

B E T W E E N:

GREENWICH PROPERTY LIMITED

Appellants

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Sitting in public in London on 9 June 2000

Penny Hamilton, counsel, instructed by PricewaterhouseCoopers, accountants, for the Appellant

Hugh McKay, counsel, instructed by the Solicitor for Customs and Excise, for the Respondents

DECISION

1. Greenwich Property Ltd ("GP") appeal against an assessment to VAT issued on 14 July 1999 for £186,945 plus £23,630 of interest. The assessment is in respect of input disallowed for the periods from 1/96 until 8/98.
2. The Commissioners applied to strike the appeal out. The grounds for the strike out application were essentially that the Tribunal has not jurisdiction in matters concerning a non-statutory concession. The non-statutory concession referred to was a written "Concordat" entered into between University Vice-Chancellors and Principals and the Commissioners. The Tribunal, it was said by the Commissioners, has no jurisdiction to give effect to such a concession. GP's response to the strike out application was that the Tribunal does have jurisdiction to hear the appeal; it is an appeal against an assessment under VAT Act 1994 section 83(b). GP went on to explain that they would contend that the appeal was covered by section 84(10).
3. Rule 6(1) of the VAT and Duties Tribunals Rules has been invoked here. This enables the Commissioners to contend that an appeal does not lie to or cannot be entertained by the Tribunal and to apply to have the appeal struck out or dismissed. The Tribunal is normally reluctant to take this cause without having a good look at the circumstances behind the appeal. Our experience is that many appellants have better points than those disclosed in their grounds of appeal, particularly where they appeal in person or through advisers who are unfamiliar with the ways of VAT litigation. The Tribunal tends to treat these strike out applications as preliminary hearings with a wider remit than the issue raised by the strike out application. Here, of course, GP has strong advice and effective representation. Even so the issues arising from the application of the Concordat are far from straightforward. Consequently I have decided that because the appeal is against an assessment and comes

within the ambit of section 83(b) I should, until persuaded otherwise, entertain it. I therefore directed that the question of the application or otherwise of section 84(10) be dealt with as a preliminary issue, giving the Appellant, GP, the right to open. At the same time I have waived the requirement on the Commissioners to lodge a Statement of Case pending the resolution of the preliminary issue.

The Preliminary Issue: Summary of facts

4. GP is a wholly-owned subsidiary of the University of Greenwich (“the University”). In 1995 the University and GP entered into agreements covered by the private finance initiative with Avery Hill Developments Ltd (“AHDL”) under which AHDL would construct and manage student residences on the University's campus at Avery Hill.

5. On 25 October 1995 GP granted an underlease to the University of buildings known as “Phases 1A and 2 of the Avery Hill Development” which it had constructed. The term of the underlease was 125 years less 10 days. For VAT purposes GP treated that grant as a zero-rated grant being of a major interest in a newly constructed building to be used for a relevant residential purpose in accordance with Item 1(a)(ii) of Group 5 of Schedule 8 to the Act as the University had given GP a certificate in accordance with Note 12(b) to that Group.

6. The certificate given by the University had been raised in the knowledge (so the further and better particulars of GP’s notice of appeal assert) that the buildings would be used for residential accommodation in the University term time but that there would be some use in the vacations which would not qualify as use for a relevant residential purpose in accordance with Note 4 to Group 5 of Schedule 8. In so issuing the certificate the University relied on the Concordat. Paragraph 1 of that document states:

“Since the beginning of Value Added Tax (VAT) in 1973, there has been a working arrangement on how VAT applies to United Kingdom universities agreed between Customs and Excise and the Committee of Vice Chancellors and Principals of the Universities of the UK (CVCP). Detailed guidelines, agreed with Customs and Excise, have been issued by the CVCP to the UK universities in order that the universities were aware of their obligations under VAT law. All local VAT offices hold a copy of these guidelines

...

Customs and Excise have agreed, in consultation with the CVCP, the Committee of Directors of Polytechnics (CDP), and the Standing Conference of College Principals (SCOP), to widen the coverage of the guidelines, previously issued by the CVCP to the United Kingdom universities, to include the new higher education institutions. The guidelines continue to apply to those institutions named in note (3A) of group 6, schedule 6 of the VAT Act 1983 (see annex 1).

These revised guidelines incorporate much of the former CVCP guidelines issued in 1987 and have been updated to include changes since then.”

Paragraph 37(a) of the Concordat states:

“37a Construction

Zero-rating for the construction or acquisition of a new building for use as student accommodation depends on the higher education institution being

able to issue a certificate to the builder or developer as set out in the VAT leaflet on 'Construction: VAT certificates for residential or charity buildings'.

Higher education institutions may, on occasions be in some difficulty with respect to issuing certificates as they know that some use is likely to be made of student accommodation for non-qualifying purposes during vacations, e.g. the letting of student accommodation for holiday use or for non-educational conferences, etc., but such use is difficult to quantify. In the circumstances, because in any event tax will be collected in respect of this non-qualifying use and provided that the new building is clearly intended primarily for use as student accommodation for ten years from the date of its completion, then Customs have agreed that higher education institutions may issue a certificate for the construction or acquisition of such a building as a relevant residential building."

7. On 14 and 28 October 1994 an officer of the Commissioners visited the university. Following those visits and correspondence with the university and its advisers the Commissioners wrote to GP on 6 July 1999 stating, among other things, that -

"... the Commissioners' view is that no certificate [under Note 12(b) to Group 5 of Schedule 8] should have been validly issued".

and that accordingly GP had made an exempt supply under Item 1 of Group 1 of Schedule 8. Input tax attributable to that exempt supply would therefore be recoverable.

8. In that letter the Commissioners also stated that they would not apply Extra-Statutory Concession 2.11 which is set out in Public Notice No.48. As the application of this concession is no longer in issue I make no further reference to it.

9. In the letter of 6 July 1999 the Commissioners also stated that -

"... the university did not intend to use the underleased property solely for a relevant residential purpose as modified by the CVCP guidelines. By way of clarification, the CVCP guidelines provide some relaxation of the rules under which a certificate can be issued."

10. The reason behind this statement was clarified in the Commissioners' letter dated 27 September 1999 (the review letter). This upheld the issue of both disputed assessments —

"with regard to the first assessment (£186,945). [the reviewing officer] particularly considered the CVCP concession which relates to the use of relevant residential buildings outside of term time and the *University of Bath* VAT Tribunal decision (1996) VAT Dec 14235 referred to by Customs headquarters. She agrees with headquarters regarding the use and extent of the CVCP concession in that the Tribunal's decision in this case appears to restrict the concession to accommodation provided outside term time by the university itself. A more liberal interpretation would extend the use limitations imposed by the certificate regime beyond what was intended and what the Tribunal was prepared to allow."

The Issue and the contentions

11. The preliminary issue is whether, as GP contends, the circumstances of its case fall

within section 84(10). That reads as follows:

“(10) Where an appeal is against a decision of the Commissioners which depends upon a prior decision taken by them in relation to the Appellant, the fact that the prior decision is not within section 83 shall not prevent the Tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision.”

The critical question is whether the view formed by the Commissioners and communicated to the University on 6 July 1999, that paragraph 37a of the Concordat was not applicable with the result that the university should not have issued the certificate to GP when it granted the underlease of the newly converted buildings to the University on 27 September 1996, was a “prior decision” upon which the decision to assess (taken on 14 July 1999) depended.

12. GP, through Penny Hamilton, argues that it was. The Concordat had been a product of the Commissioners’ “care and management” powers in Schedule 11 to the Act. The process leading to the Commissioners’ “prior decision” had started with the review of the circumstances of the arrangements between GP, the University and AHDL in the light of the Concordat. The prior decision within section 4(10) was the conclusion that these arrangements did not come within paragraph 37a of the Concordat on the grounds that use for a non-qualifying purpose was not by the University but by AHDL with the result that GP could not make a zero-rated supply. The Commissioners then decided to assess for input tax incurred in respect of that supply on the basis that it was an exempt supply; this decision to assess, it was argued, depended upon the prior decision as to the application of paragraph 37a.

13. The Commissioners through Hugh McKay contended that the phrase “prior decision in section 84(10) is a term of art. “Prior decisions”, argued, are those decisions which Parliament, specifically in the VAT primary and secondary legislation, has empowered the Commissioners to make in the exercise of their statutorily conferred discretion in particular cases. These decisions, when made, affect a particular person’s tax liability. They are those which the Commissioners make by virtue only of such legislative phrases as – “save as the Commissioners may allow” (relating to evidence required for input tax deduction), or “such other records as the Commissioners may regard as sufficient” (as required in operating the margin scheme, see below); or “where the Commissioners are satisfied that ...” (exports). The term “prior decision” in section 84(10), being a decision upon which the decision appealed against depended, is limited to decisions which can only have been made before the appealable decision here there had been no such prior decision. All that had happened here was that the Commissioners had concluded that the non-statutory Concordat was not to be applied and had taken the decision to assess, that decision being the only relevant decision in the context of section 84.

Conclusions

14. The term “prior decision” as found in the opening words of section 84(10) is, I think, referring to a decision that has been taken by the Commissioners in pursuance of a statutory power or discretion, being a decision that is an integral part of the machinery of the tax system and which, when taken, will affect the rights and liabilities of the taxable person to which its directed. Decisions of that nature will, in some instances, have been made appealable matters by section 83. Others have not. The function of section 84(10) is to plug the gap and to enable the Tribunal to substitute its own decision for the prior decision of the Commissioners where the appealable decision depends on that prior decision. In this respect I agree with the interpretation of section 84(10) that was advanced for the Commissioners. The terms “decision” and “prior decision” refer to those which the Commissioners are in terms directed or specifically empowered to take, and which, when taken, create issues of an

appealable nature (even though they may not have been singled out as appealable matters by section 83).

15. *Commissioners of Customs and Excise v J H Corbitt (Numismatists) Ltd* [1980] STC 231 provides an example of a decision of the nature just identified; and it explains the legislative purpose behind section 84(10).

16. In *Corbitt* the applicant was a VAT-registered dealer in antique coins and medals. It bought stock from unregistered sellers. This meant that it had no input tax to credit against its liability to output tax on its own sales. It therefore accounted for VAT using the “margin scheme” under which the VAT was chargeable on a difference between the cost of stock and the gross selling price. The margin scheme was authorised by Finance Act 1972 section 14(1) which enabled the Treasury to “make provision ... as may be specified in the Order or as may be imposed by the Commissioners”. The Order, VAT (Works of Art, Antiques and Scientific Collections) Order 1972, provided by article 4(1) that VAT was to be charged on the margin. But article 3(5) directed that article 4(1) was not to apply unless the trader in question kept such records as the Commissioners might —

- - publish in a Notice
- - or recognize as sufficient.

The Appellant fail to keep records in the manner specified in the Notice and the Commissioners refused to recognise the records that had actually been kept “as sufficient”. The majority of the House of Lords decided against the Appellant’s contention that the VAT Tribunal had a power to rule on the Commissioners’ decision on this point; its jurisdiction was, the House of Lords decided, limited to ruling on whether or not the conditions laid down in the Notice had in fact been complied with. See Lord Lane’s speech on page 239e-h. Lord Salmon dissented. On page 234j-235a, he explained that in the decision of the Commissioners was whether the records in question were “sufficient for the purposes of the Order”. This decision, in his view, involved a question of fact; and if the Commissioners were wrong on this, the assessment could not survive.

17. Had section 84(10) been enacted at the time of the *Corbitt* appeal, *Corbitt* would have had no problem in asserting the existence of the Tribunal’s jurisdiction even on the view taken by the majority of the House of Lords. The decision whether the records were insufficient would have ranked as “a prior decision”. It was a decision prescribed by “statute” as part of the operation of the margin scheme code which when exercised would have affected the trader’s right to account for tax under the scheme. And it was a decision upon which the decision to assess would have depended, because it had to be taken by the Commissioners before they could have assessed on the general principles of the VAT Act as distinct from the special method. Evidently recognising that taxable persons like *Corbitt* might be keeping objectively impeccable records, albeit ones that were not regarded by the Commissioners as sufficient for the purposes of the scheme (the inference from Lord Salmon's speech), Parliament enacted section 15 of Finance Act 1981 (the predecessor of section 84(10)). This had the effect of enabling the Tribunal on an appeal to satisfy itself of the sufficiency of the records and, if satisfied, to substitute its own decision on that matter; it could therefore have allowed an-appeal, like that in the *Corbitt* case, against the assessment on the grounds that it would have, to use the concluding words of section 84(10), “have allowed the appeal against the prior decision”.

18. The decision in *Corbitt*, unlike the decision in the present case, was one that had been taken in pursuance of a specific legislative direction. Once taken it displaced *Corbitt* from the special margin scheme and imposed on *Corbitt* the obligation to account for VAT under the normal statutory procedure. In the present case the alleged prior decision was really a

conclusion, based on the circumstances of the arrangements between GP, the University and AHDL, that the non-statutory treatment contained in the Concordat was not applicable. It did not alter GP'S position in law; as a matter of law GP's liability to account for input tax have been determined by the grant of the underlease to the University on 27 September 1996. Thus the Commissioners' conclusion, expressed in their letter of 6 July 1999, was merely part of the decision-making process leading to the decision to assess. The decision to assess did not depend on it. And whether the grant of the underlease was an exempt supply, being the issue on which alone the Commissioners' decision to assess depended, will be a matter for the Tribunal to determine when the substantive appeal comes on for hearing.

19. The principle here is similar to that addressed by the High Court in *Commissioners of Customs and Excise v. Arnold* [1996] STC 1271. There the relevant question was whether the Commissioners' refusal to apply an extra statutory concession constituted a prior decision on which a decision not to refund tax depended. The Court held that there had been no prior decision; the only decision had been the Commissioners' refusal of the claim to refund, and to have split off the decision not to apply the extra statutory concession from that decision would, to use Hidden J's words (1288g), have been "fanciful and illogical". More fundamentally, Hidden J ruled that the Tribunal had no jurisdiction in regard to the operation of extra statutory concessions. These are matters "solely for the Commissioners": see 1289e-f and see also the decision of the Court of Session in *Customs and Excise Commissioners v. United Biscuits (UK) Ltd* [1992] STC 325.

20. In common with extra statutory concessions, the Concordat (which is non- statutory concession) will have conferred no legal right on GP: at most it will have given it a legitimate expectation. It is not therefore within the jurisdiction of this Tribunal, which is appellate in nature, to review the Commissioners' application of the Concordat any more than it is within our jurisdiction to review the exercise of the Commissioners' "care and management" powers, such as their conferring and withdrawing the benefit of extra-statutory concessions.

21. To summarize, section 84(10) comes into play where there is a valid appeal (i.e. one falling within one of the heads in section 83): and for reasons I gave at the start of this decision, I think that GP's appeal was prima facie valid. The assessment to which that valid appeal relates (the assessment in the present case) must, if this case is to fall within section 84(10), depend on a prior decision of the Commissioners in the sense that the legal basis for or the content of the disputed decision must have been determined by or follows as a necessary consequence of that other decision. The prior decision must, if the matter is to come within section 84(1C), have been taken better or in anticipation of the disputed decision and, to qualify as such, must be conclusive in the sense of affecting the rights or liabilities of that particular taxable person. The view taken by the Commissioners as to the non-application of article 37a of the Concordat did not conclusively determine GP's rights and liabilities. And if the Tribunal is to allow the appeal against the substantive decision, the prior decision must be shown to have been defective in some material respect such that, had the Tribunal had jurisdiction over that prior decision, it would have allowed an appeal against it. Here there was, as I have already concluded, no prior decision.

22. For those reasons I do not think that GP can rely on section 84(10). I dismiss the appeal so far as it relates to the preliminary issue. The parties are at liberty to apply for directions about the next steps in the substantive appeal.