[2014] UKFTT 1090 (TC)

TC04179

Appeal number: TC/2013/05029

VAT – purchase of Single Farm Payment Entitlements – whether referable to taxpayer's business – Yes – VATA 1994 and relative Regulations – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRANK A SMART & SON LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
MRS EILEEN A SUMPTER, WS

Sitting in public at George House, 126 George Street, Edinburgh on 23-26 September 2014

Appellant company:- David Small, Advocate, with Glyn Edwards, CTA

Respondents:- Mrs E McIntyre, Officer of HMRC

© CROWN COPYRIGHT 2014

DECISION

Introduction

1. The Appellant company runs a farming business, rearing cattle and producing some crops. It occupies principally Tolmauds Farm, Aberdeenshire, which extends to about 200 hectares, and which it leases from a family partnership. Under the Common Agricultural Policy of the EU the Appellant is entitled to benefits under the Single Farm Payment ("SFP") Scheme. It received initially 194.98 units of Single Farm Payment Entitlements ("SFPEs"). Units in terms of the Scheme may be traded and in addition to its initial allocation the Appellant company purchased further units at a cost in excess of £7M exclusive of VAT of £1,054,852.28. To secure payment of the SFPEs the Appellant company required to have "at its disposal" on 15 May of the relevant year one hectare of agricultural land for each unit, and for this purpose it entered various seasonal grazing leases. In conjunction with each lease it entered also a post-lease agreement with the landlord which enabled the latter to continue farming the land by stock or cultivation. Provided that the land was maintained in Good Agricultural and Environmental Condition ("GAEC"), which the post-lease agreement stipulated, the Appellant company was considered to hold the land "at its disposal" for purposes of payment of the SFPEs. Repayment of the VAT has been refused by the Respondents, and that is the subject of this Appeal. The amounts in dispute for the various tax periods which extend from that ending in December 2008 to that ending in June 2012 are set out in paras 3 and 4 of the Joint Minute of Agreement lodged for purposes of the Appeal.

The law

2. We were referred to the provisions of the Value Added Tax Act 1994 ("VATA") and the relative VAT Regulations (SI 1995/2518). In addition extensive reference was made to the relevant case-law which is listed in the Appendices hereto.

The Evidence

3. The Appellant led three witnesses, its sole director and shareholder, Frank Alexander Smart, its accountant Graham Thomson CA, and one of Mr Smart's sons, Stuart Smart, who is involved to a limited extent in the management of the farming business. The Respondents led one witness, Miss Sheila Rennie, its investigating officer, who having sought guidance from senior colleagues determined that the repayment of VAT should be refused.

4. **Mr Frank Smart** adopted the terms of his Witness Statement. He explained that after attending agricultural college he joined his parents' farming business. He established the Appellant company which now leases Easter Tolmauds Farm from a partnership of himself and his wife. He had been tenant of the farm but had acquired the landlord's interest in about 1997. The company bought SFPE's to obtain the annual payments with a view to funding the expansion of the business. Mr Smart is the sole director and shareholder of the company and works on the farm full-time. The only other full-time employee is his son, Roderick. His son, Stuart, was company secretary but has now only a limited involvement in management and administration. Mr Smart himself has not taken any director's salary or bonus but receives dividends at a relatively modest level as a tax efficient form of income. The business rears beef cattle and grows to an extent crops. Plans to diversify into production of electricity by wind turbines is contemplated.

5. Next, Mr Smart explained that SFPE units became tradeable. He retained his own allocation. For a claim one hectare of eligible land had to be at the farmer's "disposal" as at 15 May of the particular year. Different units are entitled to different amounts of SFP, which is reflected in the unit price. The company ensures that it has at least sufficient hectares to fulfil its claim. The company tended to hold more hectares than units to allow for a margin of error. The main practical requirement on the claimant was to ensure that the land was kept in GAEC. It entered leasing arrangements to hold sufficient eligible land, but it did not have to farm it actively itself by means of post-lease agreements. These essentially enabled the landlord to continue to farm the land leased. Mr Smart explained that the claim for SFPEs must be in Euros, but this can be converted into sterling. After payment in Euros, the conversion into Sterling can be made at any later date which may give a currency exchange advantage. The Appellant company's claims for SFP have not been the subject of any serious scrutiny. This Scheme, Mr Smart noted, is to be revised in 2015.

6. Next, Mr Smart explained the need for farming subsidies. Production costs tended to outweigh sale prices. He was anxious to expand the company's business and saw purchasing SFPE's as a means of financing this. He acknowledged that such ploys had been the subject of public criticism. However, there was an established market in trading in SFPEs.

7. The company had retained the original SFPE units allocated to it. From February 2007 to March 2012 it had invested about £7.7M plus VAT in acquiring additional SFPEs. Its bankers, the Clydesdale Bank, had been helpful in financing this. Latterly SFPEs had been bought where the seller was not charging VAT. The object was to generate cash to finance business expansion. The price of the units depended on the return and the terminal date of the Scheme, which in fact had been extended. The return varied on the individual unit. Initially expansion could not be contemplated because the acquisition cost had to be met before a gain resulted. The seasonal lets had not been used for conventional farming. This would have required an up-front investment in stock. Mr Smart considered the preferable course was to subsidise farming on the existing ground, and to invest in the improvement of farm buildings, and diversification into wind energy.

8. Mr Smart referred to the terms of one of the SFPE claims. He noted that the total of the units of entitlement was marginally less than the number of hectares at the company's "disposal". This avoided any marginal problems of eligibility. He emphasised too that the requirement of having land at its "disposal" did not require the company to actively farm the land itself. The SFP system required the ground to be maintained in good agricultural condition. Via the leases and post-lease agreements the cross compliance obligations should ensure this. The initial leases were of land in a relatively close proximity to Easter Tolmauds. That reflected the original intention of the company to stock the land itself. Later it rented land further afield as it concerned itself only with the maintenance of its agricultural condition.

9. Mr Smart acknowledged that there had been two sales of SFPEs in 2008 and 2009. These had been at a favourable price and the proceeds were used to purchase smaller value entitlements at a lower cost and, also, to reduce the level of bank borrowings. The Clydesdale Bank had been prepared to fund these purchases by way of normal overdraft facilities. The Bank considered that it had sufficient security over the company's assets. The company maintained a Euro account with the Bank which

enabled advantage to be taken when the Pound Sterling/Euro exchange rate was favourable. Only one sterling account was held by the company, into which sales of Euros, other subsidies and sales income were paid. Mr Smart noted that the SFPE transactions did not produce a surplus before 2012. Up until then he had not thought it appropriate to embark on major capital expenditure. Livestock numbers have been increased and a replacement tractor (costing £60,000) was purchased. Mr Smart's son, Roderick, has been engaged full-time. As the SFP Scheme was extended from 2012 to 2014 it has produced a greater benefit to the company than originally anticipated.

10. Mr Smart then considered the company's plans for capital expenditure, being the wind-farm project and new farm buildings. A planning application has been lodged and related negotiations with the local community and interested parties have been undertaken. The matter is presently the subject of a planning appeal but a tentative contract with Scottish Southern Electric has been negotiated. There will be a significant capital outlay, and to date, substantial sums have been expended on the preliminary stages. (Mr Stuart Smart spoke in detail to this project.)

11. Additionally Mr Smart indicated that he proposed to expand the farm's buildings. He planned to build two new cattle courts, a cattle handling building and a Dutch barn. This would cost about £800,000. The purpose was to feed cattle indoors over the winter, which would produce greater efficiency. A planning application for this has been lodged. Additionally, Mr Smart expects that two nearby farms may be on the market for sale soon. He would hope to make an offer to expand his present farming area, anticipating an outlay between £250,000 and £600,000 depending on the acreage involved. He stressed that the company could not have contemplated any of these developments had it not strengthened its financial position by buying the SFPEs. The alternative course of borrowing large sums and having to meet the interest payments from farming and electricity windfarm returns seemed much more risky. He stressed that he had not withdrawn any of the money from the company for personal or family use: it had all been retained in the company's bank account as a financial resource.

12. In cross-examination Mr Smart insisted that he had purchased the SFPEs as an investment to fund development of the farming business. When cattle were being sold at premium prices, he found it opportune to buy units instead. The post-lease agreement was in a standard form. As noted supra it enabled the landlord to continue farming the ground provided that the agricultural and environmental condition was maintained satisfactorily. The land was categorised as "LFA" (Less Favoured Area), low-quality hill-farming land. The SFP, Mr Smart explained, was greater than other agricultural subsidies. The level of rental in terms of the seasonal leases tended to vary from about £1 to even £10 per hectare and reflected the market rate.

13. Finally, in re-examination, Mr Smart indicated that he could have grazed his own animals on the leased areas. In response to the Tribunal he explained that to claim SFP one had to be registered as a farmer and hence this was a pre-condition to purchasing and registering further units.

14. The next witness was **Graham Thomson CA**. He spoke to and confirmed the terms of his Witness Statement. He is a partner in Bain Henry Reid, CA, Aberdeen, and acts for a large number of farming clients. He has acted for the Appellant company since 2010. He explained that the SFPEs were recorded in the Balance

Sheet as intangible fixed assets and were written off over their useful life which, originally, was calculated up to the end of 2012. However, the SFP Scheme has been extended. Rent paid in respect of Tolmauds Farm of £30,000 has been deducted annually together with the rents for the seasonal grazings in respect of rented land to meet the SFPE requirements. The business accounts record also an "exchange rate variance" to take account of any gains or losses arising from the conversion of currency from Euros to sterling, resulting from subsidies paid in Euros.

15. In the 2013 accounts the total accumulated cost of SFPEs of £7,294,354 is recorded. That is a net of VAT figure. These were recorded as intangible fixed assets in accordance with proper accounting practice in circumstances in which the company acquired them for continuing use in the business. These were "amortised" ("amortisation" is equivalent to depreciation in the case of intangible assets) over their useful life.

16. Mr Thomson confirmed that VAT could ordinarily be reclaimed on purchases of SFPEs. He conceded in cross-examination that he had not encountered another farming business holding as many SFPEs as the Appellant company. He acknowledged that VAT could not be reclaimed in respect of invoices for personal or other non-business use.

17. The Appellant's final witness was **Mr Stuart Smart**. He adopted the terms of his (brief) Witness Statement and spoke to a Record of Events (production SS1) which essentially was a continuing diary setting out the development plans of the Appellant and progress made, and dealing particularly with the proposed windfarm. This is a lengthy and detailed document setting out the complicated and time-consuming exercise necessary before such an enterprise could be established and become profitable. It records wind-speeds on various potential sites. It refers to negotiations with various manufacturers and possible joint-developers. There are surveys of wild life, particularly birds, in the area. The need for community support is recorded and possible philanthropic projects, such as rebuilding local community halls, are noted. This, Mr Smart explained, had been a frustrating process with varying support but also opposition. There had been negotiations to connect an electrical supply with the national grid. While considerable progress had been made, the proposals are presently the subject of a planning appeal. There had been considerable expenditure incurred to date and the Appellant was committed to further expenditure in furthering this project.

18. Mr Stuart Smart's evidence was not the subject of cross-examination.

19. Finally, we heard evidence from **Miss Sheila Rennie**, the only witness called for the Respondents. She in turn read and adopted the terms of her Witness Statement. She has been an officer of HMRC since 1984 and since 1993 has specialised in compliance matters in the Aberdeen VAT office. She has visited the Appellant company since 1998. These visits have been routine but in April 2010 she sought further information in relation to a relatively substantial repayment claim. There was thereafter an exchange of email correspondence and in about July 2012 she considered that a visit with another tax officer was necessary and she raised then the matter of purchase and disposal of SFPEs and the rental of the land to match up with the Entitlements. A report of this visit (SR14) was referred to. Information was provided also about post-lease agreements. By letter dated 13 August 2012 (SR18) Miss Rennie warned that the VAT repayment claim on the purchase of SFPEs might

be disallowed. She invited the Appellant company to put its views, but on 19 November 2012 she wrote to the Appellant setting out her reasons for the refusal of the repayment claim (SR23). Assessments were then issued for periods from 12/08 to 03/12 for a total of £1,030,665 (SR25). Early in 2013 the assessments were amended and sought the slightly increased amount of £1,034,120 (SR29). The Appellant's representatives sought a review but this in principle confirmed Miss Rennie's stance (SR37).

20. It was clear that what had alerted Miss Rennie's attention was the size of the repayment claim. She stressed that throughout she had liaised with a policy unit and her head office in London. Indeed, the critical correspondence issued in her name had in fact been drafted by them.

21. In cross-examination Miss Rennie explained her concerns that the purchases of SFPEs represented a non-business activity on which repayment of VAT would not be appropriate. She was referred to the terms of an official HMRC Bulletin dated June 2005 (App Auth 11, p3) which considered the purchase of SFPEs in order to claim subsidies. Miss Rennie considered that this supported her stance that the purchase of SFPEs as an investment represented a non-business activity on which repayment of VAT was not appropriate. She was then pressed about whether there was a contradiction between her letter of 5 August 2013 (SR43) and HMRC policy as set out in the Bulletin of June 2005. Miss Rennie explained that this particular enquiry raised matters beyond her immediate experience and, essentially, she had acted in accordance with specialist guidance from her superiors. She confirmed this in re-examination.

22. We found each of the witnesses to be credible and reliable. Indeed their evidence individually was not the subject of criticism in cross-examination. Moreover, the extensive documentation referred to tended to confirm their accounts. Additionally an extensive Joint Minute of Agreement was negotiated by parties' representatives.

Submissions

23. We were addressed in turn by Mr Small and Mrs McIntyre. Both had helpfully provided written Skeleton Arguments in advance, Mr Small's original being revised in expanded form.

24. On behalf of the Appellant company Mr Small submitted that the VAT on the SFPEs purchased should be allowed as they had been acquired by a taxable business for purposes of making taxable supplies. The units were intended to subsidise the farming business and expand and diversify it. All the monies had been retained in the business and none had been used for private purposes. HMRC's stance, as Mr Small understood, was that only dealers trading in SFPE's could reclaim input tax. That, he argued, was incorrect. The flaw in that argument was that it failed to discriminate between use within the business and use for private personal purposes. Crucially there was no "supply" intervening between purchase of the SFPEs and the spending of SFP income. The link between the purchase of SFPEs and future taxable supplies was thus preserved.

25. The SFP Scheme is part of the Common Agricultural Policy of the EU. It was introduced in 2005 and expected to continue until 2012, but was in fact extended for

two further years. Initially every UK farmer received an allocation of units of entitlement based on the extent of ground occupied. These units could be traded. An annual claim may be made in May for payment of the SFP based on the units held. The SFP is made the following December and may be in Euros or pound sterling according to the farmer's wish. To qualify for payment the farmer must have at his "disposal" one hectare of ground for each unit. He need not farm it actively but must ensure that its agricultural and environmental condition (GAEC) is maintained. The Appellant company has never been challenged as to its compliance with these requirements. That, and political views as to aspects of policy affecting the operation of the SFP Scheme, were not in any event relevant to the appeal, Mr Small observed.

26. Between February 2007 and March 2012 the Appellant company bought about 35,000 SFPE units in addition to its initial allocation, and that at a cost exclusive of VAT of approximately £7.7M. The sole purpose was to generate cash for its business and expand it and perhaps employ all four of the Smarts' sons. All the objective evidence supported this. Substantially all of the money remained in the company's bank account except insofar as it had been used to meet its overdraft. Mr Smart Senior drew only modest amounts for his personal use. He and his son, Roderick, are the only "workers" on the farm. Investment in new farm buildings and the windfarm development had been confirmed.

27. The combination of seasonal grazings, leases and post-lease agreements ensured that the requisite area of hectares was at the Appellant company's "disposal". The Appellant did not have to stock or cultivate the land. The Appellant's bank had been prepared to grant an overdraft to purchase the units: it might have considered funding for traditional farming activities more risky. The SFP and beef calf subsidies received by the Appellant were paid in Euros. These were converted into pounds sterling and the whole proceeds retained in the company's bank account. The SFP was not held separately.

28. The profit resulting has been significantly higher as the SFP Scheme has been extended, Mr Small observed. The re-investment could not begin immediately as Mr Smart was anxious to pay off the company's overdraft. Some extra cattle have been acquired, together with a new tractor. Roderick is now employed full-time. Implementation of the two major financial projects, *viz* the windfarm and the new farm buildings, has begun. That financial undertaking, Mr Small continued, could not have been contemplated without the benefit of receiving the enhanced SFP.

29. Mr Small then considered the law applicable. He noted the legislation first, *viz* the Directive 2006/12 and VATA 1994, Sections 4, 5, 24-26 and Regulation 101. These all provided for the deduction of input VAT where referable to taxable supplies. The sale of SFPE units, Mr Small submitted, was a supply of services to the Appellant company. It in turn made only taxable supplies, and no exempt supplies. The input tax should thus be deductible in terms of Article 168 of the Directive and Section 24, VATA.

30. Mr Small turned then to the relevant case-law. The ECJ had confirmed that for input VAT to be deducted, the relative expenditure had to be a component of the cost of its outputs. That link is preserved even where there are steps not involving a supply between the input transaction and taxable outputs. In particular the decision in *Abbey National* confirmed that VAT was deductible on overheads, and that these had a sufficiently direct and immediate link with its taxable supplies. The later decision in

Kretztechnik supported this, and its circumstances, in Mr Small's view, were "on all fours". There a fully taxable business issued new shares. It was held that the costs of supplies incurred in connection with that operation were part of its overheads and the VAT incurred was recoverable. There was the necessary *direct and immediate link* with the taxpayer's whole economic activities. That principle had been echoed in the decisions of the English High Court and ECJ in the decisions in *C of E Children's Society*, *University of Southampton,* and *Securenta*. Mr Small accepted that the receipt in the present case was of income, whereas in *Kretztechnik* it related to capital. That, he suggested, was irrelevant however. A recent FTT decision in *University of Cambridge* (presently under appeal) seemed consistent with that view. Briefly Mr Small distinguished the ECJ's decision in *Mohr*. There had been no supply by the Appellant company to the Government in the present case: meeting the conditions of a grant was not a supply for purposes of VAT.

31. Finally, Mr Small addressed HMRC's arguments. Their flaw was that on the basis of the decisions in *Abbey National* and *Kretztechnik* there was no "supply" or other factor which broke the chain between the input and the Appellant's outputs. Having acquired the SFPE units, claiming and receiving the SFP itself was not a supply. Further, there was no element of private use or benefit resulting. The extra units of SFPE were acquired in the course of and for the Appellant's business activities, Mr Small continued. The decisions in *Lord Fisher* and *Morrison's Academy Boarding Houses Association* were on that basis irrelevant. As he, Mr Small, read *Securenta*, it confirmed that where overheads related to the taxpayer's economic activity, input tax could be deducted. The acquisition of the SFPEs was to further the Appellant company's economic viability. There was, he accepted, a delay between acquisition of the SFPEs and the intended business developments. That delay did not matter. A business decision had been made to prioritise repayment of the Appellant company's overdraft before embarking on substantial expenditure.

32. At the outset of her reply Mrs McIntyre acknowledged that HMRC was not criticising the manner or motive of the Appellant company in claiming an enhanced SFP by purchasing extra units of entitlement. However, she submitted that the purchase of SFPEs was simply a step to claim the SFP itself. That, she continued, was outside the scope of the business' supplies. VAT on the purchase of the entitlements was not recoverable as it did not relate to the making of a taxable supply.

33. Mrs McIntyre adopted the decisions in *Lord Fisher* and *Morrison's Academy* as supporting her stance, and she noted especially six factors considered in the former decision (viz (a) was the activity serious and earnestly pursued; (b) was there continuity; (c) were the supplies of substance; (d) was the activity conducted in a regular, business-like way; (e) was the predominant concern the making of taxable supplies; and (f) were the supplies of a kind commonly made for profit), all or most of which, she suggested, had to be satisfied to meet the criterion of a "business". She did not consider that the VAT incurred on the purchase of the SFPE units related *directly* and *immediately* to taxable supplies, nor could the expenditure be viewed as an overhead. She noted also the decision in *Becker* as supporting her contention that purchasing the entitlements was in effect wealth generation for the taxpayer's private benefit. In the present case in effect the SFPE units received represented an investment held by the farming company.

34. Mrs McIntyre commented on *Securenta* and referred us also to *Skatterverket*. However, these in our view tend to confirm the right to deduct input VAT on all cost

components where these relate to taxable outputs. The crucial issue is whether the expenditure can be attributed to the taxpayer's economic activity.

35. Mrs McIntyre expressed concern at the lapse of time between the acquisition of the SFPEs and the exploration of the capital projects contemplated. The decision in 5 *Rompelman*, she submitted, stressed the need to consider objectively the taxpayer's intention at the time of the acquisition.

36. The 35,000 hectares leased were "naked", she argued, inasmuch as they were unused and leased purely to match the SFPE units purchased. They did not relate to the Appellant company's business activities.

10 37. For all of these reasons the VAT incurred on the acquisition of the units should not be repaid, Mrs McIntyre concluded, and the appeal should be dismissed.

Decision

38. Generally, matters of fact were not in controversy and we set out our crucial **Findings in Fact** as follows:-

15 (a) The Appellant company is wholly owned by Frank Smart who is its sole director. He and his wife are the whole partners of "Mr and Mrs Frank Smart, trading as Tolmauds Farm" which owns the farmland there. The farm which extends to about 200 hectares is leased by the Appellant company for £30,000 per annum.

20 (b) The Appellant company receives Single Farm Payments ("SFPs"). These are agricultural subsidies paid by the Scottish Government. At the inception of this scheme in 2005 UK farmers received initial units of entitlement without consideration. These were tradeable and a market in them developed. To claim the SFP in respect of one unit the farmer must have one hectare of eligible land 25 at his disposal on 15 May of the particular Year. To satisfy this, the requirements of ensuring plant and animal health and maintaining Good Agricultural and Environmental Condition ("GAEC") must be met. This latter condition does not require the claimant personally or anyone else to cultivate the land or stock it with animals.

30 (c) In addition to leasing Tolmauds Farm the Appellant company leased a further 35,150 hectares under seasonal lets. Typically the relative leases were qualified by a post-lease agreement in terms of which the landlord could stock the land or cultivate it himself provided that the ground was kept in GAEC. The rent payable in respect of such seasonal lettings was generally about £1 per acre 35 but could go up to £10 per acre.

(d) At Tolmauds Farm the Appellant company produces beef cattle for slaughter and store purposes. It also produces certain crops. It did not cultivate or stock the ground held on seasonal leases. The Appellant company ensured that it held more hectares than units to ensure that it received its full 40 entitlements to SFP.

(e) The Appellant company paid over a period about £7.7M in respect of traded SFPE units. In addition to its original allocation of 194.98 units, it purchased a further 34,477 units. This was funded by loan finance from the Clydesdale Bank with whom it had its only bank accounts. These units yielded a payment

of £1.7M in the year to 30 September 2011 and of £2.4M in the year to 30 September 2012. VAT was charged to the Appellant company in respect of the units purchased. After about March 2012 the Appellant company did not purchase units bearing "input" VAT. The operation of the Scheme has been extended from 2012 to 2014.

(f) The Appellant company's intention in purchasing the units was to apply the income arising in settling its overdraft and developing its business operations. At present and for most of the material period the farm has been worked by Mr Frank Smart and Roderick, one of his four sons. Both are engaged full-time on the farm. Another son, Stuart, now employed as a land agent, assisted on the farm for a period. There are no other employees. During the material period stock numbers have not been increased, at least significantly. From about 2011 the Appellant company has been considering establishing a windfarm. The necessary preliminary investigations have involved obtaining technical information and costings. Local community responses, including finding a "community partner", have been investigated. A planning application and enquiries have been conducted with professional assistance. Over £119,000 has been spent to date in relation to this. The capital costs of such a development would be substantial.

(g) The construction of further farm buildings, including cattle-courts and a Dutch barn, is contemplated. Recently site preparation works have been undertaken with a view to erecting one additional cattle-court. The necessary planning applications have been made too.

(h) The possible purchase of neighbouring farms, expected to be on the market for sale shortly, is being contemplated too.

(i) The SFP payments have been accumulated in the company and are held as cash in the company's bank account with the Clydesdale Bank. (This is the company's only bank account apart from a Euro account in which the payments were deposited initially and then later transferred. This has certain potential currency exchange advantages.) The SFPs received and the amounts of other subsidies are set out in FS15 and G5. The company's overdraft has been repaid but none of the SFP payments have been withdrawn for any personal use or benefit by Mr Smart.

(j) The Appellant company seeks repayment of VAT paid on SFP units during the period from October 2008 to June 2012. The Respondents have refused to make payment. That decision is the subject of the present appeal.

Reference is made to the Joint Minute of Agreement concluded by the Parties as relative hereto.

39. The matter of the Appellant company's intention with regard to the application of the payments received on the purchased units of SFPE is critical to our conclusion. There, the evidence of Mr Frank Smart as to its being used to develop the farming business bears to be consistent with the evidence of the farm accounts and the other documentation produced relating to exploratory work relating to the wind-farm development and the excavations and site preparation work for a cattle-court, the first of several new farm buildings. The evidence is thus subjective and objective, and supports the necessary direct and immediate link between inputs and future taxable supplies. The acquisition of SFPE units was a funding exercise and related to business overheads.

40. We paid regard particularly to the ECJ's decisions in *Abbey National* and *Kretztechnik*, and in the opinion of the Advocate General in the latter we note –

> "76 It seems likely that the use of the capital – and the services connected with the raising of that – cannot be linked to any specific output transactions, but must rather be attributed to the company's economic activity as a whole. There can be no reasonable doubt that a commercial company which raises capital does so for the purposes of its economic activity."

41. In *Kretztechnik* the input VAT related to the costs of a share issue, a means of raising capital by the taxpayer. We tend to agree with Mr Small that its circumstances are "on all fours" with the circumstances of the present appeal. The supplies of the Appellant (present and future) are all taxable: none are exempt. There is no intermediate factor which might break the VAT "chain", such as an *exempt* transaction. There is no factor subsequent to the acquisition of the units which might amount to a supply of goods or services. The leasing arrangements entered and the annual SFP claim do not represent "supplies". The decision in *Mohr* confirms this and it seems consistent with the commentary on VAT in the Respondents' Tax Bulletin dated June 2005 (App auth/11).

42. The financing opportunity afforded by purchasing the SFPE units did not form a distinct business activity in our view. Given the intended application of the profits *ab initio* it was a wholly integrated feature of the farming enterprise. It was not a separate enterprise. None of the receipts was abstracted for any unrelated or personal purpose. On this view the circumstances of *Lord Fisher* and *Morrison's Academy* are readily distinguishable. It follows that we disagree with the stance of Miss Rennie in her letter to the Appellant's tax adviser dated 5 August 2013 (SR13).

43. Accordingly we consider that the appeal should be allowed.

44. 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.

KENNETH MURE
TRIBUNAL JUDGE

RELEASE DATE: 8 December 2014

Appendix 1

In the First-Tier Tribunal (Tax Chamber) **Tribunal Centre:** Edinburgh
Tribunal Ref: TC/2013/05029

FRANK A SMART & SON LIMITED

Appellants

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

LIST OF AUTHORITIES FOR THE APPELLANTS

---

1. Council Regulation (EC) No 73/2009, Preamble, Articles 1 – 50 and Annexe III.
2. *Mohr v Finanzamt Bad Segeberg* (C-215/94) [1996] STC 328.
3. *Landboden-Agrardienste GmbH & Co KG v Finanzamt Calau* (C-384/95) [1998] STC 171.
4. *Abbey National plc v C&E Commissioners* (C-408/98) [2001] STC 297.
5. *Kretztechnik AG v Finanzamt Lenz* (C-465/03) [2005] STC 1118.
6. *Church of England Children's Society v HMRC* [2005] STC 1644.
7. *The University of Southampton v HMRC* [2006] STC 1389.
8. *Securenta G. I. und V. AG v Finanzamt Gottingen* (C-437/06) [2008] STC 3473
9. *The Chancellor, Masters and Scholars of the University of Cambridge v HMRC* [2013] UKFTT 444
10. HMRC VAT Manual VFOOD 3120.
11. Tax Bulletin Special Edition June 2005.

5

Appendix 2

In the First Tier Tribunal: Tax Chamber

Tribunal Service: Edinburgh
Tribunal Ref: TC/2013/05029

FRANK A SMART AND SON LIMITED

Appellant

- and -

COMMISSIONERS OF REVENUE AND CUSTOMS

Respondent

AUTHORITIES AND LEGISLATION

	Folio
Securenta Gottinger Immobilienanlagen und Vermogensmanagement AG v Fiananzamt Gottingen C437/06	1
Securenta Gottinger Immobilienanlagen und Vermogensmanagement AG v Fiananzamt Gottingen C437/06 Opinion of Advocate General Mazak	2
Skatteverket v AB SKF	3
Skatteverket v AB SKF Opinion of Advocate General Mengozzi	3A
Customs and Excise Commissioners v Lord Fisher [1981] STC 238	4
Customs and Excise Commissioners v Morrison's Academy Boarding Houses Association [1978] STC 1	5
Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen Arnhem c60/90	6
Finanzamt Koln-Nord v Wolfram Becker c104/12	7
Kretztechnik AG v Finanzamt Linz c465/03	8
D A Rompelman and E A Rompelman-Van Deelen and Minister van Financien c268/83	9
BLP Group plc and Commissioners of Customs and Excise c4/94	10