



**TC07815**

*VAT – input tax claim -supplies made by intermediate contractors - third party “gang masters” – vatable supply of workers – CIS status of suppliers – evidence of taxable supply – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/00685**

**BETWEEN**

**SMART ORGANISER LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE Rachel Short**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London on 20 February 2020**

**Mrs Alina Salabin, a director of Smart Organiser Limited for the Appellant**

**Mr Victor Olamide litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents**

## DECISION

### INTRODUCTION

1. This is an appeal by Smart Organiser Limited (“Smart Organiser”) against
  - (1) HMRC’s refusal to repay VAT amounting to £40,995.38 for the 04/17 VAT period,
  - (2) HMRC’s assessment dated 4 June 2018 of £69,533.70 of VAT due for the 04/17 VAT period confirmed by HMRC’s review letter of 4 January 2019.

### SUMMARY

2. The question for the Tribunal in this appeal is whether supplies of workers which Smart Organiser says were made to it by three companies involved in the refurbishment of office buildings were supplies received in respect of which Smart Organiser can reclaim input tax.
3. Smart Organiser argues that those three companies (Dragos Design Limited, (“Dragos”), Meteora Construct Limited (“Meteora”) and Proiect Limited (“Proiect”), which I have labelled the “Intermediate Companies” were set up as its contractors acting as “gang masters” to manage sub-contractors involved in the refurbishment of office buildings and made supplies of workers to Smart Organiser.
4. HMRC argue that the Intermediate Companies did not make supplies to Smart Organiser. In fact supplies were made by the sub-contractor workers themselves, who were paid directly by Smart Organiser and who, as sub-contractors, could not make taxable supplies of staff, but could only provide their services as employees.
5. HMRC’s second argument is that even if taxable supplies were made by the Intermediate Companies, the invoices provided to Smart Organiser in respect of those supplies are not valid VAT invoices because they do not provide sufficient information to identify the supplies made.

### BACKGROUND FACTS

6. Smart Organiser is a UK resident company registered for VAT. Its business is described as an employment agency, including providing temporary workers, accounting, bookkeeping and tax activities.
7. HMRC opened an enquiry into Smart Organiser’s VAT return for the 04/17 period on 18 July 2017. Smart Organiser provided various documents to HMRC between 28 July 2017 and 4 June 2018 in response to their queries, none of which HMRC considered to be “valid VAT invoices”.
8. On 4 June 2018 HMRC issued a decision letter reducing the amount of VAT claimed by Smart Organiser for the 04/17 period disallowing an input tax reclaim of £110,529.08, reducing its repayment claim of £40,995.38 to zero, and assessing Smart Organiser to VAT in the amount of £69,533.70.
9. On 16 July 2018 HMRC issued a penalty explanation letter to Smart Organiser referring to a penalty for inaccuracies in its 04/17 VAT return which were deliberate. A penalty assessment of £50,290.69 was issued on 22 August 2018.
10. Smart Organiser requested a review of HMRC’s decisions of 4 June 2018 and 16 July 2018 by letter on 22 October 2018.
11. HMRC issued a review conclusion letter on 4 January 2019 confirming its original decisions in respect of the VAT due but varying the penalties payable to £21,533.17
12. Smart Organiser appealed to this Tribunal on 2 February 2019.

## THE PENALTY ASSESSMENT

13. At the hearing on 20 February 2020 HMRC were unable to provide evidence that the notice in respect of the amended penalty assessment for the 04/17 period had been issued or served.

14. In subsequent correspondence dated 22 June 2020 HMRC stated that “due to technical issues in raising the amended penalty” there was no penalty to dispute for the 04/17 period.

15. This decision proceeds on the basis that no penalty will be charged on Smart Organiser for the 04/17 period. This penalty is not dealt with as part of this appeal.

## THE LAW

16. The relevant VAT legislation is set out in the Value Added Tax Act 1994 (“VATA 1994”) including:

(1) S 24 defines “input” tax in relation to a taxable person for these purposes as:

“(a) VAT on the supply to him of any goods or services

(b) .....

being in each case goods or services used or to be used for the purpose of any business carried on or to be carried on by him”

(2) S 25(2) deals with the circumstances and process for claiming credit for input tax against output tax:

“Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under s 26, and then to deduct that amount from any output tax that is due from him”

(3) S 26 sets out input tax which is allowable:

“The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below”

17. The VAT Regulations at SI 1995/2518

(1) Regulation 14 sets out the prescribed contents of a VAT invoice including:

“(g) a description sufficient to identify the goods or services supplied”

(2) Regulation 29 sets out the basis on which input tax can be reclaimed including by providing a valid VAT invoice or “such other evidence of the charge to VAT as the Commissioners may direct”.

18. We were also referred to this case authority by HMRC:

(1) *Genius Holdings BV* [1991] STC 239, in that decision paragraph 15 states

“it follows that that right cannot be exercised in respect of tax which does not correspond to a given transaction, either because that tax is higher than that legally due or because the transaction is not subject to value added tax”

and at paragraph 19

“The right to deduct provided for in the Sixth Directive does not apply to tax which is due solely because it is mentioned on the invoice”

#### **EVIDENCE SEEN AND HEARD**

19. Tax invoices issued to Smart Organiser by

- (1) Dragos for January to March 2017
- (2) Meteora for January to March 2017
- (3) Proiect for January to March 2017

Each dated 20 March 2017 and provided to HMRC in November 2017

Each invoice includes a description of the services provided as:

“services provided in relation to project in construction for general builders” with a single sum charged, and

as a separate line “non labour” with a single sum charged.

20. VAT only invoices issued to Smart Organiser by

- (1) Dragos dated 21 April 2017
- (2) Meteora dated 24 April 2017
- (3) Proiect dated 21 April 2017

Described as “VAT difference” invoices and referring to “services provided in relation to project in construction for general builders” for the months from January to March 2017 and provided to HMRC in October 2017.

21. Documents headed “brakedown invoice” for each of Dragos, Meteora and Proiect for the January, February and March 2017 periods setting out “*professional services provided in relation to construction at the site named [one of the construction sites] located at [address of construction site]*”, listing individuals by name, the Intermediate Company to which the supplies were made and the value and payment date of those supplies, provided to HMRC in December 2017.

22. HMRC monthly Constructions Industry Scheme (“CIS”) contractor returns for

- (1) Proiect Limited for the periods from January 2017 to January 2018
- (2) Dragos Design for the periods from January 2017 to March 2017
- (3) Meteora Contract Limited from January 2017 to May 2017

23. VAT Audit Report for Smart Organiser from February to April 2017.

24. Construction Management Plans for four refurbishment projects referred to as:

- (1) Arden House, Birmingham
- (2) Lombard House, Lichfield
- (3) Threadneedle, Redditch
- (4) Compton House, Northampton

Each describing the principal contractor as Vale Construction Management and the sub-contractor as Smart Organiser working with specified sub-contractors, including Proiect, Meteora and Dragos (the Intermediate Companies).

The only details of the work to be undertaken is set out in the introduction of the management plan and stated, in each case, as:

“The project is a conversion of the existing planning office building to residential apartments, the works to be undertaken are described as follows:

- Strip out existing systems, office installations and finishes
- Provision of new windows to all facades
- Extension of existing single storey structure at roof level
- Fit out of self-contained apartments on each floor
- New M&E infrastructure services and separate metering”.

25. Correspondence between the parties from 18 July 2017 to 4 January 2019 including;

(1) Letter of 24 Nov 2017 from Smart Organiser to HMRC saying:

“Our clients were VIDY Construction Limited and KGBP Limited since last year until April 2017. For these clients we have found sub-contractors to work on construction sites, in order to change offices buildings in residential (apartments) buildings”;

(2) Letter of 7 March 2018 from Smart Organiser to HMRC saying:

“Smart Organiser paid CIS for these companies directly to their sub-contractors as advised by them. We have received every month sheets with amounts to pay to sub-contractors directly by these companies”;

(3) Letter of 19 April 2018 from HMRC to Smart Organiser saying

“The three companies above are not set up as contractors they don't pay anyone through CIS. They are just registered as sub-contractors in receipt of payments. There is therefore no evidence to substantiate your claims that these companies are in the supply chain”;

(4) Letter from Smart Organiser to HMRC dated 5 September 2018 accompanying documents for the VAT return for the VAT period February to April 2017 including a breakdown for the related VAT invoices received from each of the contractors.

#### **PRELIMINARY MATTERS**

(5) HMRC submitted a witness statement of Mrs Helen Dunnery dated 18 February 2020. This was received by the Tribunal in the afternoon of 19 February 2020, the day before the hearing. Mr Olamide could not provide any explanation for the lateness of its service.

(6) Given the lateness of its service and the lack of any reasonable explanation for the lateness, I decided that this witness evidence should not be admitted and Mrs Dunnery was not called as a witness.

#### **SMART ORGANISER'S ARGUMENTS**

26. In the letter accompanying their notice of appeal dated 1 February 2019 Smart Organiser explained that they were appealing against HMRC's decision to reduce their repayment claim to nil and assess them to further VAT because:

(1) HMRC had not properly considered all the information requested and received from Smart Organiser.

(2) Smart Organiser did not initially understand how the CIS scheme worked and mistakenly made payments on behalf of sub-contractors to someone else. Reasonable steps were taken to correct this error and corrected CIS returns were sent to HMRC.

(3) Despite what HMRC allege about the Intermediate Companies not being registered as contractors, workers were supplied by those companies to Smart Organiser. Evidence in the form of "collaboration contracts" and worksheets had been provided to HMRC to demonstrate this.

(4) The disputed VAT invoices for the 04/17 VAT periods included not only the services of the workers provided to Smart Organiser but also the materials provided to the sub-contractors.

(5) This is not a case of Smart Organiser "just inserting third party invoices on the VAT claim" the collaboration between the Intermediate Companies and their sub-contractors really existed and the payments were really made.

#### **What supplies were made for VAT purposes?**

27. At the Tribunal Mrs Salabin explained that Smart Organiser were requested by their clients to provide staff for four office refurbishment projects at Arden House, Lombard House, Threadneedle and Compton House. At the start of the projects, Smart Organiser had been dealing with 47 different entities who were providing various workers to those projects. When it became apparent that this was not practicable, at Mrs Salabin's suggestion, the foremen who were working on the project set up three entities (the "Intermediate Companies") so that Smart Organiser only had to deal with these entities which would be treated as the "gang masters" for the project.

28. Initially those Intermediate Companies were not registered for VAT and did not have their own bank accounts. To solve this issue Smart Organiser agreed to pay the sub-contractors themselves, effectively acting as agent for the Intermediate Companies, the gang masters, including dealing with CIS payments for the sub-contractors. Mrs Salabin explained that she thought that this was possible because of HMRC's own guidance in their CIS guidance document:

*"Payments to someone else" including the statement "If you're a sub-contractor operating under the CIS, you can choose someone to get payments for you ..... This person is known as your 'nominee.'"*

29. Smart Organiser had provided many sets of documents to HMRC and HMRC have accepted that PAYE and NI were paid by Smart Organiser on behalf of the Intermediate Companies.

#### **Were valid VAT invoices provided?**

30. Mrs Salabin accepted that once the Intermediate Companies had been registered for VAT, the form of the invoices initially provided by them had not been correct. Because VAT had been charged retrospectively, it had not been clear how the invoices should be produced. Initially the Intermediate Companies had produced "VAT only" invoices, of which I was

shown an example. But by December 2017 HMRC had been provided with correct invoices setting out the services provided, the price paid, the VAT charged and the backup information giving details of all of the services provided for the relevant period by the Intermediate Companies. Mrs Salabin took me to an example of a VAT invoice and the backup information provided to HMRC to substantiate the nature of the supplies.

31. Mrs Salabin also explained that after discussions with HMRC evidence had been provided that the Intermediate Companies had properly accounted for CIS payments.

32. I was referred to the construction documents for the four site refurbishments in standard format which Mrs Salabin said demonstrated that the construction work had been carried out by the sub-contractors working under the Intermediate Companies.

### **HMRC's ARGUMENTS**

33. HMRC have denied Smart Organiser's VAT claim because in their view supplies were not made by the Intermediate Companies but by the sub-contractors.

34. The Intermediate Companies were not registered under the CIS scheme as contractors. They were registered as sub-contractors and so could not act as contractors and could not make a taxable supply of workers. The Intermediate Companies were not entitled to issue a valid VAT invoice.

### **What supplies were made for VAT purposes?**

35. HMRC argue that the Intermediate Companies were not in the supply chain. The CIS status of the companies and the manner in which payment was made, determines the nature of the supplies made for VAT purposes.

36. The supplies in respect of which Smart Organiser have claimed input tax cannot have been properly made by the Intermediate Companies, who were not contractors and who could only have employees, not sub-contractors working for them.

37. Smart Organiser made its payments directly to the sub-contractor tradesmen, not to the Intermediate Companies. Smart Organiser had short cut the payment process and paid their sub-contractors directly. This suggests that the sub-contractors were making supplies directly to Smart Organiser and not providing any services through the Intermediate Companies.

### **Were valid VAT invoices provided?**

38. Even if it is accepted that the three Intermediate Companies made taxable supplies to Smart Organiser, the documentary evidence (in the form of the VAT invoices) provided to support the input tax claimed is questionable. It does not contain all the information required of a valid VAT invoice. The information provided is not broken down in sufficient detail and it is not clear on an invoice by invoice basis which period and what supplies each invoice relates to.

## **DISCUSSION AND DECISION**

### **Onus of proof**

39. In respect of the VAT assessments, the onus of proof is on Smart Organiser to demonstrate that the supplies in respect of which it is claiming input VAT were actually made, were taxable supplies and that input tax claims are supported by valid VAT invoices issued by the supplier

## **Findings of fact**

40. On the basis of the evidence produced to the Tribunal I have found the following facts:
- (1) At the time when the supplies in question were made, (from January to March 2017) the Intermediate Companies were not registered as contractors under the CIS scheme.
  - (2) Smart Organiser paid the subcontracting entities, not the Intermediate Companies, for the supplies made.

## **What supplies were made for VAT purposes?**

41. I have approached this question by asking what in essence the nature of the supplies made to Smart Organiser were, by reference to economic and commercial reality and bearing in mind that it is Smart Organiser who must provide sufficient evidence to support its treatment of the supplies as taxable supplies of workers made by the Intermediate Companies to Smart Organiser.
42. To determine this question I have looked at (i) the contractual documents underlying the supplies, (ii) the manner in which payments were made in relation to the supplies and (iii) the surrounding circumstances in which these supplies were allegedly made.
43. Neither party attempted to describe the nature of the services which were supposed to have been supplied by the Intermediate Companies to Smart Organiser. I have taken the supplies to be taxable supplies of workers, on which VAT would be chargeable.

## ***Documentary evidence***

44. The documentary evidence provided by Smart Organiser to support its treatment of the supplies made by Smart Organiser amounted to;
- (1) The standard form project plans for each of the four refurbishment projects
  - (2) The backup schedules which were included with the corrected VAT invoices provided to HMRC in December 2017.
45. These did not include any evidence of what was actually done by the Intermediate Companies, other than a generic description of each of the projects and (in the back up schedules) a list of the individuals who carried out the works at the project sites. There is nothing in these documents to explain what services the Intermediate Companies were providing, over and above the value of the services provided by these individual sub-contractors.

## ***Legal character of the supplies made***

46. HMRC's argument relies on an analysis of the legal character of the supplies made; these could not have been taxable supplies of workers because the Intermediate Companies were not legally able to provide workers since they were not registered as CIS contractors.
47. The way in which an entity is treated for one tax purpose (as a CIS contractor) does not necessarily determine how that entity's activities may be treated for another tax purpose (VAT in this case). The fact that the Intermediate Companies may have not been in compliance with the CIS rules does not mean that they could not have made the supplies which Smart Organiser say they made. However, I have taken it as relevant to the overall context in which these supplies were made that the CIS status of the Intermediate Companies does not match the nature of the supplies which are alleged to have been made at the relevant time.



### ***Evidence of how payments were made***

48. HMRC referred to bank account evidence which demonstrated that payments had been made directly to the sub-contracting entities, not to the Intermediate Companies. I was not taken to this evidence, but Smart Organiser did not dispute that payment had been made in this way.

49. While Mrs Salabin provided an explanation for this, (that the Intermediate Companies did not have bank accounts) it does raise questions about the commercial role of the Intermediate Companies if they were not in receipt of any economic reward for their role in these transactions.

### ***The context and circumstances of the supplies***

50. Mrs Salabin explained the background for the introduction of the Intermediate Companies; it was a matter of administrative convenience for Smart Organiser to reduce the number of entities which it had to deal with.

51. In my view, if any value was provided by the Intermediate Companies, it was the administrative convenience which having to deal with three rather than 47 companies provided to Smart Organiser. I was not provided with any evidence that the Intermediate Companies provided any other independent value or service as part of the four projects with which Smart Organiser was involved.

### **CONCLUSION**

52. In my view, there is little evidence to suggest that in substance supplies of staff were made by any of the Intermediate Companies to Smart Organiser. It was only the after the fact and in response to HMRC's queries that VAT documentation which suggested that services were provided to the Intermediate Companies and then on-supplied to Smart Organiser was provided.

53. The evidence which has been provided demonstrates that the work was carried out at each of the construction sites, but does not demonstrate that the sub-contractors who carried out that work were supplied by the Intermediate Companies to Smart Organiser.

54. While perhaps not the best authority for this proposition, this is in line with the reasoning in the *Genius Holdings* decision to which HMRC referred. A claim for input tax must be on the basis of a substantive supply having been made, not merely on the basis of input tax having been included on a VAT invoice.

55. I have concluded that Smart Organiser has not provided sufficient evidence to demonstrate on the balance of probabilities that taxable supplies of workers were made by the Intermediate Companies to Smart Organiser during the 04/17 VAT period.

### **WERE THE INVOICES VALID VAT INVOICES**

56. Having concluded that Smart Organiser has not demonstrated that taxable supplies were made by the Intermediate Companies, it is not necessary for me to consider whether the VAT invoices provided by the Intermediate Companies were valid VAT invoices.

**DECISION**

57. Smart Organiser’s appeal is not allowed and HMRC’s assessment of 4 June 2018 for the 04/17 VAT period is confirmed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

58. 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.

**RACHEL SHORT**

**TRIBUNAL JUDGE**

**RELEASE DATE: 17 AUGUST 2020**