[2016] UKFTT 0572 (TC)

TC05321

Appeal number:TC/2015/03664

VAT – input tax – purchase of motor car – Value Added Tax (Input Tax) Order 1992 – whether intention to make car available for private use – Commissioners of Customs & Excise v Elm Milk Ltd applied – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VENDA VALET LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
CHRISTINE OWEN FCA

Sitting in public in Manchester on 11 May 2016

Mr James Minton of J Minton & Co Accountants for the Appellant

Mrs Lisa Fletcher of HM Revenue & Customs for the Respondents

DECISION

Background

1. The Appellant is in business selling and operating vending machines. It has two directors, Mr Sean Bradley and Ms Linzi Eckersall. The appeal concerns the Respondents' decision to refuse input tax credit for VAT of £7,833.34 incurred on the purchase of a Mercedes S350 motor vehicle ("the Vehicle"). The basis upon which input tax credit was refused was that the Respondents were not satisfied that the Appellant intended to use the Vehicle exclusively for business purposes. They considered that the Appellant intended to make it available for private use.

2. Following a VAT visit on 17 April 2013 the Respondents assessed the Appellant to recover input tax credit claimed on purchase of the Vehicle. The Appellant asked for a review of the decision and on a number of occasions provided additional information for that purpose. The assessment was upheld following various reviews, the last of which was dated 6 May 2015. On 4 June 2015 the Appellant appealed to the tribunal. The grounds of appeal are to the effect that restrictions on use of the Vehicle implemented by the Appellant were sufficient to establish that the Appellant did not intend to make it available for private use.

3. We heard evidence from Mr Minton, the Appellant's representative who also acted for the Appellant at the time of purchase of the Vehicle, and from Ms Eckersall who was and is a director of the Appellant. Before making our findings of fact based on that evidence we set out the statutory provisions which govern entitlement to input tax credit on the purchase of motor cars and consider relevant authorities.

The Law

4. The provisions restricting input tax credit for VAT incurred on the purchase of motor cars are contained in Article 7 of the Value Added Tax (Input Tax) Order 1992. Paragraph 7(1) sets out a general rule that input tax on the supply of a motor car to a taxable person is excluded from credit. However paragraph 7(2)(a) disapplies the exclusion where the motor car is a qualifying motor car, supplied by a taxable person and where the "relevant condition" is satisfied.

5. Paragraph 7(2E) defines the relevant condition 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 ..."

6. The circumstances in which a taxable person may be said to intend to use a motor car exclusively for business purposes are restricted by paragraph 7(2G):

" (2G) A taxable person shall not be taken to intend to use a motor car exclusively for the purposes of a business carried on by him if he intends to ...
(a)…
(b) make it available (otherwise than by letting it on hire) to any person (including where the taxable person is an individual, himself, or where the taxable person is a partnership, a partner) for private use, whether or not for a consideration..."

7. These provisions have been considered by the Court of Appeal on two occasions, in *Commissioners of Customs & Excise v Upton (trading as Fagomatic) [2002] EWCA Civ 520* and in *Commissioners of Customs & Excise v Elm Milk Ltd [2006] EWCA Civ 164.*

8. In Upton the vehicle was a Lamborghini. Mr Upton was a sole trader supplying and servicing cigarette vending machines. He needed the car so that he would be treated as "a person of consequence" when visiting customers. The VAT tribunal allowed his appeal. The High Court and the Court of Appeal found in favour of HM Customs & Excise as they then were. As will be seen, the case bears certain superficial similarities to the facts of the present appeal. Importantly, however, Upton was concerned with a sole trader, whereas the present appeal is concerned with a limited company. Neuberger J (as he then was) sitting in the Court of Appeal said as follows:

" 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 parlance, made it available for that use. On the other hand, if the supplier provides the article under a contract which bona fide precludes the recipient from putting it to a particular use, or if it is supplied only at such times that it cannot be put to a particular use, then there is clearly a powerful argument for saying that it has not been "made available" for such use.

42. … to my mind, the proper enquiry is, as the Commissioners contend, whether the taxpayer intends to supply the motor car to a third party in circumstances where it could be available for private use. The intention in question is concerned with the basis on which the motor car is to be made available to the recipient, not with the use to which the motor car is to be put by the recipient.

…

48. Accordingly, I have reached the same conclusion as the Vice-Chancellor, for the same reasons. 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 paragraph 7(2E)(b) (sic), to avoid falling foul of paragraph 7(2G)(b). It was suggested on behalf of the Commissioners

during argument that, if a sole trader acquired a motor car for the sole use of employees in his business, and arranged for the motor car to be housed some distance away from his home, and for the keys to be kept by an employee, with a view to its only being used for business purposes, the motor car would not thereby be made available for private use. I find that difficult to accept. The person in control of the motor car and of the keys would be an employee of the trader, and could be compelled to provide him with the motor car and the keys for whatever purpose the trader chose. Accordingly, while it is unnecessary to express a concluded view on the point, I think that the logical consequence of the Vice-Chancellor's decision is that a sole trader who purchases a motor car with that sort of arrangement in mind would not avoid the consequences of paragraph 7(2G)(b)."

9. In Elm Milk the taxable person was a company with one director, Mr Phillips. The company was owned by members of the director's family. It purchased a Mercedes motor car and claimed that it was intended to be used exclusively for the purposes of its faming business. It was a landlord of farm premises, a consultant to the dairy trade and a consultant to the leisure industry. The director travelled considerable distances on the company's business. He passed a board resolution stating that the vehicle was to be used for business purposes only, that the company did not intend to make it available for private use and that any private use would be a breach of an employee's terms of employment.

10. The tribunal in Elm Milk held that the there was no intention that the vehicle should be made available for the director's private use. That was upheld by the High Court. In the Court of Appeal at [14] Arden LJ (with whom Moore-Bick and Ward LJJ agreed) summarised and subsequently adopted the reasoning of the High Court as follows:

" 14. The judge held that the tribunal had not erred. The physical circumstances of where the car was kept did not mean that as a matter of law the company intended to make it available for private use ([22]). The tribunal found that the board resolution was genuine and was properly to be taken into account in determining the VAT effects of the company's acquisition of the car ([23]). Accordingly, the decision of this court in the *Upton* case was distinguishable ([24] to [25]). There was a clear difference between the sole trader situation and the employer and employee situation ([26]). Where an employer provides a car genuinely on terms that the employee may use it for business purposes only, the "relevant condition" in art 7(2)(a)(iii) of the 1992 Order was satisfied and thus if all the other requirements for input tax recovery were fulfilled the employer could recover the input tax included in the price of the car ([27)]. The condition could be satisfied even if the car was not for example placed in a locked compound when not required for business use ([28]). Deductibility was not lost if the employer recognised that the car might be used for non-business use in an emergency ([29]). Such use would be a breach of the contractual restriction on use for private purposes but "realistically…few reasonable employers would do anything about it" ([29)]. The important point was not whether it was possible to imagine any exceptional circumstances in which the car might be used for private purposes. The question was whether when the employer purchased the car he intended to make it available for private use. The maxim that a person is presumed to intend the natural consequences of his acts was only a presumption ([30)]. "In my judgment the presumption is pushed too far if it used to argue that a person intends something to happen when he has specifically imposed a contractual condition designed (and genuinely designed, rather

than merely colourably designed) to prevent it happening." ([30]). There was no difference of principle where the director was the sole director of a small family company though where the employer and employee are connected the facts may require closer scrutiny ([32]) but the tribunal had examined the claim of the taxpayer with care ([33] to [36]).”

11. Arden LJ went on to consider the overall scheme of Article 7 at [35] to [37] and the purposive approach to construing the provision. In particular she stated as follows:

“ 36. …the scheme of [Article 7] is to exclude the right to deduct VAT paid on the purchase of a motor car to which the 1992 Order applies. Art 7(2) then creates an exception to that exclusion and art 7(2G) creates an exception to that exception. The taxpayer has a high threshold to cross if he wishes to bring himself first within the exception and then within the exception to the exception. For this purpose he must show that the intention is to use the car exclusively for business use. Then he must bring himself within the exception to that exception and for this purpose he has to show not that he does not intend to use the car for private use (which would probably add nothing to art 7(2E)) but it is not his intention even to make it available for private use. The policy is clear … Tax paid on the purchase of cars for private use is not deductible and it would be anomalous and unfair if that rule could be avoided by controllers of organisations who buy cars ostensibly for business purposes but also for private purposes. Cars are by nature mobile and capable of mixed business and private use. The convoluted nature of the provisions demonstrate that Parliament regards the deduction of VAT on the purchase of cars as the exception rather than the rule and something that has to be subject to rigorous scrutiny and the satisfaction of tough conditions. There is no discretion in the Commissioners to waive compliance with these conditions.

37. In my judgment a purposive approach of this kind to art 7 is helpful for at least two reasons. First it provides additional support for the approach of the tribunal and the judge that claims to deduct input tax in cases like this, where there is a close connection between the user of the car and the taxpayer, should be carefully scrutinised. That approach is consistent with the purpose of art 7 being to restrict relief to cases where it can be demonstrated to be wholly justified. Secondly, in my judgment it assists in responding to Mr Paines' submission that the concept of availability in art 7(2G) is concerned with physical availability only… In my judgment, while, if "available" meant only "physically available", there would undoubtedly be fewer cases where VAT paid on the purchase of a car could be deducted, that itself is not the object of the provision. The object is to prevent claims to deduct tax on cars purchased for business save where the possibility of private use is excluded. That purpose can equally well be achieved if the concept of availability is not restricted to physical availability but includes also cases of unavailability due to the imposition of effective legal restraints.”

12. In the light of those observations it is clear that we must carefully scrutinise the Appellant’s claim for input tax credit, recognising that the conditions for relief are strict. Further, we are concerned with both physical restrictions on availability for private use and also effective legal restraints.

13. Arden LJ went on to consider the meaning of the term “available” in paragraph 7(2G):

" 38. So with the above considerations in mind I turn to consider the meaning of "available" in art 7(2G). This point was not considered in detail by the judge because the argument on this point has received greater emphasis in this court than before the judge. Nor was this point decided in the *Upton* case. The judge and the tribunal in this case clearly thought that unavailability for private use could be achieved by appropriate contractual provisions as well as by physical constraints. I agree. However, for the reasons given by Neuberger J in the *Upton* case, it is difficult to see that physical restraints such as parking the car in a locked car park out of business hours could of themselves be effective in the case of a car acquired for use by a sole trader, or, I would add, a sole director.

39. 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 thus no reason why a car cannot be made unavailable for private use by suitable contractual restraints, that is effective restraints."

14. In cases involving sole traders and companies with a sole director, the focus is therefore on effective legal restraints rather than physical restraints against private use. That is because in those cases physical restraints cannot really be effective in preventing private use. Absent an effective legal restraint, the vehicle will be available for private use even if not intended to be used privately at the time of purchase.

15. Arden LJ applied the principles she had outlined to the facts of Elm Milk at [40] and [41] as follows:

" 40. In the present case the prohibition was backed up by the terms of Mr Phillips' employment and in addition the arrangements as to the location of the keys. The tribunal accepted Mr Phillips' evidence that he intended to be bound by the terms of the board resolution prohibiting from using the car for private use. There is no doubt that a company can enter into a binding employment contract with its sole director, even where that director is also the controlling shareholder: see *Lee v Lee's Air Farming Ltd* [1961] AC 12, a decision of the Privy Council. Mr Paines contends that the restrictions are worthless in this case because they can be revoked at any time by Mr Phillips and would be automatically revoked if he were to use the car for private purposes. The first part of that submission is not open to Mr Paines in the light of the tribunal's findings to which I have referred. As to the latter part of that submission, the question whether the restrictions are revoked would depend on what should be inferred to be the intention of the company in that situation. It would not necessarily follow that the intention of the company would be to lift the restrictions rather than to enforce any remedy for breach.

41. It follows that I agree with the judge that that the terms of the insurance for the car did not mean that an intention not to make the car available for private use could not be shown. I further agree with what the judge said about the possible use of the car in emergencies. It follows from the tribunal's findings that it does not matter that in theory Mr Phillips could have revoked the board resolution at any time."

16. In other words, on the facts as found the tribunal and the Judge had been entitled to find that there were effective legal and physical restrictions on private use such that there was no intention to make the vehicle available for private use.

17. Both parties referred us to a decision of the VAT Tribunal in *Robert & Lillian Waddell v Commissioners for HM Revenue & Customs [2009] UKFTT 185 (TC)*. In that case the appeal was dismissed but in our view it is simply an illustration of the application of the principles described by the Court of Appeal in Upton and Elm Milk. As such it does not really assist in our decision.

Findings of Fact

18. This appeal was originally listed to be heard on 23 February 2016. On that occasion Mr Minton was the only person available to give evidence on behalf of the Appellant. We granted an application by Mr Minton, made at our suggestion, to adjourn the hearing so that Ms Eckersall could give evidence. Based on the evidence before us we make the following findings of fact.

19. The Appellant's business was originally started by Mr Bryan Bradley in 1983. Sean Bradley, who we shall call Mr Bradley, is Bryan's son and has worked in the business since leaving school. In 2003 Bryan was looking to sell the business. By then Mr Bradley was aged 38 and he was married to Ms Eckersall. Together they formed the Appellant as a new company and purchased the business with the help of bank finance. Mr Bradley and Ms Eckersall were the only directors and equal shareholders. Mr Bradley dealt with sales and new customers. He was also involved in attending customer premises to re-stock machines. Ms Eckersall dealt with customer service issues and the bank.

20. The business continued successfully until the financial crisis of 2008 when many customers started to reduce their use of vending machines. The Appellant's turnover and profits fell significantly and the bank placed it under "special measures". Thereafter the bank closely monitored the Appellant's income and expenditure on a monthly basis and there were monthly meetings between the directors and the bank.

21. In November 2008 Mr Bradley and Ms Eckersall separated and divorce proceedings were commenced. We were told and we accept that the divorce was acrimonious and that there was much bitterness and jealousy between the two of them. They continued working together in the business out of necessity. Finances were such that Mr Bradley could not afford to buy out Ms Eckersall's share. They would not speak about anything other than the business and they had a "built-in distrust" of one another. The divorce was not finalised until July 2012.

22. The business had 8 employees including Mr Bradley and Ms Eckersall. In 2012 it operated 7 vans which were used to attend customer premises to re-stock the vending machines. Until 2012 Mr Bradley also used a company van when attending existing and prospective customers. Mr Bradley and Ms Eckersall considered that it would be good for the business and project a more professional image if Mr Bradley

was driving a more prestigious vehicle when attending meetings. They were keen to attract more blue chip customers.

23. In 2012 a friend of Mr Bradley who was a car dealer told him that occasionally he was able to source qualifying second hand vehicles where he would charge VAT on resale to customers. If the car was only for business use then it would be possible for the Appellant to reclaim VAT charged on the sale. For example a car costing £60,000 when new might be sold at six months old for £40,000 plus £8,000 VAT. If the Appellant could reclaim the VAT the cost of purchasing the car would effectively be £40,000.

24. Mr Bradley approached Mr Minton for advice. Mr Minton is a chartered accountant but not a tax specialist. He explained to Mr Bradley that it was very difficult to put a motor car beyond private use in order to reclaim the VAT. Mr Bradley considered that their intention in purchasing a vehicle was to use it solely for business purposes and that they could do anything that was necessary to put it beyond private use.

25. Mr Minton agreed to help the Appellant put a case to the bank for purchasing a vehicle on the basis that the VAT would be reclaimed. In February 2012 Mr Minton and the two directors met with Joanne Barlow of the bank. They convinced her of the business case for a more prestigious vehicle and the bank sanctioned the monthly payments on the basis that the VAT would be recovered in the next VAT return.

26. No minutes of that meeting were available, but Mr Minton produced a summary of his recollection dated 7 January 2015. It included the following paragraph:

> "Joanne Barlow asked James Minton to confirm that it would be possible to reclaim the £8,000 vat in this example and James Minton replied that this would only be possible if there was no private use permitted of the vehicle. Sean Bradley and Linzi Bradley confirmed that they would agree not to use the vehicle privately and that it would be garaged at the company's premises. At this point they were finalising their own divorce (concluded in July 2012) and they joked that they would monitor each other to make sure that no personal benefit was enjoyed from the car."

27. We accept that Mr Minton's note reflects the tenor of what was said at the meeting. The bank agreed to the purchase of a prestige car and on 23 May 2012 the Appellant purchased the Vehicle from Optima Cars Ltd. The Vehicle had some 12,000 miles on the clock when purchased. It cost £39,160 plus VAT of £7,833 which was reclaimed in the next VAT return. The Vehicle was purchased on finance which involved a final "balloon payment" of £15,000 in 2015. In the event the Appellant exercised its option not to make the balloon payment and handed the Vehicle back to the finance company in 2015. Termination of the finance agreement was treated by the Appellant as a supply for VAT purposes and it accounted for output tax of £2,500 at that time. Hence the net amount of VAT at issue in the present appeal is £5,333.

28. The Appellant had an existing fleet insurance policy for its vans which covered use by any person with the permission of the Appellant. The vans were insured for use in the Appellant's business and also for social domestic and pleasure purposes. The

Vehicle was simply added to this policy and no consideration was given to obtaining a separate policy for the Vehicle covering business use only.

29. There was no formal board meeting to discuss and authorise purchase of the Vehicle or its terms of use. Restrictions on use of the Vehicle were not documented at the time of purchase. However we are satisfied that at the time of purchase Mr Bradley and Ms Eckersall agreed and implemented the following restrictions on use of the Vehicle:

(1) The vehicle was kept locked at the Appellant's premises when not being used, including overnight. The premises comprise a unit with roller shutters on an industrial estate. Inside there is an area to keep stock and a small office area. At night the Vehicle was kept inside the unit behind the roller shutters.

(2) Mr Bradley and Ms Eckersall were the only employees permitted to use the Vehicle. Neither of them was to use the vehicle unless it was booked out for a meeting. Ms Eckersall administered a booking facility for the Vehicle in a desk diary which she maintained.

(3) The car keys were kept in the Appellant's safe when the vehicle was not being used.

(4) A tracker was fitted to the Vehicle in the same way as trackers were fitted to the Appellant's vans. This meant that it was possible for both Mr Bradley and Ms Eckersall to monitor use of the Vehicle. It was also a security device in case the Vehicle was stolen. The trackers were not a requirement of the insurance policy but had been installed in the vans to ensure that van drivers, who took the vans home at night and weekends, did not use them for private purposes.

30. Ms Eckersall was the key holder for the safe, which was also used to keep cash, spare van keys and important documents. Mr Bradley did not have a key. For periods when Ms Eckersall was away from the Appellant's premises the operations manager who supervised cash in the business held a key to the safe.

31. The premises were open between 8am and 4pm on weekdays. Outside those hours an alarm was set and externally monitored. CCTV was also in operation. Security at the premises was tight, indeed Ms Eckersall had previously been a detective in the police force. If the alarm was triggered or de-activated outside opening hours by anyone including Mr Bradley and Ms Eckersall the alarm monitoring service would call either Mr Bradley or Ms Eckersall.

32. Ms Eckersall described it as "set in stone" that Mr Bradley would not use the Vehicle for private purposes. We accept that their relationship was such that each would have been angry if it was found that the other had used the vehicle for private purposes.

33. The Vehicle was used by Mr Bradley and Ms Eckersall, although mainly by Mr Bradley. Mr Bradley continued to use a company van to travel between his home and the Appellant's premises and when re-stocking vending machines. He lived approximately 7 miles from the Appellant's premises. His partner had her own car

which they used for private purposes. Ms Eckersall had her own car, a BMW 1 Series which she used for private purposes, including travel between her home and the Appellant's premises. She lived approximately 6 miles away.

34. No mileage log or other record of mileage was kept, but for the purposes of this appeal Ms Eckersall has used the booking diary to re-create a mileage log for the period 1 June 2012 to 31 May 2013. The Respondents did not take issue with the contents of that log. It shows that the Vehicle did 18,621 miles in the first year of ownership, with a break down of the date, destination and mileage of each individual journey. We are satisfied on the evidence that the Vehicle was not actually used for private purposes. The Respondents did not challenge the Appellant's case on actual use.

35. When the Vehicle was sold in 2015 it was not replaced. At the same time in 2015 Ms Eckersall replaced her BMW with a Mercedes. At some stage Mr Bradley purchased his own Mercedes although Ms Eckersley could not recall when.

Reasons

36. Mr Minton submitted that:

(1) legal restraints could be amended or varied. It would be unrealistic to expect a company such as the Appellant to pass a board resolution. It was the physical restraints which were the most significant.

(2) the insurance policy was irrelevant, for the same reasons as given in Elm Milk. It would have been much more expensive to get a separate policy for the Vehicle.

37. Mrs Fletcher submitted that the agreement between Mr Bradley and Ms Eckersall was an informal agreement as to use of the Vehicle and did not amount to an effective restriction on private use. She submitted that there was no effective legal restriction on private use. She also submitted that the present appeal was distinguishable from Elm Milk on its facts in that:

(1) Elm Milk had enquired about a business use only policy but had been told that it was not possible to insure the vehicle for business use only.

(2) There was a board resolution in Elm Milk that the vehicle must be used only for business purposes and the director intended to be bound by that resolution.

(3) The restriction against private use was incorporated into the director's contract of employment.

38. We consider first the physical restrictions on private use.

39. It is relevant to note that Arden LJ in Elm Milk referred to the significance of actual use as a means to test any finding as to intention. At [6] she stated:

> " 6. … the exceptions in art 7(2E) are based around the intention to use the car rather than use itself. No doubt that is because the deductibility of the input tax has to be determined when the car is purchased. The time for assessing the relevant intentions is at the time of the supply. Nonetheless the need to find intention to use rather than actual use adds an additional layer of difficulty. In the *Upton* case, the conclusion as to intention as to use departed from the evidence as to actual use after acquisition although it was not suggested that there had been any change of intention. This highlights the point that the *Upton* case turns on its very special facts since in the usual way consciously or unconsciously a tribunal or court would seek to test any provisional finding as to the taxpayer's intention as to use by reference to what use had actually taken place after the alleged intention was formed."

40. In the present case the evidence of Ms Eckersall was that the Vehicle was not used for private purposes by anyone. That evidence was not challenged and we accept it was the case. That would tend to support the Appellant's case that there was no intention to use the Vehicle other than for business purposes. However the real issue on this appeal, as it was in Upton and in Elm Milk, is whether the restrictions imposed by the Appellant were effective so as to justify a finding that there was no intention to even make the Vehicle available for private use.

41. We are satisfied that Ms Eckersall was to some extent in a position to ensure that Mr Bradley did not use the Vehicle for private use. He would not have access to the keys unless she or the operations manager opened the safe. She would not know how he used the Vehicle when he did have the keys. In theory she could have checked the mileage when the Vehicle left and returned and viewed data from the tracker although there was no evidence that she ever carried out such checks. The restraints on Ms Eckersall were not at the same level. In particular she had access to the keys in the safe and she maintained the booking diary. It seems to us that Mr Bradley and Ms Eckersall could use the Vehicle for private purposes, albeit running a risk that the other might find out. In those circumstances there would be no sanction other than incurring the anger of the other person.

42. We do not accept Mr Minton's submission that the physical restraints are somehow more important than any legal restrictions. It is clear that the existence of legal restrictions was significant in both Upton and Elm Milk. It seems to us that we must consider the combined effect of both physical and legal restrictions in the circumstances as a whole. We therefore turn to the legal restrictions.

43. The Appellant's failure to consider insuring the Vehicle only for business use adds little if any weight to the Respondents' arguments. It was not suggested that the Appellant had consciously decided to retain insurance for social domestic and pleasure purposes. This was simply one form of restriction that might have been implemented but was not.

44. We accept that there was an agreement between Mr Bradley and Ms Eckersall at the time of purchase that neither of them would use the Vehicle for private purposes. We are not satisfied from the circumstances in which the agreement was made that it was intended to have any legal effect. It was not documented in any way and there was no sanction for breach of the agreement. It contrasts with the circumstances in

Elm Milk where there was express provision that private use would be a breach of the director's contract of employment. In that case there was also a formal board resolution and any private use would have been a breach of the director's duties to the company.

45. There is force in Mr Minton's submission that it would be unrealistic to expect a company such as the Appellant to pass a formal board resolution. However in the light of the relationship between Mr Bradley and Ms Eckersall it is not unrealistic to expect at least some formalilty if the agreement was intended to have legal effect. In particular we would expect to see some sanction for breach. In Elm Milk for example the agreement was incorporated into the director's contract of employment. In our view the agreement between Mr Bradley and Ms Eckersall was simply a non-binding informal agreement as to use of the Vehicle. It was not a legal restriction on private use enforceable by the Appellant.

46. In the absence of any effective legal restrictions we do not consider that the physical restrictions lead to a conclusion that there was no intention to make the Vehicle available for private use. As we have stated above, the physical restrictions could be ignored. They did not in themselves prevent private use of the Vehicle by Mr Bradley or Ms Eckersall, although they did make possible that any private use by one could be identified by the other. In the absence of a sanction we consider that the Vehicle was available for private use and that at the time of purchase the Appellant must be taken to have intended to make it available for private use.

Conclusion

47. We are satisfied that the Appellant, through Mr Bradley and Ms Eckersall, acted in good faith in reclaiming input tax on purchase of the Vehicle. However for the reasons given above the Appellant intended to make the Vehicle available for private use. In those circumstances it was not entitled to input tax credit and we must dismiss the appeal.

48. 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: 12 AUGUST 2016