TC02635

Appeal number: TC/2011/19

VAT – deductibility of input tax on purchase and maintenance of helicopter – method adopted by taxpayer – whether apportionment under s 24(5) VATA 1994 or Lennartz method – whether private use – whether assessment time barred - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JNK 2000 LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE PETER KEMPSTER
Mr PHILIP JOLLY

Sitting in public at Priory Courts, Birmingham on 2 July 2012

Ms Laura Poots of counsel (instructed by Smith & Williamson) for the Appellant

Mr Bernard Haley (HMRC Appeals Unit) for the Respondents

DECISION

1. By an assessment issued on 9 September 2010 ("the 2010 Assessment") the Respondents ("HMRC") assessed VAT in the amount of £39,246 (plus interest of £5,288.37) in respect of the VAT accounting periods of the Appellant ("the Taxpayer") ended 09/06, 03/07, 09/07 & 12/08. The 2010 Assessment relates to recovery of input tax allegedly over-deducted in respect of the purchase and maintenance of a helicopter by the Taxpayer.

Evidence presented by the parties

2. The Tribunal considered documentary evidence presented by the parties and oral evidence from Mr Keith Tolley (director and shareholder of the Taxpayer) and Mr Christopher Green (HMRC officer).

3. The Taxpayer was incorporated in 2004 and took over a business previously run by Mr Tolley and his wife. The business is mainly the design, development, manufacture and distribution of specialist parts for 4X4 vehicles, especially Land Rovers ("the Parts Business"). The Parts Business is predominately wholesale (at least in the periods in dispute). Mr Tolley is an experienced helicopter pilot, having previously run a helicopter business. The inspiration for some of his early products came from his experience of 4X4 vehicles at airfields. For many years Mr Tolley used a helicopter in his business and this continued after the business was incorporated. In 2007 the helicopter then used developed engine problems and the Taxpayer part-exchanged it for a new Robinson R-44 ("the 2007 Helicopter"). Because of changes in the dollar/sterling exchange rate and the market for used helicopters, it made commercial sense for a new helicopter to be purchased. The Taxpayer's corporate logo was painted on one side of the 2007 Helicopter. The 2007 Helicopter was hangered at the farm where Mr & Mrs Tolley lived; this saved on hanger charges that would be incurred if a commercial airfield was used. The Taxpayer's business had suffered during the current recession and the 2007 Helicopter was sold in 2010; VAT was charged on the sale.

4. During the period in dispute the 2007 Helicopter logged 54.3 flying hours. These may be summarised as follows and are examined further below:

Use of 2007 Helicopter	**Flying hours**
Parts Business	13.2
Maintenance	19.2
Hire to Mr Mark Greenway	10.0
Hire to Mr Nick Tolley	4.8
Hire to Mr Keith Tolley	7.1
Total	**54.3**

5. Use in the Parts Business included visits to owners of Land Rover vehicles for measurement and fitting of new designs; visits to customers requiring urgent deliveries; visits to customers for photo-shoots, and other marketing opportunities.

6. Mr Greenway is not connected to the Taxpayer. He is a helicopter pilot instructor. For a number of years he had hired the helicopters owned by the Taxpayer (and previously Mr Tolley) for pilot instruction. Mr Tolley estimated that in most years around two thirds of the flying hours represented hires to Mr Greenway. In the period in dispute the small number of hires by Mr Greenway was partly because he had a health problem that restricted his instructor licence, and partly because unusually bad weather had limited available flying time. A hire fee was charged to Mr Greenway and VAT was charged. Mr Tolley set the hire fee by reference to what was charged by other suppliers such as Heli Air. In the period in dispute the hire fee was £150 plus VAT per hour. Mr Tolley believed that was a normal commercial rate for supply of a helicopter alone - ie without pilot, fuel, landing charges etc.

7. The 2007 Helicopter was also flown by Mr Tolley and his son, Nick. Hours flown by Nick Tolley were invoiced to him at the same rate as charged to Mr Greenway, and VAT was charged. After many years as a professional helicopter pilot and instructor Mr Keith Tolley did not view his flying hours as a leisure or fun activity; again, his flying hours were invoiced to him at the same rate as charged to Mr Greenway, and VAT was charged. As a result of a misunderstanding by the Taxpayer invoices had been raised to Mr Keith Tolley not only for those hours but also for the hours flown by him in relation to the Parts Business and the maintenance flights. That was an error and was to be corrected internally and on the relevant VAT returns, where possible.

8. In March 2009 Mr Green made a routine VAT inspection visit to the Taxpayer. He queried the input tax reclaim on the purchase of the 2007 Helicopter. His internal notes record:

> "The large amount of input tax claimed and output tax declared in period 09/07 was caused by the sale and then the purchase of a helicopter. It seems that the trader uses the helicopter for private use and not for the purpose of the business, the helicopter is only insured for Mr Tolley and his son and one associate to pilot and is not for the purpose of making any taxable supplies. Mr Tolley explained that the only reason that they have the helicopter in the business is for the limited liability that the company offers in the case of any litigation. I cannot see that there is any business use. Since the helicopter was purchased in September 2007 only two sales invoices have been issued by the company to the directors totalling only £1800 which I suspect was an attempt at tax avoidance but not kept up, I do not consider that the Lennartz principle can apply here.
>
> ...
>
> *Irregularities*
>
> 1. Input tax of £37310.85 was claimed in period 09/07 against the purchase of a helicopter. This purchase is not for the furtherance of

making taxable supplies and I will be issuing an assessment for the whole amount claimed.

The helicopter can only be used for the private business of the three insured, Mr Tolley, his son and a friend Mr Greenway according to the insurance documents. It cannot be used for any commercial use, it cannot be rented out or used for private hire. Mr Tolley states that he has owned a helicopter since 1979. He currently owns one through his limited company because he states it affords him limited liability status as regards any litigation against any action involving the helicopter.

2. I also intend to issue an assessment against the input tax claimed against the running expenses of the helicopter as follows [detailed figures follow].

In making my decision I have taken advice from the TAPE team and also the team that has been specifically set up to look at boats and light air craft and taken note of guidance V1-6.

Credibility

The Tolleys were aware that their input tax claims made against the helicopter would be challenged and I think it would have been prudent of them to check the deductibility of this input tax before claiming it."

9. In relation to the claim that Mr Tolley said the 2007 Helicopter was owned by the Taxpayer because the limited liability of the company gave protection against possible claims, Mr Tolley's recollection is that that was just one comment he made during the discussion concerning use of the helicopter. In relation to the claim that the insurance did not cover commercial use, Mr Tolley's evidence was that "commercial use" in this context meant flights carrying fare-paying passengers; that was not insured but the helicopter was never used for that purpose; the insurance covered all the uses that were made of the helicopter – namely use for the purpose of the Parts Business and hiring to Mr Greenway and Keith and Nick Tolley.

10. There then followed correspondence between HMRC, the Taxpayer and its advisers. This included the following:

(1) On 16 March 2009 HMRC wrote:

"After considering all of the information that you provided it is my opinion that the helicopter was purchased for private use and therefore the associated input tax is not allowable. The helicopter can only be used for the private business of the three insured persons, Mr Tolley, his son and Mr Greenway according to the insurance documents. The helicopter is kept at the home of Mr Tolley, It cannot be used for any commercial purpose; it cannot be rented out or used for private hire. Mr Tolley states that he has owned a helicopter since 1979. He currently owns one through his limited company because he states it affords him limited liability status as regards any matter involving the helicopter. Even before the formation of JNK 2000 Ltd Mr Tolley owned a helicopter. If you could allocate all of the input tax claimed against the helicopter into VAT periods I would be grateful."

(2) On 2 April 2009 the Taxpayer wrote explaining the background.

(3) On 14 April 2009 HMRC stated that they intended to issue assessments in relation to the disputed items. On 16 April HMRC raised a VAT assessment accordingly, disallowing all the disputed input tax.

(4) The Taxpayer took professional advice and on 22 October 2009 the advisers wrote contending that the asset was not a "personal use helicopter" and stating:

> "*Business use*
>
> The helicopter has been repainted with the logo of JNK on it. This is an advertising feature and simply highlights JNK ownership. Mr Greenway uses the helicopter to fly individuals around for business purposes.
>
> As you know, invoices have been raised by JNK 2000 Ltd to Keith Tolley, Nicolas Tolley and Mark Greenway for use of the helicopter. If, in any case, you are contending it is private use (which we do not agree with) then the Lennartz principle is applicable and full recovery of input tax incurred on the purchase of the helicopter and the associated running costs, should be allowable."

(5) On 23 November 2009 HMRC wrote:

> "As regards Lennartz, given the nature of the Tolleys' business which is manufacturing after market automotive parts in the Black Country I do not believe any genuine business use was ever intended for the helicopter and therefore consider it cannot apply."

(6) The advisers requested a formal internal review of Mr Green's conclusions, and on 3 June 2010 Mr Braeger of HMRC gave the result of his internal review. He concluded that "the decision to disallow the VAT in full should be cancelled" and stated:

> "*My conclusion*
>
> Based on the information provided by your agent I am prepared to accept that at the time the helicopter was purchased there was an intention to use it for both business and private purposes. I have therefore concluded there is an entitlement to recover at least some of the VAT incurred on its purchase and on the associated running costs and that Mr Green's decision to disallow the VAT claimed in full should be cancelled.
>
> The amount of VAT recoverable will depend on whether you choose to use the Lennartz approach to account for private use or to apportion the VAT so that the input tax claimed reflects the use to which the supplies were intended to be put.
>
> *What happens next*
>
> I have asked Mr Green to contact you/your agent to determine what basis you intend to use to account for the private use and to make any necessary amendments to the assessment."

(7) On 9 June 2010 (letter incorrectly dated 2009) Mr Green of HMRC wrote:

"... as you are aware Mr Braeger is anxious that the private use element of the helicopter should be accounted for correctly and has advised that my original assessment be amended when you have advised your intentions.

Having examined all the flying logs Mr Braeger considers that private use of the helicopter accounts for approximately 90% of the total and has requested that I determine how you propose to account for that element of private use for VAT purposes. The options are that only 10% of the original input tax claim on the purchase should be claimed or that you should adopt the Lennartz principal [*sic*] and increase the amount of output tax that has been declared. I would advise that you discuss the issues with your agent."

(8) On 16 June 2010 the advisers wrote:

"Private use element

We are somewhat mystified by your assertions that 90% of the use of the helicopter was for private purposes. As we have maintained all along, all use of the helicopter has been invoiced by JNK 2000 to the individual pilots. Output VAT has been charged, and paid over to HMRC for this element. Therefore in our view, there is no element of private use to account for."

(9) On 22 June 2010 HMRC wrote:

"Mr Braeger is clear in his letter to your client that he considers that there is an element of private use of the helicopter. I do not dispute that the private use of the helicopter has been invoiced out to the Tolleys and Mr Greenway however the calculation of the charges do not appear to be at a commercial rate. Based on the helicopter log and the sales invoices issued 90.83% of the hours flown in the helicopter appear to be for private use albeit invoiced, however I would refer you to HMRC guidance V1-13 para 5.17 which explains how output tax must be accounted for if Lennartz is used. I would be grateful if you would look at this again and I would be very happy to discuss the matter."

(10) On 21 July 2010 HMRC wrote:

"I have not received a reply to my letter of 22nd June or 7th July. I will take you at your word that all use of the helicopter has been invoiced out to the individual pilots. I will also assume that the reason the company invoices the pilots for the use of the helicopter is because their usage of the helicopter is not for the purpose of the business. The company of course would not invoice for the use of the helicopter if it was for company business."

(11) On 23 July 2010 the advisers wrote:

"*Private use*

… I should like to make it clear that my client is not making a claim under the Lennartz mechanism. There is no combination of private and business use, because all private use is being invoiced, so it is all business use.

> You will appreciate that in accordance with the Lennartz mechanism, Lennartz will not apply if there is a consideration for the "private use". Therefore the guidance you refer to under [reg 116A] does not apply. In any event I do not see the relevance of Lennartz accounting in this situation."

(12) On 2 August 2010 HMRC wrote:

> "I understand that the input tax claim made against the helicopter was not in accordance with the Lennartz principle but on the basis that all use of the helicopter is for the purpose of the business. Furthermore you state that the helicopter is for the private use of the Tolleys and Mr Greenway but is business use because the company raises sales invoices for this private use.
>
> Unfortunately paying output tax on private use does not in itself give a right to deduct input tax and subsequently your client's claim to input tax is not allowable and I will be reinstating the assessment I previously withdrew in accordance with Mr Braeger's the reviewing officers instructions which were notified to your client."

(13) On 19 August 2010 the advisers wrote:

> "We would like to clarify the use of the helicopter. In our view the helicopter is used entirely for business use because all flying hours have been invoiced, charging VAT. Any 'private use' of the helicopter by the pilots ceases to be private because it has been charged for.
>
> …
>
> As all the 'private use' has been invoiced (you have acknowledged this in your letter dated 21 July 2010), it follows that the supplies of services under paragraph 5(4) Schedule 4 have been made for a consideration and paragraph 7 Schedule 6 does not apply.
>
> As to your remark in your letter dated 2 August 2010, that charging output tax on private use does not give a right to deduct input tax, we would refer you to paragraph 5(6) Schedule 4 which states:
>
> "(6) Anything which is a supply of ... services by virtue of subparagraph … (4) is to be treated as made in the course or furtherance of the business (if it would not otherwise be so treated); … " (my underlining).
>
> This is clear statutory authority that the invoicing of the "private use" is by way of business which gives our client the right to deduct input tax, contrary to your assertion otherwise.
>
> We hope that the above explanation will allow you to accept that. In the circumstances of this particular case, it is not possible to carry out Lennartz accounting to account for the output tax, Indeed there is no need to account for output tax as this has, already been accounted for on the invoices issued for the 'private use'. If Lennartz accounting were to be carried out this would have the effect of accounting for output tax twice on the same supply which clearly is not correct."

(14) On 25 August 2010 HMRC stated "… the helicopter is not held for the purpose of the business at all …". On 9 September HMRC raised a new VAT

assessment (which is the assessment under appeal in these proceedings); it is identical in amount to the 16 April 2009 assessment. On 24 September HMRC raised a misdeclaration penalty.

(15) On 6 October 2010 the advisers requested a further internal review and also protested that the new assessment was out of time (other than in respect of the VAT period 12/08).

(16) On 22 November 2010 Mr Jennings of HMRC gave the result of his internal review. He concluded that the assessment should stand but the misdeclaration penalty should be withdrawn, and stated:

> "Subsequent to this decision [ie Mr Braeger's review decision], it has been asserted that there was no private use of the helicopter, for the reason that the use of the helicopter had been invoiced by JNK and therefore was used entirely for business purposes.
>
> …
>
> I have seen and perused all correspondence and related documentary evidence relating to the purchase and use of the helicopter. I have no reason to depart from Mr Braeger's conclusion that *'based on the information provided ... I* am *prepared to accept that at the time the helicopter* was *purchased there* was *an intention to use it for both business and private purposes'*. However, I am unable to agree with the assertion put forward that the *actual use* to which the helicopter has been put relates directly to the business activities of JNK. No evidence has been forthcoming to show that the *intention* to use the helicopter in the course or furtherance of JNK's business was actually carried out in practice.
>
> …
>
> In line with the decision in *Rosner*, I have been unable to find or discern any connection between the expenditure incurred in the purchase and running costs of the helicopter and the business purposes of JNK. The fact that JNK issued invoices for the use of the helicopter does not confer evidential weight to show that that use was directly related to JNK's business activities, or that the disallowed input tax was attributable to the course or furtherance of JNK's business.
>
> In Ms Benussi's letter dated 6 October 2010, reference is made to the time limits for issuing assessments. I consider HMRC adhered to the legislative time limits in issuing the assessment on 9 September 2010. In particular I consider that new evidence of facts was brought to HMRC's attention in Ms Benussi's letter to Mr Green dated 23 July 2010. Until that time it had been argued that the helicopter had been used for business purposes. In Ms Benussi's letter it was argued that " *... all private use is being invoiced, so it is all business use"*. The question arising from this - and which *inter alia* formed the basis of my decision - was whether this private use could, by the issuing of invoices, constitute business use.
>
> In conclusion therefore, I regret that I am unable to find grounds on which to withdraw or amend the assessment for £39,246. Mr Green's decision is consequently upheld."

(17) On 21 December 2010 the Taxpayer appealed to the Tribunal against the September 2010 assessment.

Relevant legislation

11. All legislation is cited as in force for the VAT periods in dispute.

12. Section 24 VATA 1994 provides (so far as relevant):

> "**24 Input tax and output tax**
>
> (1) … "input tax", in relation to a taxable person, means … —
>
> (*a*) VAT on the supply to him of any goods or services;
>
> …
>
> 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.
>
> …
>
> (5) Where goods or services supplied to a taxable person … are used or to be used partly for the purposes of a business carried on or to be carried on by him and partly for other purposes, VAT on supplies … shall be apportioned so that only so much as is referable to his business purposes is counted as his input tax."

13. Section 19 VATA 1994 provides (so far as relevant):

> **"19 Value of supply of goods or services**
>
> (1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.
>
> (2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration.
>
> …
>
> (5) For the purposes of this Act the open market value of a supply of goods or services shall be taken to be the amount that would fall to be taken as its value under subsection (2) above if the supply were for such consideration in money as would be payable by a person standing in no such relationship with any person as would affect that consideration."

14. Section 73 VATA 1994 provides (so far as relevant):

> "(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete

or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

…

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(*a*) 2 years after the end of the prescribed accounting period; or

(*b*) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment."

15. Paragraph 5(4) sch 4 VATA 1994 ("Matters to be treated as supplies of goods or services") provides (so far as relevant):

"(4) Where by or under the directions of a person carrying on a business goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, that is a supply of services."

16. Paragraphs 1 and 7 sch 6 VATA 1994 ("Valuation: special cases) provide (so far as relevant):

"1(1) Where—

(*a*) the value of a supply made by a taxable person for a consideration in money is (apart from this paragraph) less than its open market value, and

(*b*) the person making the supply and the person to whom it is made are connected, and

(*c*) if the supply is a taxable supply, the person to whom the supply is made is not entitled under sections 25 and 26 to credit for all the VAT on the supply,

the Commissioners may direct that the value of the supply shall be taken to be its open market value.

(2) A direction under this paragraph shall be given by notice in writing to the person making the supply, but no direction may be given more than 3 years after the time of the supply.

…

7 Where there is a supply of services by virtue of—

…

(*b*) paragraph 5(4) of Schedule 4 (but otherwise than for a consideration),

the value of the supply shall be taken to be the full cost to the taxable person of providing the services …"

17. Regulation 116A VAT Regulations 1995 (SI 1995/2518) ("Goods used for non-business purposes during their economic life") provides (so far as relevant):

"116A *APPLICATION*

This Part makes provision for calculating the full cost to a person of providing the supply of services ("relevant supply") that is treated as made pursuant to paragraph 5(4) of Schedule 4 to the Act where goods that are held or used for the purposes of a business are used for private or non-business purposes. Where goods that are held or used for the purposes of a business have an economic life (see regulations 116C, 116D, 116G and 116L) at the time when they are used for private or non-business purposes, the value or part of the value of the relevant supply which is referable to that use on or after 1st November 2007 shall be calculated in accordance with the regulations in this Part."

Relevant case law cited by the parties

18. In *Lennartz v Finanzamt München III* (Case C-97/90) [1995] STC 514 the ECJ held (at 546):

"1. Article 20(2) of the Sixth Directive applies where a person acquires capital goods in his capacity as a taxable person and allocates them to his economic activity within the meaning of art 4 of the Sixth Directive.

2. Whether, in a particular case, a taxable person has acquired goods for the purposes of his economic activity within the meaning of art 4 of the Sixth Directive is a question of fact which must be determined in the light of all the circumstances of the case, including the nature of the goods concerned and the period between the acquisition of the goods and their use for the purposes of the taxable person's economic activity.

3. A taxable person who uses goods for the purposes of an economic activity has the right on the acquisition of those goods to deduct input tax in accordance with the rules laid down in art 17 of the Sixth Directive, however small the proportion of business use. A rule or administrative practice imposing a general restriction on the right of deduction in cases where there is limited, but none the less genuine, business use constitutes a derogation from art 17 of the directive and is valid only if the requirements of art 27(1) or (5) of the directive are met."

19. In *Hausgemeinschaft Jörg und Stefanie Wollny v Finanzamt Landshut* (Case C-72/05) [2008] STC 1618 the ECJ explained (without citing *Lennartz*) (at 1635-1636):

"21. Where capital goods are used both for business and for private purposes the taxpayer has the choice, for the purposes of VAT, of (i) allocating those goods wholly to the assets of his business, (ii)

> retaining them wholly within his private assets, thereby excluding them entirely from the system of VAT, or (iii) integrating them into his business only to the extent to which they are actually used for business purposes (*Charles v Staatssecretaris van Financiën* (Case C-434/03) [2006] STC 1429, para 23).
>
> 22. Should the taxable person choose to treat capital goods used for both business and private purposes as business goods, the input VAT due on the acquisition or construction of those goods is, as a rule, immediately deductible in full (*Seeling v Finanzamt Starnberg* (Case C-269/00) [2003] STC 805 (para 41) and *Charles* (para 24)).
>
> 23. However, pursuant to art 6(2)(a) of the Sixth Directive, when the input VAT paid on goods forming part of the assets of a business is wholly or partly deductible, their use for the private purposes of the taxable person or of his staff or for purposes other than those of his business is treated as a supply of services for consideration. That use, which is therefore a taxable transaction within the meaning of art 17(2) of that directive, is, under art 11A(1)(c) thereof, taxed on the basis of the cost of providing the services (*Charles* (para 25)).
>
> 24. Consequently, where a taxable person chooses to treat an entire building as forming part of the assets of his business and uses part of that building for private purposes he is, on the one hand, entitled to deduct the input VAT paid on all construction costs relating to that building and, on the other, subject to the corresponding obligation to pay VAT on the amount of expenditure incurred to effect such use (*Seeling* (para 43)).
>
> 25. The question referred by the national court seeks, against that background, to ascertain how to interpret the expression 'full cost … of providing the services' within the meaning of art 11A(1)(c) of the Sixth Directive. …"

The Taxpayer's case

20. Ms Poots for the Taxpayer submitted as follows. First, the disputed input tax was fully recoverable. Secondly, the 2010 Assessment was out-of-time, save in relation to the 12/08 VAT period.

Recovery of input tax

21. It was clear from the evidence that substantial business use had been made of the 2007 Helicopter. All the flying hours recorded for use in the Parts Business and for maintenance purposes were business use. Similarly, the hiring at commercial rates to Mr Greenway. However, there was also use by Mr Tolley and his son.

22. As explained by the ECJ in *Wollny*, where a taxpayer uses capital goods for both business and for private purposes the taxpayer has the choice of three possible methods for VAT accounting.

(1) First, he can retain them wholly within his private assets, thereby excluding them entirely from the system of VAT. It is common ground that the Company did not choose that method.

(2) Alternatively, he can integrate them into his business only to the extent to which they are actually used for business purposes. That is accommodated by s 24(5) VATA which provides for apportionment of VAT on supplies to the taxpayer so that only so much as is referable to his business purposes is counted as his input tax. That may be termed "the apportionment method".

(3) Finally, he can allocate those goods wholly to the assets of his business. In that case (a) the input VAT on the acquisition of those goods is immediately deductible in full; but (b) the use of those goods for private purposes is treated as a supply of services for consideration, which is a taxable transaction taxed on the basis of the cost of providing the services. That may be termed "the *Lennartz* method".

23. The Taxpayer had adopted the *Lennartz* method; that was clear from the fact that the input VAT on the acquisition of the 2007 Helicopter had been deducted in full. The Taxpayer had also charged output VAT on the whole of the sale consideration in 2010 for the 2007 Helicopter.

24. That left only the matter of output tax on use of the 2007 Helicopter for private purposes, which was calculated by reference to the relevant provisions of VATA. Paragraph 5(4) sch 4 provided that non-business use, whether or not for a consideration, constituted a supply of services. Where such a supply was made *without* consideration then para 7 sch 6 provided that the value of the supply shall be taken to be the full cost to the taxable person of providing the services; that then led one to reg 116A VAT Regulations 1995 which provided how to calculate the full cost to a person of providing the supply of services; however, that was irrelevant in the current case because the Taxpayer *had* charged consideration (£150 + VAT per hour) to all pilots in respect of all flying hours. Given that there was consideration in money for the supplies of services, one looked instead to s 19(2) which provided that the value of the supply shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration (ie £150 + VAT per hour). In case it might be thought that this left a "loophole" whereby a taxpayer could charge only a nominal monetary consideration and still satisfy s 19(2), that was addressed by para 1 sch 6 which allowed HMRC to substitute (by formal direction) open market value as the value of the supply (open market value being defined in s 19(5)). The Taxpayer contended that the charge made to the pilots was in fact open market value but in any event no direction under para 1 sch 6 had been made by HMRC to the Taxpayer. Thus output tax had been correctly and fully accounted for in respect of private use.

25. All the requirements of the *Lennartz* method had been satisfied and so the input tax in dispute was fully deductible and the 2010 Assessment under appeal was incorrect.

Assessment out of time

26. Further, the 2010 Assessment was out-of-time, save in relation to the 12/08 VAT period. The 2010 Assessment was issued on 9 September 2010 and related to the VAT periods of the Taxpayer ended 09/06, 03/07, 09/07 & 12/08. The 09/06 and 03/07 periods related to input tax incurred in respect of maintenance of helicopters owned before the 2007 Helicopter, and HMRC now accepted those periods should be excluded from the 2010 Assessment. The 09/07 period included the purchase of the 2007 Helicopter.

27. Section 73(6) VATA set a deadline for an assessment of the later of two dates:

(1) Two years after the end of the prescribed accounting period. All the assessed periods except that ended 12/08 were out-of-time under this rule.

(2) One year after evidence of facts, sufficient in the opinion of HMRC to justify the making of the assessment, comes to their knowledge. All the facts of this case had been made known to HMRC before September 2009.

28. The evidence of new facts on which HMRC sought to rely was (to quote from HMRC's statement of case) that "Until [the advisers' letter to HMRC dated 23 July 2010 the Taxpayer] maintained that the helicopter had been used for business purposes, however it was then stated that "all private use is being invoiced, so it is all business use."". That was not new evidence; in the Taxpayer's letter to HMRC dated 2 April 2009 it stated, "All private flying for the last year has been invoiced."; that position was not altered by the 23 July 2009 letter; there were no new facts on which to base the 2010 Assessment and thus it was out of time (except in relation to the period ended 12/08).

HMRC's case

29. Mr Haley for HMRC submitted as follows.

30. At the hearing Mr Haley for HMRC confirmed that the 2010 Assessment would in any event be adjusted so as to exclude the VAT periods 09/06 and 03/07, as those related to maintenance costs incurred before the acquisition of the 2007 Helicopter.

Recovery of input tax

31. The *Lennartz* method had not been adopted by the Taxpayer. On the facts of the case an apportionment approach was appropriate.

32. The *Lennartz* method can apply only where (a) there is mixed business and private use of the asset, and (b) *Lennartz* treatment is adopted by the taxpayer. Neither requirement was satisfied in the current case. The Taxpayer's advisers had stated categorically that there was no private use of the asset – see, for example, the correspondence quoted at paragraphs 10(8), 10(11) & 10(13) above. Further, on Mr Tolley's own evidence he was unaware of the *Lennartz* method at the time of the acquisition of the asset - that was perfectly reasonable but pointed against the

Taxpayer applying the method. Accordingly, the *Lennartz* method was not applicable to the Taxpayer's case.

33. Instead, the appropriate treatment was a s 24(5) apportionment between business and private use. Here there was a large difference of views between HMRC (Mr Braeger and Mr Green) and the Taxpayer (and its advisers).

34. Mr Green's enquiries had led him to conclude there was no business use – see the correspondence quoted at paragraphs 10(1) & 10(5) above. Mr Green considered the Taxpayer was simply putting a hobby asset through the company records. The helicopter was kept at the directors' home in Worcestershire and it seemed strange for the parts to be driven from the company's premises in Bilston to the house, then to be flown to, say, a customer in Bromsgrove.

35. On formal internal review of Mr Green's decision, Mr Braeger had concluded that on acquisition of the asset there had been an intention of mixed use and had concluded from the flight logs that 90% use of the helicopter had been private use – see his review letter quoted at paragraph 10(7) above. Mr Green was instructed to cancel the assessment and reissue it accordingly.

36. On the other hand, the Taxpayer through its advisers contended that all use of the 2007 Helicopter constituted business use - see, for example, the passages quoted at paragraphs 10(8), 10(11) & 10(13) above. Faced with that position, Mr Green had reinstated the assessment in its entirety.

37. While the calculation of the proportion of business use would never be an exact science, HMRC (after enquiries) considered that only a small amount of business use was evident. As the Taxpayer refused to accept that conclusion, the 2010 Assessment had been issued on the basis that all the disputed input tax was disallowed. Mr Haley stated that, having heard the evidence presented at the hearing, HMRC accepted that the fact that the Taxpayer had hired the 2007 Helicopter to Mr Greenway at a consideration (and charged VAT on that supply) indicated that some business use had been made of the asset. However, there would still need to be some calculation of apportionment of the disputed input tax between business and private use.

Assessment out of time

38. The assessment was not out of time. A careful review of the correspondence clearly showed that there had been a change of approach by the Taxpayer (and its advisers). The Taxpayer's original stance had been that the 2007 Helicopter was used wholly in the course of its automotive parts business. In their first review letter HMRC had concluded there was mixed use and invited an adjustment, either by way of *Lennartz* or an apportionment – see paragraph 10(6) above. However, the Taxpayer's advisers had then changed tack and asserted that the invoicing of the non-parts business hours to the three pilots was also business use. This was not fully clear to HMRC until the advisers' letter dated 23 July 2010 – that was when the facts that were sufficient to justify the making of the assessment came to the knowledge of

HMRC. The deadline for raising the assessment was one year later (s 73(6)(b)) and thus the 2010 Assessment was issued in time.

Consideration and conclusions

Did the Taxpayer adopt the Lennartz method?

39. We agree with Ms Poots' summary of the three methods of dealing with VAT available to a taxpayer who acquires a capital asset for mixed use – see paragraph 22 above.

40. We do not agree with the Taxpayer's contention that it adopted the *Lennartz* method. Miss Poots invited us to construe the letters from the Taxpayer's advisers as consistently arguing that the Taxpayer had adopted *Lennartz* accounting for the 2007 Helicopter. However, we consider that the letters written by the advisers are unequivocal – see the correspondence quoted at paragraphs 10(11) & 10(13) above, in particular the statements: "… I should like to make it clear that my client is not making a claim under the Lennartz mechanism. " and "In any event I do not see the relevance of Lennartz accounting in this situation."

The quantum of the s 24(5) apportionment

41. Having decided that the *Lennartz* method was not adopted and thus a s 24(5) apportionment is appropriate, we need to consider the quantum of apportionment of the disputed input tax. We are guided by the High Court in *CEC v Rosner* [1994] STC 228 that it is not necessarily sufficient for the expenditure to be of benefit to the business, rather the expenditure must be for the *purposes* of the business. Further, we follow the test put forward by Stuart-Smith J in *Ian Flockton Developments Ltd v CCE* [1987] STC 394 (at 400):

> "The test is were the goods or services which were supplied to the taxpayer used or to be used for the purpose of any business carried on by him? The test is a subjective one: that is to say, the fact-finding tribunal must look into the taxpayer's mind as it was at the relevant time to discover his object. Where the taxpayer is a company, the relevant mind or minds are those of the person or persons who control the company or are entitled to and do act for the company.
>
> …
>
> The tribunal must look at all the circumstances of the case and draw such inferences as they think fit. In the end it is a question of fact for them whether they were satisfied on the balance of probability that the object in the taxpayer company's mind at the time the expenditure was incurred was that the goods and services in question were to be used for the purposes of the business."

42. From *Flockton* it follows that we must examine what was in Mr Tolley's mind when the 2007 Helicopter was acquired by the Taxpayer. The Taxpayer having more than one economic activity (the Parts Business and hiring of the helicopter) is not a problem, provided they are all proper business activities. Having considered the

evidence produced to us, we conclude that the 2007 Helicopter was acquired with a view to making supplies wholly for business purposes. The use for the Parts Business was all business use – we understand the reasons for Mr Green's reservations about why parts were being flown by helicopter but we accept Mr Tolley's evidence that there were good business reasons why this was done. Mr Greenway's hire of the helicopter was invoiced to him (plus VAT) and we find that he was charged a commercial rate for a "bare charter" without fuel or pilot; we conclude that was all also business use by the Taxpayer (as we understand HMRC now accept). The use by Mr Tolley and his son was, again, invoiced to them (plus VAT) at the same commercial rate – again, we understand the reasons for Mr Green's suspicion that a hobby was being put through the company books but we consider that the hiring of the helicopter by the Taxpayer to Mr Tolley and his son was business use of the asset by the Taxpayer. We agree with Mr Haley that the mere fact of charging does not definitively demonstrate a business supply, but we consider that the evidence in this case taken together indicates that in hiring the asset at open market prices the Taxpayer was making business supplies, and the fact that two of the hirers were Mr Tolley and his son does not change that. Accordingly, the asset was acquired wholly for business purposes; all use of the asset in the relevant period was business use; and all the disputed input tax was incurred for business purposes. Thus the amount of the input tax to be disallowed should be reduced to nil and the 2010 Assessment is also to be reduced to nil.

43. It follows that the 2010 Assessment should be discharged in its entirety, albeit not on the *Lennartz* argument advanced by the Taxpayer.

Is the 2010 Assessment time barred?

44. This question is not material given our decision at paragraph 43 above but we determine it for completeness.

45. We agree with Mr Haley that the facts sufficient to justify the making of the 2010 Assessment came to the knowledge of HMRC when the Taxpayer's advisers advanced their argument that the invoicing of the three pilots demonstrated business use of the asset (in addition to the parts business use). However, from our review of the correspondence we conclude that was brought to HMRC's attention not in the 23 July 2010 letter, as contended by HMRC, but in the earlier letter dated 16 June 2010 (quoted at paragraph 12.8 above).

46. Accordingly the deadline under s 73(6) for issue of the 2010 Assessment was twelve months after 16 June 2010, and thus the 2010 Assessment (issued on 9 September 2010) was issued in time.

Decision

47. The appeal is ALLOWED.

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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 9 April 2013