

INPUT TAX - Range Rover Discovery bought and used entirely for business purposes - Whether on acquisition of motor car, Appellant intended to make motor car available to himself and others for private use - Yes - Value Added Tax (Input Tax) Order 1992, SI 1992/3222 article 7(2G)(b)

LONDON TRIBUNAL CENTRE

CHRISTOPHER LEONARD CHERRY
T/A COUNTRY TAVERNS OF OXFORD - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: STEPHEN OLIVER QC Chairman
ELIZABETH MACLEOD JP, CIPM

Sitting in public in Plymouth on 15 January 2003

Mike Hawthorn FCA for the Appellant

Shaheen Rahman, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

© CROWN COPYRIGHT 2003

DECISION

1. Mr Christopher Cherry appeals against an assessment to recover input tax claimed in the quarter ended December 2001 in the sum of £4,320. The item in dispute represents VAT on the purchase of a motor vehicle (a Landrover Discovery) on 19 September 2001, which Mr Cherry treated as deductible and which the Commissioners have disallowed on the basis that the vehicle was made available for private use.
2. Mr Cherry is a sole proprietor of the business called "Country Taverns of Oxford". He has been registered for VAT since 1998. The business operates open-air bars at sporting events throughout the United Kingdom. Mr Cherry also conducts a haulage business transporting beer for Morrells, his former employers. The businesses are run from his home in Kidlington, Oxfordshire. The Landrover Discovery with which this appeal is concerned has been used since its purchase in the open-air bars business.
3. The open-air bars business involves transporting trailers, marquees, equipment and tubs of beer to the venues. A team of between three and six people may be required to staff these bars. Because of the uneven terrain on which the events

are held, Mr Cherry's business has always required a 4-wheel drive vehicle. The trailers, the goods and the beer have to be hauled from the road onto the land where the event is held. The Landrover Discovery is used for that. It is also used to transport staff to and from the events.

4. A purchase of the Landrover Discovery on September 2001 was, for Mr Cherry, a business solution. Originally Mr Cherry had operated with a Landrover and a mobile home which he transported to the sites. The mobile home was not suitable, so he replaced both with an "extended-cab" Toyota pickup truck and a large caravan. He found the Toyota to be too light at the rear; this caused "flexing" when towing heavy trailers. So Mr Cherry decided to revert to a Landrover Discovery. Mr Cherry's specifications for the new Landrover Discovery were that it should be able to tow a 28 foot caravan or a one tonne trailer. It must be a 4-wheel drive vehicle. It should be able to transport six people as well as the driver. It had to have a self-levelling rear air suspension access; this enables the vehicle to lower and raise its rear suspension for hooking up caravans and trailers. This, we understand, is essential in fields where the ground is soft. It had to have a 12 volt electric system to provide power to the catering trailers; most commercial vehicles have a 24 volt system which is unsuitable for that purpose.

5. The trade name "County Taverns of Oxford" is exhibited on the spare tyre cover at the rear of the Landrover Discovery.

6. Mr Cherry owns several vehicles that he uses in his open-air bar and commercial haulage business. He also owns a Citroen BX saloon which he and his household use for domestic purposes. Mr Cherry has effected a "Minifleet" motor vehicle insurance policy with Norwich Union. This covers all motor vehicles belonging to, lent to or hired by Mr Cherry. It covers them when driven by "any person who is driving at Mr Cherry's order or with his permission". The "Limitations as to Use" are-

"Use for social, domestic and pleasure purposes and for the policyholder's business."

This cover was in force when the Landrover Discovery was purchased. In anticipation of this hearing an enquiry was made of Mr Cherry's insurance consultants as to whether the social, domestic and pleasure use could be excluded from the cover. The consultants advised that there was no option to delete them from the cover; they were an integral part of the actual policy cover provided.

7. The Landrover Discovery and its keys have always been kept overnight by Mr Cherry at his home address, except when the vehicle has been out at an event. Other vehicles of Mr Cherry are stored at a leased site nearby, but the security there is not good. When the Landrover Discovery is in operation at events, members of Mr Cherry's staff have access to the keys and are able to use the vehicle. It was accepted by Mike Hawthorn, the chartered accountant who represented Mr Cherry at the hearing, that staff would be allowed to use the Landrover Discovery for personal purposes. There are no rules of the business that prohibited this.

The law

8. VAT Act 1994, section 25(2) provides that a taxable person is entitled at the end of each prescribed accounting period to credit for so much of his input tax as

is allowed under section 26, and then to deduct that amount from any output tax that is due from him. If no output tax is due from him, or if the amount of the credit exceeds that of the output tax due, then pursuant to section 25(3) the amount of the excess should be paid to the taxable person by the Commissioners.

9. Article 7(1) of the VAT (Input Tax) Order 1992 provides that tax charged on the supply of the motor car to a taxable person shall be excluded from any credit under section 25. However, article 7(2) sets out that the exclusion in section 7(1) does not apply where (i) the car is a qualifying motor car, (ii) the car is supplied to a taxable person and (iii) the "relevant condition" is satisfied.

10. The "relevant condition" so far as is material, is that the supply is "to a taxable person who intends to use the motor car ... (a) exclusively for the purposes of a business carried on by him" (article 7(2E)).

11. Article 7(2G) qualifies this further by setting out that a taxable person shall not be taken to intend to use a motor car exclusively for the purposes of a business carried on by him if he intends to (b) "make it available (otherwise than by letting it on hire) to any person ... for private use".

12. The case for Mr Cherry was carefully argued by Mike Hawthorn. Essentially his case is that the Landrover Discovery was not used personally by Mr Cherry. Nor was it available either for his use or for the use of others. It was in every respect a vehicle adapted for and dedicated to the business carried on by Mr Cherry. When he bought it, Mr Hawthorn argued, Mr Cherry did not intend that it should have any other use.

13. We are satisfied from the evidence that the Landrover Discovery was intended by Mr Cherry to be used exclusively for the purposes of his business in the ordinary sense of that expression as found in article 7(2E). The question for us is whether the vehicle is excluded from satisfying that relevant condition by article 7(2G). We have to determine whether, when Mr Cherry bought the vehicle, he intended to make it available to any person for private use.

14. The Landrover Discovery has, as Mr Hawthorn stressed, been chosen and adapted to meet the specific needs of Mr Cherry's business. However, the evidence reveals that nothing has been done to prevent it from being used by Mr Cherry and his staff for "private use". When the Landrover Discovery is at Mr Cherry's home, as it is when it is not out on site, the keys are with Mr Cherry who is free to drive it for any purpose that suits him. When it is out on site, use may be made by members of Mr Cherry's staff; apart from Mr Hawthorn's admission on this point, there is no evidence of it ever having been used for the private purpose of a member of the staff.

15. The decision of the Court of Appeal in *Customs and Excise Commissioners v Upton (trading as Fagomatic)* [2002] STC 640 was concerned with the question of whether, as here, the taxable person purchasing a "motor car" intended to make the motor car available to himself for private use. In the circumstances of that case, the VAT tribunal had found as a fact that Mr Upton's intention had been to use the vehicle only for the purposes of the business and, as a matter of fact, it had only been used for business purposes. Nonetheless, the Court of Appeal concluded that Mr Upton must be taken to have intended the result of the vehicle being used for Mr Upton's private use bearing in mind Mr Upton's deliberate action in acquiring the car and obtaining insurance permitting private use and in the absence of any evidence to the contrary. Peter Gibson LJ said, in paragraphs 22 and 23 on page 647 -

"The very fact of his deliberate acquisition of the car whereby he makes himself the owner of the car and controller of it means that at least ordinarily he must intend to make it available to himself for private use, even if he never intends to use it privately."

"But what is plain is that the Tribunal did not recognize that Mr Upton's deliberate action in acquiring the car and obtaining insurance permitting private use was to make the car available to himself for private use and that he must be taken to have intended that result in the absence of evidence to the contrary, even if he did not intend to use the car privately."

16. The facts in *Upton* are, as Mr Hawthorn rightly pointed out, quite different from those in the present case. The Landrover Discovery purchased by Mr Cherry is different in almost every imaginable feature from the Lamborghini purchased by Mr Upton. But, on the reasoning of the Court of Appeal, it seems to us to be inescapable that Mr Cherry's intention was to make the car available to himself for private use. There is nothing in the evidence to show that any barriers were created to prevent this. As in the *Upton* case, the insurance cover permitted this, both for himself and for his staff. The matter can be tested quite shortly by asking the question, as an officious bystander seeing the Landrover Discovery parked outside Mr Cherry's home - "Is that Landrover Discovery available for your use?". The answer must be "Yes". It will be so even though Mr Cherry might qualify his answer by saying - "But I do not intend to use it except on business". The same goes for the staff. It may not have been the intention when the Landrover Discovery was bought that it should be used by them. But the insurance enables them to use it for social, domestic and pleasure purposes and private use by the staff was actually permitted in the present case. Thus, on the *Upton* reasoning, the Landrover Discovery was available to the staff as well.

17. We are driven by the *Upton* reasoning to the conclusion, notwithstanding the able argument of Mike Hawthorn, that the Commissioners were correct to make the assessment.

18. We should mention that Mr Hawthorn referred us to the decision in *Squibb & Davies (Demolition) Ltd v Customs and Excise Commissioners* produced by this tribunal on 13 September 2002. That was the case where two cars were owned by a company. They were insured for private use. The difference between that case and this is that the users of the cars were not contractually entitled to use them privately. Indeed there were physical and legal restraints on their using them privately, such as a system of logging the keys in and out, keeping a record of mileage and identifying the business trips undertaken. Those were regarded by the tribunal as providing sufficient evidence that the vehicle, when purchased, was not intended by the company to be made available to any person for private use. Had Mr Cherry run the business through a limited company and placed an embargo on any form of private use, the answer to the present dispute might have been different. Unfortunately those were not the facts of the present case. Reluctantly, therefore, we have to dismiss Mr Cherry's appeal.

STEPHEN OLIVER QC

CHAIRMAN

RELEASED:

LON/02/643