cox's witness statement, save that they did take issue with what Mrs Cox apparently understood to be private mileage. Mrs Cox' evidence was that she did no private mileage. HMRC challenged her evidence only to the extent that they argued that some of her journeys contained an element of private mileage. Mrs Cox kept a diary and her diary for 2012 was produced in evidence.

19. The Appellant is a wholesaler of alcoholic and soft drinks. It operates from premises at Bamber Bridge near Preston. The Assessments relate to two vehicles used by the Sales Reps. Each vehicle was a BMW 1 Series. The Assessments also relate to a BMW X5 used by the two directors of the Appellant, but Mrs Gibbons conceded that a fuel scale charge was payable in relation to the X5 and that aspect of the appeal was withdrawn at the hearing.

20. During the period of the Assessments the Appellant had 9 or 10 employees, including delivery drivers. There were only two sales representatives. We were told that the Sales Reps had no written terms of employment.

21. The Appellant paid all running costs in relation to the two vehicles including maintenance, insurance and petrol. The Appellant operates a fleet policy for all its vehicles but we did not have a copy of the policy. The Sales Reps were made aware by the directors that no private mileage was allowed in the company vehicles. The role of the Sales Reps included visiting existing and prospective new customers, giving quotes, raising sales invoices and acting as a point of contact for customers. A typical working day would involve administration in the form of preparing quotes,

processing orders, invoicing, and visiting customers including cold calling. Mrs Cox covered areas around Wigan, Chorley, Bolton and south Preston. Ms Jones covered other areas in the North West.

22. We were told and we accept that the two vehicles were leased and that the leases provided for a mileage of 10,000 miles per year. We accept that both vehicles did a fairly consistent mileage of approximately 10,000 miles per year.

23. Mrs Cox has worked for the Appellant for 15 or 16 years and is still employed by the Appellant. Ms Jones worked for the Appellant for about 4 years but left in about 2013. Both were employed throughout the period of the Assessments.

24. Whilst the overall period we are concerned with is identified above, in fact it can be broken down into the period before April 2012 and the period after April 2012. That is because there was a significant change in use of the vehicles at some stage in April 2012.

25. In April 2012 the Appellant introduced a new computer system which enabled the Sales Reps to work from home. Prior to April 2012 the Sales Reps were office based and each had a desk at the office. After April 2012 they were home based with no desk at the office.

26. We consider firstly the period up to April 2012. The Sales Reps would drive to and from the Appellant's office premises using their own vehicles, generally getting to the office at about 9.30am. They would carry out any office based tasks and then pick up one or other of the two vehicles to make their visits to customers. The office was open until about 5.30pm, but the Sales Reps would generally be back at about 5.00pm, park the vehicles at the office and then use their own cars to go home.

27. On rare occasions, approximately twice a year, the Sales Reps would have a late appointment and they would take one of the vehicles home overnight. That was because the industrial estate where the Appellant is based is dark and not secure. In winter, one of the directors would wait for the Sales Reps to return to the office at 5.00 – 5.30pm so that it would be safer for them to drop off the vehicle and pick up their own car.

28. When one or other of the Sales Reps was on holiday, both vehicles would continue to be kept at the Appellant's premises and be available for use by the other Sales Rep.

29. In the period after April 2012 the Sales Reps worked from home with remote access to the Appellant's computer systems. They were able to produce and send quotes, process orders and invoice orders from home. Mrs Cox used one of the vehicles and Ms Jones used the other vehicle. We are satisfied from Mrs Cox's diary and from the evidence of Mr Oxley and Mr Howley that she would do administration tasks at home and then go directly to customers from home. Of course there may have been occasions when she would go directly to the office for a sales meeting. We are satisfied that Ms Jones' working patterns were the same as Mrs Cox. Mr Haley did

not invite us to treat Ms Jones' use as any different to that of Mrs Cox and he didn't rely on the absence of any evidence from Ms Jones.

30. When one of the Sales Reps was on holiday, the vehicle used by her would be kept at her home.

31. Throughout the period of the Assessment both vehicles were fuelled at a service station on the same industrial estate as the Appellant's offices. There was a fuel card in the name of the company and therefore all fuel put into the vehicles was billed directly to the Appellant. The card was kept at the service station. The service station served business users only and its staff knew all the Appellant's users, including delivery drivers. Generally each vehicle would be fuelled once a week. The Appellant's directors had a sales meeting with the Sales Reps once a week, usually on a Friday lunchtime. That was generally when the vehicles would be fuelled. The Sales Reps would go back to work after the meeting, either at the office or visiting customers.

32. Mr Haley's broad submission on behalf of HMRC was that if there was any private mileage then the Appellant would be obliged to account for output tax by reference to the fuel scale charge. We do not accept that broad submission. In the present circumstances it is only if the relevant vehicle is "allocated" to an individual that the fuel scale charge will apply. Section 56(9)(b) provides that a vehicle shall not be regarded as allocated if any private use in the period was "merely incidental" to the other use.

33. Mr Haley submitted that in the period prior to April 2012 on those occasions when the vehicles were taken home in the evening or driven from home in the morning there was private mileage. It is certainly possible that some of that mileage was from home to office and therefore capable of being treated as private mileage. However we have found that such occasions were rare and arose only if there had been a late appointment the night before. We are satisfied that any such private mileage by each of the Sales Reps was merely incidental to their other use of the vehicles.

34. We are satisfied therefore that in the period up to April 2012 the condition in section 56(9)(b) was met. In the light of the evidence Mr Haley did not suggest that the conditions in section 56(9)(a) and (c) were not met. For that period therefore neither vehicle can be regarded as allocated to Mrs Cox or Ms Jones and therefore section 56 and the fuel scale charge is not engaged.

35. Mr Haley submitted that in the period after April 2012 the Sales Reps' principal place of work remained the Appellant's office. Therefore any mileage between home and office was private mileage. We do not consider that submission is supported by the facts of the present case. We are satisfied that in the period after April 2012 the Sales Reps were home based employees and that any travel between home and the Appellant's office was not private use. In that period the vehicles were allocated to Mrs Cox and Ms Jones respectively but we are satisfied that there was no private use of the vehicles. Again, section 56 and the fuel scale charge is not engaged.

Conclusion

36. For the reasons given above we allow the appeal in so far as it relates to the vehicles driven by Mrs Cox and Ms Jones. The balance of the appeal has been withdrawn.

37. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 16 FEBRUARY 2016