Vans: benefits in kind

If it looks like a van and drives like a van, is it still a van for tax purposes?

The recent case of *HMRC v Coca-Cola European Partners Great Britain Ltd and others* [2019] UKUT 90 explains everything you want to know about the distinction between cars and vans. I guess that may not be a whole lot.

However, it may be of some interest because the distinction between a car and a van is important not only to whether the employee is subject to income tax on a benefit in kind, but also to the employer because of the possible liability to class 1A NICs. You can imagine that for a large employer with a fleet of vans, that could be a serious liability.

The distinction is also relevant to VAT and, in particular, the entitlement to reclaim input tax on the cost of the vehicle. Unfortunately, the definition of a van for the purposes of VAT is not the same as that for income tax (no, I don't understand either) but the principles explained in this case may still have a wide application.

Coca-Cola European Partners Great Britain Ltd (I think we can assume that it is a substantial organisation) provided its technicians with vehicles for the purposes of doing their work.

Coca-Cola clearly thought that these vehicles were vans and not subject to a benefit in kind charge on their employees, or indeed to a class 1A NICs charge on the company. I bet the technicians thought so too. However, HMRC disagreed, saying that the vehicles were cars and their provision was therefore subject to both income tax and NICs.

ITEPA 2003 s 115 defines a van for this purpose. The relevant part of the definition is that the vehicle is 'a vehicle of a construction primarily suited for the conveyance of goods or burden of any description'.

The company provided three types of vehicle: a Vivaro, a VW 'Kombi 1' and a VW 'Kombi 2'.

The First-tier Tribunal said that the key question was not whether a vehicle would be regarded as a van in ordinary parlance or by reference to the commonly understood meaning of 'van'. It considered that if Parliament had wished to rely on commonly understood meanings, it could simply have left the terms undefined. Instead, Parliament enacted prescriptive definitions of car and van and it was therefore necessary to consider whether the primary suitability of the vehicle was for the conveyance of goods or burden. The FTT decided that if the vehicle is of a construction marginally more suitable for the conveyance of goods than it is for any other use, its primary suitability is for conveying goods.

The FTT acknowledged that vehicles which are primarily suited for the conveyance of goods will share features with vehicles primarily suited to the conveyance of passengers. However, after an exhaustive analysis of all its characteristics, the FTT decided that on balance, the Vivaro should properly be described as a van within the meaning of s 115. The Upper Tribunal upheld this conclusion.

The finely balanced nature of the test was demonstrated by a similar analysis of the Kombi vehicles. The slightly different configuration of these vehicles, including the fact that they had seats in the front for the driver and a passenger (I am not kidding), caused the FTT to conclude that they were not vans.

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The Upper Tribunal said that the FTT had decided as a question of fact that the Kombi vehicles were equally suitable for the conveyance of goods and passengers, and declined to interfere with its decision.

This may not be entirely satisfactory for a number of reasons, not least that the Kombi range of vehicles definitely look like vans and anybody buying one would almost certainly think that they were buying a van – even though it had a seat for the driver. However, we know from the tribunal that the way in which an ordinary person might view the position is irrelevant. Maybe the vans (sorry, cars) should have a health warning stuck on the side, or something to warn taxpayers of the tax implications. ■

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Sale and leasebacks and VAT 'change of use'

UK real estate VAT has tended to be wedded to form. A recent CJEU decision takes a broader approach.

Those involved in the development of or investment in care homes, student accommodation and other institutional living space will likely be familiar with the VAT concept of 'relevant residential purpose' (RRP) in VATA 1994 Sch 8 Group 5 note 4 and some of the VAT conundrums that come with it. None perhaps can give such perverse results as the 'change of use' rules in VATA 1994 Sch 10 para 36. The recent decision of the Scottish Court of Session in *Balhousie Holdings Ltd v HMRC* [2019] CSIH 7 illustrates this.

Where a person ('P') pays for the development or acquisition of a new RRP building, the supply is typically at the zero rate of VAT under VATA 1994 Sch 8 Group 5. The benefit to the supplier is that this allows recovery of associated input VAT. Under VATA 1994 Sch 10 para 36, if the building ceases to be used for an RRP within ten years, under the change of use rules P may suffer a VAT charge based on the VAT it saved by virtue of the original zero rating (though this unwinds over the period to reflect the amount of 'good' use). Since para 36 was substituted by SI 2011/86 in 2011, however, 'change of use' has been a misleading description. The charge also applies if P merely disposes of their 'entire interest' in the property during the same period.

The taxpayer in *Balhousie* owned and operated a number of care homes. A member of the corporate group that had made a zero-rated acquisition of one home entered into (as a form of financing) a sale and 30-year leaseback transaction with a third party, under which the seller/tenant company was then obliged to continue operating the property as a care home.

HMRC claimed that despite the leaseback immediately following it, the sale meant the seller/tenant company had disposed of its 'entire interest', and therefore the VAT charge applied. The court agreed, characterising VAT as a tax dependent on objective analysis of each individual transaction. It was therefore not correct to say (as has been held in the direct tax world in, for example, *Sargaison (Insp of Taxes) v Roberts* (1966–69) 45 TC 612) that a sale and leaseback is merely a part disposal.

You might wonder what policy requires the rules to operate in this way. Shouldn't it help that there was demonstrably no actual change of use, since despite the 'disposal' the property had remained in possession of the same care home operator? Unfortunately not. The 'disposal of entire interest' rule clearly operates independently from the need for any change of use. However the court's unwillingness to characterise this transaction as something other than an outright disposal seems to have been founded on its support for the purported policy of the rule.

The idea (as HMRC said, and the court effectively adopted) is to avoid a situation where P sells the property and so loses control over the subsequent use, but remains liable for an (actual) change of use charge. That this is a sensible reason for instead imposing an automatic charge on the disposal itself (irrespective of whether there is a subsequent change of use) only has to be stated to invite the John McEnroe response.

The real policy here is, of course, that the development of and capital investment in this kind of accommodation should not create a real VAT cost for those involved in it, or for its users. That's what the zero rating is for. If you rely on that regime and then turn the premises to uses outside that policy, it makes sense that you can suffer a 'clawback' of the benefit. If you rely on that regime and use the property only for an RRP purpose but still suffer irrecoverable VAT on sale, then investors, and any care home residents seeing concomitant rises in fees, could be forgiven for thinking the policy pretty ill-served.

Incidentally, the CJEU has now taken a different approach to a situation of this kind in giving its decision in *Mydibel SA v État Belge* (Case C-201/18). This Belgian case also concerned a sale and leaseback financing by an occupier. The question was, in part, whether the sale was a (VAT-exempt) supply of the goods constituted by the property? If it was, the result would be a negative adjustment of the seller/tenant's input tax recovery under the Belgian capital goods scheme rules.

The contrast with *Balhousie* is in the CJEU's adoption of a composite approach to the sale and leaseback, ruling that there can have been no supply of goods, since overall the transactions did not give the buyer (financier) the right to dispose of the property as owner. Also, the seller/tenant continued to use the property for the purposes of its taxable business. In fairness, the technical question was not quite the same as in *Balhousie*, and the 'sale' was the grant of a 99 year emphyteutic lease by the seller to the financier, rather than of the freehold (or Belgian equivalent). It is a tantalising question whether the CJEU would have come to the same view had the sale been of the seller's entire interest.

UK real estate VAT has tended to be wedded to form. This is the approach in *Balhousie* and echoes, for example, the long-held view (before *Robinson Family Ltd* [2012] UKFTT 360 (TC), that it was impossible for the grant of a lease to be the 'transfer' of a property letting business as a going concern. But the CJEU here does seem to be taking a broader approach (and one not merely explicable by the nature of the specific interest sold) in concluding that the sale and leaseback was a 'single transaction' for VAT purposes. ■

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Atholl House and IR35

The tribunal focuses on the bigger picture in another taxpayer IR35 win.

The First-tier Tribunal decision in *Atholl House Productions Ltd v HMRC* [2019] UKFTT 242 (TC) concerns the basis on which the television and radio presenter Kaye Adams was engaged by the BBC. It continues the theme of HMRC seeking to invoke IR35 to challenge the use of personal service companies (PSCs) by television and radio presenters. Other well-publicised recent examples of IR35 cases concerning presenters include *Albatel* [2019] UKFTT 195 (TC), which related to Lorraine Kelly's engagement by ITV, and *Christa Ackroyd Media* [2018] UKFTT 69 (TC), another case involving the BBC. *Atholl House* is by no means the end of the story: further IR35 decisions relating to the engagement of presenters are expected to be handed down in the coming months.

This most recent decision represents a further loss for HMRC, with the First-tier Tribunal finding in favour of the appellant PSC. It is a significant decision, as it demonstrates yet again the difficulties HMRC faces in using IR35 to argue that presenters' engagements through PSCs should be treated as employment relationships for tax purposes. This was also apparent in *Albatel*, in which IR35 was held not to apply; and, while HMRC was successful in *Ackroyd*, the sense that the *Ackroyd* decision was an outlier has been given further credence following HMRC's loss in *Atholl House*.

Comparing *Atholl House* and *Ackroyd*, both of which concerned the engagement by the BBC of well-known presenters through their respective PSCs, gives a feel for the types of arguments that taxpayers will be able to muster to resist IR35 claims by HMRC in future. Such claims are likely to become more prevalent following the reforms of the IR35 rules for the private sector, which are due to take effect in April 2020.

The IR35 legislation requires the tribunal to posit, by reference to the circumstances surrounding an individual's engagement, a hypothetical contract between the recipient of the individual's services and the individual. The tribunal then has to determine whether, on the basis of the hypothetical contract, an employment relationship arises. In *Atholl House*, the tribunal made an important finding that certain, apparently key, terms in the written agreement between the BBC and Adams' PSC, which purported to give the BBC first call over Adams' services and control over her work should not be included in the hypothetical contract: despite having been written down, the tribunal found that they did not reflect the actual agreement between the parties.

While this approach may not appear ground-breaking, it has added significance in the IR35 context, as traditionally the case law has respected – and attached real weight to – contractual rights in determining whether the recipient of the services can control the service provider irrespective of whether such rights have been exercised. Indeed, this happened in *Ackroyd*, where the tribunal held that detailed BBC guidelines were incorporated into Ackroyd's hypothetical contract and were, on this basis, a factor that indicated an employment relationship. Following *Atholl House*, taxpayers are better placed to argue that rights purporting to give a service user control that have not been exercised should be ignored unless there is an evident intention at the time the contract was made that they should be capable of exercise.

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The *Atholl House* tribunal also placed less emphasis than the *Ackroyd* tribunal did on the traditional, prescriptive test for an employment relationship, which is derived from *Ready Mixed Concrete* [1968] 2 QB 497 and based on the so-called 'irreducible minima' of employment; namely, mutuality of obligation, personal service and control. The *Atholl House* tribunal instead posed the broader question of whether Adams' engagement, when considered in the context of her wider career, could be differentiated from her other activities, which were all consistent with her operating as a freelancer. The tribunal could not see a basis on which to do so. While the tribunal also considered the *Ready Mixed Concrete* test, the focus on this more impressionistic approach, coupled with the *Albatel* decision, where the tribunal was heavily influenced by Kelly's 'star status' when finding that IR35 did not apply, may provide taxpayers with increased scope to argue for a presumption that individuals who possess unique skill sets and who have historically been self-employed should continue to be regarded in that way in respect of new engagements in the same sphere. ■

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