



TC07735

VAT—Appeal against assessment in respect of disallowed input tax—Whether supplies had been paid for within 6 months or at all (s 26A VATA)—Whether input tax should have been allowed in the absence of a VAT invoice (reg 29 VAT Regulations)

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2016/05284

BETWEEN

STONYPATH DEVELOPMENTS LTD

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public at Belfast on 3 July 2019

David Dunlop BL, counsel, for the Appellant

Mary Hendrick, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant company appeals against a decision of HMRC dated 18 July 2016 to disallow an item of input VAT claimed by the Appellant for VAT period 12/13. The disallowed input VAT relates to a claimed acquisition by the Appellant from a related company, LAPM (Strabane) Ltd (“**LAPM**”).

2. HMRC disallowed input VAT claimed by the Appellant in relation to the Appellant’s purchase of LAPM’s stock and other assets (referred to below for convenience simply as “stock”), as well as in relation to purchases by the Appellant from LAPM of certain properties. At the hearing, the Appellant orally withdrew the appeal against the disallowance of input tax in relation to the acquisition of the properties. The sole remaining issue in this appeal is the decision of HMRC to require repayment by the Appellant of the claimed input tax relating to its acquisition of LAPM’s stock.

3. The Appellant’s position is that it agreed with LAPM to take the stock in discharge of a debt owed to the Appellant by LAPM, and that for VAT purposes this constitutes a supply by LAPM to the Appellant for which the Appellant paid at the time of supply. The HMRC position is that the stock was not “paid for” by the Appellant within the meaning of s 26A of the Value Added Tax Act 1994 (“**VATA**”), either within the required period of 6 months or at all.

4. At the hearing, HMRC also argued that the Appellant had not produced an invoice for the acquisition of LAPM’s stock as required by regulation 29 of the Value Added Tax Regulations 1995 (the “**VAT Regulations**”). The Appellant disputes the right of HMRC to rely on this additional ground, and argues in the alternative that the Tribunal should reject this ground on the merits.

BACKGROUND

5. The Appellant company’s business consists of the construction and rental of commercial properties. Its directors have at all material times been Lesley Mealiff and her husband William Mealiff. Mr Mealiff’s evidence is that he is the sole shareholder.

6. The business of LAPM was the retail sale of clothing. At all material times its directors were also Lesley Mealiff and William Mealiff. Mr Mealiff’s evidence is that his wife was the sole shareholder.

7. GBC Ireland Ltd (“**GBC**”) is another company whose business is the retail sale of clothing. It was incorporated on 14 May 2013 and applied for VAT registration in November 2013. From 14 May to 24 October 2013, its directors were Lesley Mealiff and William Mealiff. From 24 October 2013 its director was Amanda Monaghan. The Tribunal was informed at the hearing that Amanda Monaghan was a former staff member of LAPM.

8. On 19 July 2013, LAPM and the Appellant executed a debenture, giving the Appellant a fixed charge over all of LAPM’s plant, machinery, office equipment and debts, and a floating charge over all of LAPM’s other present and future assets. The debenture stated that the charge was security for repayment of monies loaned to LAPM by the Appellant, which LAPM was required to repay to the Appellant on demand. This charge was registered at Companies House on 26 July 2013.

9. The Appellant’s case is that in December 2013, LAPM transferred its remaining stock to the Appellant, in return for the Appellant reducing LAPM’s outstanding liability under LAPM’s loan from the Appellant by an amount corresponding to the price of the goods

including VAT. In its VAT return for period 12/13, the Appellant claimed input tax in relation to the purchase of the stock from LAPM.

10. The Appellant's case is further that on 2 January 2014, the Appellant sold that stock to GBC.

11. On 13 November 2014, the High Court of Justice in Northern Ireland ordered that LAPM be wound up.

12. On 28 September 2015, HMRC conducted a visit at the Appellant's accountant's premises. As a result of this visit, HMRC raised various queries, and there followed a series of exchanges between the parties in the course of which further information was provided to HMRC on behalf of the Appellant.

13. On 3 June 2016, HMRC sent to the Appellant's accountant a pre-decision letter, expressing the view that the input tax in relation to the acquisition of the stock had to be repaid to HMRC because the stock had not been paid for within 6 months.

14. On 18 July 2016, HMRC sent a notice of assessment to VAT. In a letter dated 27 July 2016, the Appellant's accountant requested a review of that decision.

15. In a review decision letter dated 14 September 2016, HMRC again concluded that the Appellant had not demonstrated that it had paid for the supply of the stock from LAPM within 6 months of the relevant date, and that the input tax claim had to be repaid to HMRC.

16. The Appellant now appeals to the Tribunal.

RELEVANT LEGISLATION

17. At times material to this appeal, s 26A VATA relevantly provided:

26A Disallowance of input tax where consideration not paid

(1) Where—

- (a) a person has become entitled to credit for any input tax, and
- (b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of 6 months following the relevant date,

he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.

(2) For the purposes of subsection (1) above "*the relevant date*", in relation to any sum representing consideration for a supply, is—

- (a) the date of the supply, or
- (b) if later, the date on which the sum became payable.

18. Regulation 29(2) of the VAT Regulations relevantly provides:

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—

- (a) a supply from another taxable person, hold the document which is required to be provided under regulation 13; ...

19. Regulation 13(1) of the VAT Regulations relevantly provides:

(1) Save as otherwise provided in these Regulations, where a registered person—

- (a) makes a taxable supply in the United Kingdom to a taxable person ...
he shall provide such persons as are mentioned above with a VAT invoice
...

THE EVIDENCE OF WILLIAM MEALIFF

20. In his witness statement, Mr Mealiff stated amongst other matters as follows.
21. The Appellant is essentially a property company and owns a retail park in Strabane. All of the Appellant's assets are charged to a bank.
22. LAPM traded from a unit at the retail park which it owned and which formed the anchor property at the retail park. The Appellant owned the remaining units at the retail park and leased these to other retail businesses. The bank had a debenture over all assets within the retail park other than the unit owned by LAPM.
23. LAPM, which was essentially a small fashion retailer and was struggling financially, had a debt to the Appellant of £1.265 million which was secured on very limited assets so that it was effectively an unsecured loan. To enable LAPM to trade its way out of its difficulties, Mr Mealiff and his wife put a considerable amount of their own money into that company which they never sought to extract. Mr Mealiff and his wife did not seek to benefit themselves personally at any time.
24. With the economic downturn, the bank became concerned about the Appellant's ability to continue meet its liabilities to the bank, and about the Appellant's unsecured debt from LAPM which would never be repaid in the event of LAPM's insolvency.
25. The decision to sell LAPM's stock to the Appellant was taken in consequence of enormous pressure exerted by the bank. The Appellant, being a property company, was unable to effect the retail sale of the stock, and so instead sold the stock to the company that took over LAPM's premises, GBC.
26. To effect the sale of the stock from LAPM to the Appellant, an invoice was raised by LAPM. After cessation of trading by LAPM, the Appellant sold the stock to GBC. Neither Mr Mealiff nor his wife benefitted personally from these transactions. Proceedings were issued by the Official Receiver to challenge the transactions between LAPM and the Appellant as preferential payments. These proceedings were resolved and they are of no relevance to the present appeal. No transactions were set aside and no company directors were disqualified.
27. In cross-examination, Mr Mealiff said amongst other matters as follows. He cannot locate the LAPM invoice for the sale of its stock to the Appellant, but he knows that there was one as he recalls a conversation that he had with the Appellant's accountant, Mr Grant, about getting the VAT refund. There was no formal loan agreement between the Appellant and LAPM. The amounts owed by LAPM to the Appellant were just recorded in the respective companies' accounts. The debt owed by LAPM to the Appellant arose when the Appellant carried out certain building works for LAPM in 2005. The Appellant paid for these works, and LAPM was recorded as owing some £1.2 million to the Appellant. The stock that the Appellant purchased from LAPM and sold to GBC physically stayed in the premises formerly occupied by LAPM which were then taken over by GBC.

THE EVIDENCE OF MICHAEL GRANT

28. In his witness statement, Mr Grant stated amongst other matters as follows.
29. Mr Grant is an accountant within the firm of Moore McDaid McCullough Accountants ("MMMA"), a member of the Institute of Accounting Technicians in Ireland. He was at

material times the agent of the Appellant in its dealings with HMRC. He has been informed by solicitors that some of the statements he made in correspondence with HMRC about these matters were inaccurate. The 19 July 2019 debenture was not relevant to the sale of stock by LAPM to the Appellant; rather the sale was the result of pressure from the Appellant's bank. In a meeting of the directors of LAPM held on 18 December 2013 in the presence of Mr Pat Moore of MMMA, the directors of LAPM agreed that its remaining stock should be sold to the Appellant to reduce LAPM's debt to the Appellant, and that the Appellant would pay for the stock by reducing the loan owed it by LAPM and thereafter writing off the balance. Subsequent statements by Mr Grant that the Appellant had "seized" the stock were incorrect, and Mr Grant had never been informed that this had occurred.

30. A full stock take of the stock was undertaken and it was valued. Because the Appellant had reduced the loan as payment for the stock, it did not prove in the subsequent liquidation of LAPM to any significant extent.

31. On 19 December 2013 the debt owed by LAPM to the Appellant was £1,265,453. Following the transfer of the stock, the debt was reduced to £89,453. The loan was reduced by the value of the stock. The stock was therefore "paid for".

32. The relevant VAT return was submitted by the Appellant on 31 March 2014. A VAT rebate was made on 7 April 2014. Although HMRC Officer Kelly states that no purchase invoice was seen by HMRC, Mr Grant believes that the rebate would only have been paid after a pre-credit check by HMRC which would have involved a request for HMRC to see the most significant invoices or at least to be given an explanation for the level of the reclaim. Mr Grant had a telephone conversation with HMRC which facilitated the early release of the rebate in which he provided a full explanation of the invoice in line with established HMRC procedure. Mr Grant cannot locate a copy of the invoice of 19 December 2013.

33. In examination in chief, Mr Grant said amongst other matters as follows. The same bank was the lender to both the Appellant and LAPM. LAPM has been a major debtor of the Appellant for some years. The acquisition by the Appellant of LAPM's stock was the only way to reduce the debt.

34. In cross-examination, Mr Grant said amongst other matters as follows. When saying that the Appellant "seized" stock from LAPM, he believed that the Appellant had a right to seize the stock. However, it was in fact a simple sale. He does not know if LAPM submitted a VAT return declaring output tax on the sale, but thinks this may not have occurred due to LAPM's collapse. The companies did their own VAT returns. When it was put to Mr Grant that no LAPM invoice had been produced for its sale of its stock to the Appellant, he said that this had not been put in issue before, and that with the passage of time it became harder to produce records. He believes that an invoice was issued by LAPM but that it cannot be found. The minute of the 18 December 2013 meeting was found when looking for the invoice; it is unsigned because it is taken from a computer. He is confident that the original was signed and although it does not state that Mr Moore was present, it was he who typed up the minute. When it was put to Mr Grant that there was no documentation evidencing the loan from the Appellant to LAPM, Mr Grant said that this was an inter-company loan which involved an element of trust.

THE EVIDENCE OF HMRC OFFICER KELLY

35. The witness statement of HMRC Officer Kelly sets out the history of her investigation into this matter. It states amongst other matters as follows.

36. In the records that she examined, no purchase invoice was sighted from LAPM for the sale to the Appellant of the stock. The Appellant's VAT summary for 12/13 shows purchases of "Seized Assets/Stock" for £804,167 plus £160,833 VAT, and sales of "Stock, Name, Website" for £750,000 plus £150,000 VAT. The repayment of £120,602.63 for VAT period 12/15 was released without check by HMRC.

37. In cross-examination Officer Kelly accepted that she did not have particular experience in her work of groups of companies owned by associated family members.

THE DOCUMENTARY EVIDENCE

38. There is a debenture dated 19 July 2013 between the Appellant and LAPM, which states that LAPM is indebted to the Appellant in respect of monies loaned to LAPM by the Appellant (see paragraph 8 above).

39. The financial statements of LAPM for the year ended 31 March 2013, which are stated to have been approved by its directors on 27 September 2013, state that as at 31 March 2013, LAPM owed the Appellant £1,265,453.

40. There are four invoices issued by LAPM to the Appellant dated 1 July 2013 for the sale of four properties to the Appellant, one of which was the unit at the retail park occupied by LAPM.

41. There is a document stating that it is a minute of a meeting held on 18 December 2013 at which Mr and Mrs Mealiff were present. It says that the directors agreed that, if the Appellant agreed, then stock would be sold to the Appellant to settle the Appellant's loan to LAPM, on the understanding that offset against the loan would apply and any shortfall would be written off. It states that the current stock had a cost price of £1.3 million, but that in reality, a cost value excluding VAT of £1 million would be more accurate. It is implicit that the document records a decision taken by Mr and Mrs Mealiff in their capacity as directors of LAPM, although this is not stated expressly. There is a signature block on the document, but it is unsigned.

42. Another document states that it is a minute of a board meeting of the Appellant held on 18 December 2013. It states that the proposal of LAPM was agreed as "the only practical way of closing this saga", states that a clarification was to be sought and that the name "Cilento" would need to be available and that the proposal would result in a write down of the £1.265 million loan to £1 million. This document is also unsigned. Attached to this document is an unsigned draft of a letter from the Appellant to LAPM, stating that the Appellant reluctantly agrees to LAPM's terms as a damage limitations exercise.

43. An invoice dated 2 January 2014 was issued by the Appellant to GBC in the sum of £1,035,000 (being £805,000 for men's wear and ladies' wear, £180,000 for children's wear and £50,000 for the "agreed valuation" of fixtures and fittings) plus £171,000 VAT. The amount of VAT was the standard rate of VAT on the sums for men's wear and ladies' wear and fixtures and fittings. The sum for children's wear was zero rated.

44. On 13 November 2014, the High Court of Justice in Northern Ireland, on the petition of the Department of Finance & Personnel of Land & Property Services (Rating), ordered that LAPM be wound up. The date of the winding up petition was 2 October 2014. A document said by the Appellant's accountant to be the final creditors' listing indicates that LAPM owed in excess of £380,000 to HMRC by way of VAT and PAYE/NIC, and owed £480,819 to Lesley Mealiff and £89,453 to the Appellant, these last two amounts being described as loans to LAPM.

45. The financial statements of the Appellant for the year ended 31 March 2014, which are stated to have been approved by its directors on 18 December 2014, state as follows. The Appellant rented premises to LAPM at market value. LAPM ceased as a tenant in December 2013 and the Appellant was forced to crystallise the debenture held against LAPM, realising a loss of £89,453. During the year in question, the Appellant “also acquired investment properties, stock and other assets (excluding VAT) from LAPM”. The accounts show that amounts owed by connected companies amounted to £1,266.653 in 2013 and £1,200 in 2014.

THE APPELLANT’S SUBMISSIONS

46. In December 2013, LAPM was indebted to the Appellant in the sum of £1,265,453. The resolution of this debt was not achievable by a transfer of money, and the only way forward was for LAPM to transfer its remaining stock to the Appellant, in consideration for which the Appellant would reduce LAPM’s outstanding debt.

47. The Appellant was supplied stock valued at £804,267 plus VAT of £160,833 by LAPM. This tax was reclaimed as input tax by the Appellant. For purposes of VAT, “supply” means all forms of supply but not anything done otherwise than for a consideration (s 5(2)(a) VATA). “Consideration” has a wide meaning and includes anything given in return for goods (reliance is placed on *Trafalgar Tours v Customs and Excise Commissioners* [1990] STC 127), and need not consist of money (s 19(3) VATA). The transfer of goods in return for the cancellation of a debt or part of a debt is a supply for consideration. The Appellant therefore paid LAPM for the supply. There was a supply of stock and the requirements of s 26A VATA were met.

48. The stock was not “seized” from LAPM. The debenture is irrelevant, first, because the goods were not taken from LAPM in exercise of the Appellant’s rights under the debenture, and secondly, because even if they were the supply would still be subject to VAT.

49. There is no basis for any assertion that the Appellant sought to “strip assets” out of LAPM.

50. HMRC have not disputed that title to the stock was in fact transferred from LAPM to the Appellant, and title to the stock was subsequently transferred from the Appellant to GBC.

51. The common directorships of the two companies is irrelevant. In law the companies involved are all separate legal persons and no basis has been established for piercing the corporate veil in this case.

52. In creditor’s listing provided to the official receiver, the figure of £89,453 was the amount of the LAPM’s loan from the Appellant still outstanding after the set-off had been given in consideration for the goods. The Appellant was not treated as a preferential creditor of LAPM, but even if it this were true, it would not be relevant to whether VAT is chargeable.

53. HMRC should not be entitled to rely on a new contention based on regulation 29 of the VAT Regulations, as HMRC never sought to rely on this prior to the hearing. The Tribunal’s supervisory jurisdiction under s 83 VATA is limited. The Appeal is against a net assessment. The Tribunal’s discretion under rule 15 of the Rules can only be exercised in relation to the issues under appeal and does not extend to the introduction of a fresh ground for HMRC’s determination.

54. If the Tribunal does consider the merits of this argument, the Appellant contends as follows. HMRC have a discretion to overlook the absence of an invoice (relying on *Robinson v Revenue and Customs* [2017] UKUT 383 (TCC)). HMRC never turned its mind to the question of its discretion, because it refused the assessment of input tax solely on the question of

consideration under s 26A VATA. As there was a failure by HMRC to exercise its discretion on the question of the invoice, this is an issue the Tribunal can determine.

55. The evidence very strongly suggests that there was an invoice. Invoices were drawn up for each of the other intercompany transactions, including the sale of the stock from the Appellant to GBC and the sale of properties to the Appellant by LAPM. The fact that HMRC released the VAT in late March 2014 suggests that the invoice was shown to the local VAT officer who was satisfied to release the funds. The invoice was important to show the transfer of title from LAPM to the Appellant. VAT was discharged by the Appellant through the credit that was afforded to LAPM when the intercompany loan was reduced.

56. The Appellant subsequently drew the Tribunal's attention to the decision in *Revenue and Customs v Boyce (t/a Glenwood)* [2017] UKUT 177 (TCC) ("**Boyce**").

HMRC'S SUBMISSIONS

57. The Appellant has not paid for the supplies. The Appellant advises that the goods were taken in settlement of a loan or debenture.

58. The debenture does not indicate the amount of the loan from the Appellant to LAPM. No evidence has been provided of any loan agreement or other transaction giving rise to the claimed debt owed by LAPM to the Appellant. It is unlikely there was any sale agreement between LAPM and the Appellant in respect of the stock and assets. Between two separate legal entities, a loan of £1.265 million would be documented and terms for repayment agreed.

59. The creditor's listing provided to the official receiver indicates that LAPM's liability under the loan was £89,453. The value of the goods taken was thus far in excess of what was owed under the loan.

60. LAPM did not account for output VAT on their VAT return and was been wound up 11 months later.

61. There is an inconsistency in that the Appellant's agent in correspondence with HMRC consistently stated that the stock and assets had been "seized" by the Appellant from HMRC. The first reference to the stock and assets being "sold" by LAPM to the Appellant was in an unsigned note of a board meeting produced one week prior to the hearing. This note was said to have been found on the computer of Mr Moore, a senior figure in the firm of accountants to which Mr Grant belongs, but Mr Moore did not attend the hearing.

62. Mr Grant's evidence was that following the transfer of stock and the offset of the loan, £89,453 remained owing. However, that stock was listed in the VAT return as having a value of £804,267 plus VAT of £160,833. This does not equate to an original loan amount of £1,265,000 and it is unclear whether other assets were included in this amount. The note in the accounts and director's report states that £89,453 was the remaining amount after stock and assets were seized following crystallisation of the debenture, which occurred due to cessation of a tenancy.

THE TRIBUNAL'S FINDINGS

Section 26A VATA

63. The onus of proof is on the Appellant to show that the assessment raised is incorrect. The Appellant must by evidence establish on a balance of probability that it paid LAPM within 6 months of the date of supply the full amount in respect of which input VAT is reclaimed.

64. For purposes of this appeal, the Tribunal assumes that it is possible for a trader to pay for an acquisition by setting off the purchase price against a debt of an equal or greater amount owed to the trader by the supplier.

65. For purposes of this appeal, the Tribunal also proceeds on the basis that the Appellant and LAPM are separate legal persons, notwithstanding their common directorships.

66. For purposes of this appeal, the Tribunal further assumes, as claimed by the Appellant, that LAPM transferred title of the stock to the Appellant, and that the Appellant subsequently sold the stock to GBC.

67. Mr Mealiff said in his evidence that neither he nor his wife benefitted personally from the transactions in question, that proceedings were issued by the Official Receiver to challenge the transactions as preferential payments but that these proceedings were resolved, and that no transactions were set aside and no company directors were disqualified. The Tribunal makes no findings in respect of these matters. There is no evidence before the Tribunal of the details of the proceedings brought by the Official Receiver, or of the basis on which those proceedings were resolved. The Tribunal is concerned in this appeal with the specific question whether the Appellant has established, for purposes of the VAT regime, that prior to the transfer of the stock from LAPM to the Appellant, LAPM owed the Appellant an amount equal to or greater than the amount in respect of which input VAT was reclaimed by the Appellant.

68. The earliest evidence before the Tribunal that a debt was owed by LAPM to the Appellant is the debenture dated 19 July 2013. No evidence of any such debt predates July 2013.

69. The debenture provides no details of when and how this debt arose. It states merely that a debt is owed in respect of unspecified amounts lent. The evidence is that at the time of the proceedings for the winding up of LAPM, which occurred in 2014 after the transfer of its stock to the Appellant, the list of LAPM's creditors showed that LAPM still owed the Appellant £89,453. The debenture does not of itself establish that LAPM ever owed the Appellant more than this, given that the debenture does not specify the amount of any debt owed.

70. The financial statements of LAPM for the year ended 31 March 2013 and the financial statements of the Appellant for the year ended 31 March 2014 both indicate that LAPM was indebted to the Appellant in the sum of approximately £1.26 million (paragraphs 39 and 45 above). Again, neither document provides details of exactly when and how this debt of LAPM to the Appellant arose.

71. The financial statements of the Appellant for the year ended 31 March 2014 post-date the transfer of the stock from LAPM to the Appellant. The debenture and the financial statements of LAPM for the year ended 31 March 2013 are documents created some 5 and 3 months respectively prior to the transfer of the stock. The evidence is that LAPM ceased trading in December 2013 (paragraph 45 above), at about the same time as its stock was transferred to the Appellant, and that GBC took over trading from its unit in the retail park in early January 2014. The Tribunal therefore considers that these documents were created at a time relatively proximate to the transfer of the stock and to the cessation of LAPM's trade. The debt is said to have existed since about 2005 (see paragraph 27 above). If so, there ought to be older documents attesting to the long-standing existence of this debt, but none has been produced in evidence.

72. It seems that LAPM did not pay HMRC in full the output tax on the transfer of the stock to the Appellant. Mr Grant said in his evidence that he does not know if LAPM submitted a VAT return declaring output tax on the sale. The list of company creditors from the winding up proceedings of LAPM states that LAPM owed HMRC £171,010 in respect of "stock sold on 06.12.2013". It is unclear if this relates to the stock transferred to the Appellant, given that

the documents relied on by the Appellant suggest that the decision to transfer the stock to the Appellant was taken only on 18 December 2018. However, even if it does, it seems that this amount was never paid to HMRC in full due to LAPM's insolvency and winding up.

73. The Appellant denies that the transfer of the stock to the Appellant prior to the winding up of LAPM amounted to the stripping of LAPM's assets. The Tribunal emphasises that it makes no finding that anything improper has occurred. However, the mere potential for abuse in situations such as this is apart from anything else a reason why the Tribunal must be careful to maintain the principle that the burden of proof is on the Appellant to establish by evidence on a balance of probability that the claimed debt of LAPM to the Appellant did indeed exist as claimed.

74. The claimed debt of over £1.2 million is a substantial sum. Even if the Appellant and LAPM were related companies, there is no reason why a loan of that magnitude should not be properly documented. The Appellant has produced what are said to be minutes of decisions of the respective boards of the Appellant and LAPM, recording the decision to sell LAPM's stock to the Appellant in return for a reduction in the amount of LAPM's debt equivalent to the purchase price. There is no reason why the original loan itself should not have been documented at least to the same extent. The evidence of Mr Grant was that the same bank was the lender to both the Appellant and LAPM. The Appellant's case is that the bank was very concerned about the debt owed by LAPM to the Appellant. Presumably the bank itself would have insisted on the mutual financial relations between the companies being properly documented as a condition of its lending. The Tribunal is not persuaded by the Appellant's explanation that dealings between closely related companies are conducted on a more informal basis due to the element of trust. Dealings between closely related companies still need to be properly documented for legal and tax purposes.

75. The Tribunal has taken into account the witness evidence of Mr Mealiff and Mr Grant. However, this evidence was vague and general in relation to the circumstances of the debt. No explanation was provided, for instance, of why building works undertaken for LAPM in 2005 would be paid for by the Appellant rather than LAPM, or of whether any arrangements were put in place from 2005 for the repayment of the debt by LAPM to the Appellant, and if not, why not. The Tribunal does not suggest that there is necessarily anything suspicious, but takes into account the lack of detail provided by the Appellant.

76. Ultimately, the Appellant has provided no direct documentary evidence of the debt owed by LAPM to the Appellant. The financial statements of LAPM and the Appellant are merely indirect evidence, in that they refer to the debt. No loan documentation as such has been provided. The Appellant's case is that there was in fact no loan documentation, and that the loan was simply entered into the accounts of the respective companies. However, it is noted that the Appellant has not even specified in which year's accounts for each company the loan was first entered.

77. On its consideration of the evidence as a whole, the Tribunal is not satisfied on a balance of probability that LAPM, prior to the transfer of its stock to the Appellant in December 2013, owed the Appellant £1.265 million or any amount at all. The Tribunal is also not satisfied on a balance of probability that the Appellant, when taking the stock from LAPM, in return reduced the amount of any debt owed by LAPM to the Appellant.

78. Consequently, the Tribunal is not satisfied on a balance of probability that the Appellant paid LAPM for the stock, within 6 months from the date of the transfer of the stock to the Appellant, or at all.

79. The Tribunal therefore finds that s 26A(1) VATA applies. The Appellant is to be taken not to have been entitled to credit for input tax in respect of the VAT that is referable to the stock acquired from LAPM. For this reason, the appeal must be dismissed.

Regulation 29 VAT Regulations

80. Given the finding above, it is unnecessary to decide whether HMRC are entitled to rely on regulation 29 of the VAT Regulations, or to decide the merits of that argument. However, for completeness the Tribunal finds as follows.

81. The Appellant objects to HMRC raising the regulation 29 issue at a late stage. However, the Tribunal considers that the Appellant has had a full opportunity to address this argument, and that it is appropriate for the Tribunal to address the matter, given that it goes to the basic requirements for a right to reclaim input tax.

82. In order to comply with regulation 29 of the VAT Regulations, the Appellant needs not only to have a VAT invoice issued by LAPM, but also is required to have had such a VAT invoice at the time of claiming deduction of input tax.

83. No invoice from LAPM in respect of the sale of the stock has been produced in evidence in this appeal. Nonetheless, the Appellant seeks to establish by witness evidence and inference that an invoice was issued by LAPM.

84. The Tribunal finds that the sale of the stock by LAPM to the Appellant, if it occurred, was a very substantial transaction, and that it can be assumed that the Appellant would have taken particular care to ensure the preservation of this particular invoice, had it been issued. The inability to produce such an invoice casts doubt on whether one was ever issued.

85. The Appellant argues that invoices issued by LAPM for the sale of the properties to the Appellant have been produced in evidence, and that if LAPM issued invoices for these transactions, it is likely that LAPM also issued an invoice for the sale of the stock. However, this argument cuts both ways. If the Appellant has been able to produce invoices by LAPM in respect of the sale of the properties, the question arises why it has been unable to produce one for the sale of the stock. The inability of the Appellant to produce such an invoice is at least equally consistent with the conclusion that no such invoice was issued.

86. The Tribunal takes into account that the Appellant has provided no particular explanation for the inability to produce the invoice. The impression is that the Appellant's case is that it has simply gone missing for unexplained reasons.

87. Mr Grant gave evidence that he believed that the rebate "would have" only been paid after a pre-credit check by HMRC which would have involved a request for HMRC to see the most significant invoices or at least to be given an explanation for the level of the reclaim. This is not clear evidence that an invoice ever was issued. The evidence of Officer Kelly is that no purchase invoice was seen by HMRC.

88. The evidence of Mr Mealiff is that there was an invoice as he recalls a conversation that he had with the Appellant's accountant, Mr Grant, about getting the VAT refund. The Tribunal takes this evidence into account, but does not find it to be strong evidence that an invoice was issued.

89. On its consideration of the evidence as a whole, the Tribunal is not persuaded on a balance of probability that an invoice was issued by LAPM for the sale of the stock to the Appellant.

90. The proviso to regulation 29(2) confers a discretion on HMRC to accept alternative evidence to the purchase invoice which a person claiming deduction of input tax must ordinarily have. The exercise of such a discretion can only be challenged by the taxpayer on the ground that it was a decision that no reasonable body of Commissioners could have reached. The burden lies on the taxpayer to demonstrate this, based on facts and matters available to HMRC at the time the decision was taken. (*Boyce* at [14].)

91. It appears that, prior to the taking of the HMRC decision against which the Appellant now appeals, the Appellant never expressly asked HMRC to accept alternative evidence to an invoice. If so, the failure of HMRC expressly to consider an exercise of its discretion under regulation 29(2) is understandable.

92. The Appellant has in this appeal advanced no reasons why this discretion should have been exercised in the Appellant's favour. There is certainly no evidence that the Appellant ever presented such reasons to HMRC before HMRC took the decision now under appeal. No particular reason has been given by the Appellant for the failure to be able to produce the invoice, other than to indicate that it cannot be found.

93. The Tribunal finds that there has been no unreasonable exercise of discretion, or failure to exercise discretion, by HMRC. On the material before it, the Tribunal itself sees no basis for an exercise of the discretion under regulation 29(2).

94. For this reason also, the Tribunal would dismiss the appeal.

CONCLUSION

95. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE

RELEASE DATE: 9 JUNE 2020