[2017] UKUT 383 (TCC)

Appeal number: UT/2017/0014

VAT– assessment in respect of disallowed input tax-whether FTT erred in finding HMRC entitled to disallow right to deduct in the absence of evidence of receipt by the appellant of a taxable supply -no- appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CONOR ROBINSON

Appellant

- and -

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

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Belfast, on 20 September 2017

Mr Neil Manley, of McNamee McDonnell, Solicitors, for the Appellant

Howard Watkinson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and relevant facts

1. This is an appeal by the appellant ("Mr Robinson") against the decision of the First-tier Tribunal (Judge Alastair Rankin and Miss Patricia Gordon) (the "FTT") released on 28 November 2016 (the "Decision").

2. The FTT dismissed the appeal of Mr Robinson, a road haulier, against a decision by the respondents ("HMRC") made on 29 April 2014 to assess him to VAT under s 73 of the Value Added Tax Act 1994 ("VATA") for an amount of £59,558. Mr Robinson had sought to reclaim input VAT said to have been incurred by him on purchases of fuel from Old Mill Fuel Services Limited ("Old Mill") on VAT returns he had made in respect of quarterly periods between December 2010 and December 2012 and HMRC disallowed those claims, giving rise to the assessment.

3. HMRC had disallowed the claims on the basis that the invoices produced by Mr Robinson in relation to the purported purchases of fuel were not valid VAT invoices.

4. Mr Robinson's case before the FTT was that he had purchased the fuel for his vehicles from Old Mill and that he had paid for the fuel and used it in his vehicles. Consequently, he contended that he was entitled to reclaim the input tax by reference to such purchases.

5. The following evidence was available to the FTT in respect of Mr Robinson's contentions:

(1) 24 invoices on which the supplier was shown as Old Mill, all but seven of which were dated after the date on which Old Mill had been dissolved, namely 20 May 2011;

(2) copies of four paid cheques which Mr Robinson contended had been given to Old Mill in payment for the fuel. The total amount of the sum shown on those cheques did not correspond to the total amount of the invoices referred to above. When each cheque was given to Old Mill the name of the payee was blank, but before it was cashed it had been completed with the name of the individual or entity who Mr Robinson contended was Old Mill's supplier;

(3) a handwritten schedule purporting to show the dates on which Mr Robinson said payments were made to Old Mill. The total amount shown on the schedule did not correspond with either the total amount of the four cheques or the total amount of the invoices.

6. In his evidence to the FTT, Officer Cunningham of HMRC accepted that Mr Robinson had purchased the fuel in question but did not accept that it had been purchased from Old Mill or that Old Mill had been paid for the fuel. Evidence given to HMRC from those shown as the payees of the cheques did not substantiate that those payees had supplied fuel either to Mr Robinson or to Old Mill.

7. On the basis of this evidence, the FTT made the following findings of fact at [39] of the Decision:

> "While the Tribunal finds that supplies of fuel did take place, it has not been persuaded by Mr McNamee that the fuel supplied came from Old Mill. Once Old Mill was dissolved it could not have supplied any fuel. No evidence was produced to show that Mr Robinson had made any payments to Old Mill. There were no bank statements before the Tribunal. The only evidence produced was copies of the four cheques, a handwritten statement with dates of Old Mill invoices showing rounded payments and the 24 invoices from Old Mill. Due to the inaccuracies referred to in paragraph 35 above the Tribunal is unable to rely on any of the information in the schedule."

8. At [40] of the Decision, the FTT accepted HMRC's submissions that none of the 24 invoices relied on were valid VAT invoices due to various defects on the face of them.

9. At [42] of the Decision, the FTT found that on the balance of probabilities Mr Robinson had not satisfied it that there was alternative documentary evidence to the invoices, no evidence of receipt of a taxable supply from Old Mill and no evidence of payment to Old Mill. At [44] the FTT found that Mr Robinson had failed to prove on the balance of probabilities "either that Old Mill supplied the fuel referred to in the invoices or that Mr Robinson paid for it."

The Law

10. Section 4(1) of the Value Added Tax Act 1994 ("VATA 1994") provides:

> "VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him."

11. For these purposes, a "taxable person" is defined by section 3(1) VATA 1994 as a person who is or is required to be registered under that Act.

12. Section 24(1) VATA 1994 defines input tax in the following terms:

> "Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say –
>
> (a) VAT on the supply to him of any goods or services;
>
> (b) …
>
> (c) …, being (in each case) goods or services used or to be used for the purposes of any business carried on or to be carried on by him."

13. Section 24(6)(a) VATA 1994 makes provision for regulations to determine how input tax is to be evidenced:

> "Regulations may provide –

> (a) for VAT on the supply of goods or services to a taxable person … to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases …"

14. Section 25(2) VATA 1994 provides that a taxable person is entitled to credit for so much of his input tax as is allowable under section 26 as follows:

> "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 section 26 …"

15. Section 26 VATA provides that 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 as is allowable by or under regulations as being attributable to the taxable supplies made or to be made by the taxable person in the course or furtherance of his business.

16. The Value Added Tax Regulations 1995 (the "Regulations"), which have been made under section 24(6) (a) VATA 1994, make provision for the documents which will evidence and quantify input tax. Regulation 29 is the relevant provision:

> "(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable …
>
> (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
>
> …
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct."

17. Regulation 13 provides that where a registered person makes a taxable supply to a taxable person he shall provide a VAT invoice to that person.

18. Regulation 14 stipulates what particulars must be stated in a VAT invoice. In this case, there is no appeal against the findings of the FTT that the invoices referred to at [5] above were not valid VAT invoices and accordingly there is no need to set out here the details of the particulars required to be stated.

19. Section 26A provides for the disallowance of input tax where the consideration for the goods supplied has not been paid as follows:

> "(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 six months from 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."

20. This provision was considered by the FTT in *Heanor Motor Company Ltd v Revenue & Customs* [2014] UKFTT 1074 (TC), where it was decided that where a taxpayer has not, within the six month time period, paid the consideration due on the supply then he is not entitled to reclaim the input VAT.

21. In *Opticare Ltd v Revenue & Customs* [2013] UKFTT 266 (TC) the FTT decided that it was for the taxpayer to prove on the balance of probabilities that he paid the consideration due within the statutory time period.

22. In March 2007 HMC issued a statement of practice in relation to invalid invoices entitled "*VAT Strategy: Input Tax Deduction without a Valid VAT Invoice*".

23. Paragraph 6 of this statement of practice states:

"If you are a taxable person, in order to exercise your basic right to deduct input tax, you must hold a valid VAT invoice. Without a valid VAT invoice, there is no right to deduct input tax. However, in the absence of such an invoice, you may still be able to make claims for input tax, but these claims are subject to HMRC's discretion. This of course assumes that a taxable supply has taken place. Where HMRC question the fact that an underlying supply has taken place, these provisions do not apply."

24. The statement of practice has a further section headed "Invalid Invoice and HMRC's discretion" which provides the following additional guidance:

"A proper exercise of HMRC's discretion can only be undertaken when there is sufficient evidence to satisfy the Commissioners that a supply has taken place.

Where a supply has taken place, but the invoice to support this is invalid, the Commissioners may exercise their discretion and allow a claim for input tax credit.

For suppliers/transactions involving goods stated in Appendix 3 HMRC will need to be satisfied that:

- The supply as stated on the invoice did take place
- There is other evidence to show that the supply/transaction occurred
- The supply made is in furtherance of the trader's business
- The trader has undertaken normal commercial checks to establish the bona fide of the supply and supplier
- Normal commercial arrangements are in place – this can include payment arrangements and how the relationship between the supplier/buyer was established."

25. It is to be noted that oil that is held out for sale as road fuel is mentioned in Appendix 3 to the statement of practice.

26. Appendix 2 to the statement of practice sets out a non-exhaustive list of questions may be asked by HMRC to determine whether there is a right to deduct in the absence of a valid invoice as follows:

> "1. Do you have alternative documentary evidence other than an invoice (e.g. supplier statement)?
>
> 2. Do you have evidence of receipt of a taxable supply on which VAT has been charged?
>
> 3. Do you have evidence of payment?
>
> 4. Do you have evidence of how the goods/services have been consumed within your business or their onward supply?
>
> 5. How did you know that the supplier existed?
>
> 6. How was your relationship with the supplier established?
>
> …"

27. The Tribunal's jurisdiction in relation to the exercise of the discretion of HMRC to allow input tax credit in the absence of any VAT invoices was described by Schiemann J in *Kohanzad v C & E Commissioners* [1994] STC 968 in the following terms at page 969d:

> "It is established that the tribunal, when it is considering a case where the commissioners have a discretion, exercises a supervisory jurisdiction over the exercise by the commissioners of that discretion. It is not an original discretion of the tribunal; it is one where it sees whether the commissioners have exercised their discretion in a defensible manner. That is the accepted law in this branch of the court's jurisdiction, and indeed it has recently been decided that the supervisory jurisdiction is to be exercised in relation to materials which were before the commissioners, rather than in relation to later material
>
> …

> It is, of course, well established that in this type of case, the burden of proof lies on an appellant to satisfy the tribunal that the decision of the commissioners were incorrect."

28. The supervisory jurisdiction in cases such as this involves consideration as to whether the Commissioners took into account all relevant matters, whether they took into account any irrelevant matter and whether the decision was within the bounds of reasonableness.

The Decision

29. The FTT's reasoning for its decision was extremely short. At [44] and [45] of the Decision it said that the appeal was dismissed because Mr Robinson failed to prove on the balance of probabilities either that Old Mill supplied the fuel referred to in the invoices or that Mr Robinson paid for it. It would therefore appear that the FTT was not satisfied that Old Mill was in fact the supplier or the fuel or, even if it was, that the fuel was paid for. It would therefore appear in part, that the appeal was dismissed because the FTT found that Mr Robinson had lost his right to deduct the input tax by virtue of the operation of s 26A VATA.

30. That this was partly the basis for the FTT's decision was confirmed by what the FTT said at paragraph 3 of its decision notice refusing permission to appeal. It said that while the Tribunal found that there was a supply of fuel to Mr Robinson at [37] of the Decision it also found that there was no evidence of payment for such supply and that that finding was made at [39] of the Decision.

31. In fact, the finding at [39] was that there was no evidence that Mr Robinson had made any payments to Old Mill. It was at [44] that the FTT made a finding that there was no evidence of payment in more general terms and therefore what the FTT said in paragraph 3 of its decision notice refusing permission to appeal reinforces the conclusion that the FTT had made a finding that there was no evidence that the fuel had been paid for, regardless of who the supplier actually was.

Grounds of Appeal and issues to be determined

32. Mr Robinson sought permission to appeal against the Decision from the Upper Tribunal on the grounds that the FTT made an error of law by questioning whether a taxable supply had taken place. Mr Robinson contends that both the legislative provisions, HMRC's policy and the underlying case law requires there to be an examination simply of whether a taxable supply was made to Mr Robinson so that the question that the FTT should have determined was whether there was evidence of a supply to Mr Robinson and payment for such supply by Mr Robinson. He contends that he did not have to show that the supplies had originated from Old Mill or the payments have been made to Old Mill. Mr Robinson contends that there was a finding of fact by the FTT that the supplies took place and were paid for.

33. On 27 January 2017 Judge Bishopp granted Mr Robinson permission to appeal to the Upper Tribunal on the basis that it was arguable that by focusing on the question whether Mr Robinson had shown that the supplies were made by Old Mill

and whether Mr Robinson had paid Old Mill rather than the statutory questions which were whether the person concerned has received taxable supplies and whether he has paid for them within the six-month period that the FTT had made an error of law. Judge Bishopp observed that although the identity of the supplier will usually not be in doubt and it is implicit in the requirements relating to the documentation of the supply that it will be known, it is not an express requirement. He further observed that while uncertainty about the identity the supplier will inevitably be a relevant factor, it is not one which inevitably precludes the exercise of HMRC's discretionary power to accept alternative evidence in accordance with Regulation 29 (2).

34. Accordingly, in the skeleton argument filed on behalf of Mr Robinson before this Tribunal, Mr Robinson relied on the fact that the supply of fuel to Mr Robinson did take place and that Mr Robinson used the fuel in the course of his business. It was contended that Officer Cunningham had concluded that the non-existence of Old Mill without more prevented the exercise of his discretion under Regulation 29 (2). It was submitted that this was a misdirection and the FTT had fallen into the same error.

35. Mr Watkinson, in his skeleton argument, submitted that Mr Robinson's case as advanced now, that it does not matter from whom he received the supplies, or whom he paid for them, or who invoiced him if in fact he received some supplies, was not properly before the FTT and he should not be permitted to take the point now. Had Mr Robinson properly raised these points so that they were before the FTT both HMRC and the FTT could have properly dealt with them in that jurisdiction. Mr Robinson deprived HMRC of that opportunity. Mr Watkinson submitted that the only case put to the FTT was that Old Mill had been the supplier and Old Mill had been paid for the fuel and it was that case that, on the facts, was rejected by the FTT.

36. I decided to hear Mr Manley's submissions generally before deciding whether to accept Mr Watkinson's objection. As it transpired, for the reasons set out below, it was not necessary for me to determine that issue.

Discussion

37. In my view this appeal must fail because it is clear that the evidence before the FTT as to whether the supplies had been paid for within the six month statutory limit was insufficient to enable Mr Robinson to satisfy the burden upon him to demonstrate that the fuel had been paid for within that time, regardless of who the supplier actually was. Therefore, even if the FTT had erred in focusing on the identity of the supplier rather than on the question as to whether there had been a taxable supply, on the basis of the evidence before it the FTT would inevitably have had to conclude that it had not been satisfied on the question of payment.

38. Mr Manley was unable to point to any evidence that was before the FTT on the question of payment that might establish that in fact payment for the fuel was made to some person other than Old Mill beyond the evidence which the FTT had held was insufficient to establish that that payment was in fact made to Old Mill. Mr Manley accepted the only possible evidence of payment to somebody else was the fact that the payees on the cheques were other suppliers of fuel. However, the FTT had on the

facts rejected the suggestion that those payees had in fact supplied fuel to Mr Robinson and, in the event, Mr Manley did not seek to argue before me that there was any supplier other than Old Mill.

39. Furthermore, as I have found at [31] above, in my view the FTT had made a finding of fact that there was insufficient evidence of payment for the fuel at all.

40. On that basis, the question as to whether HMRC unlawfully exercised its discretion is wholly academic.

41. In any event, even if Mr Robinson had overcome the problem of lack of evidence of payment, it does not seem to me that there is any basis on which HMRC could properly have exercised their discretion. Mr Manley relied on the section from the statement of practice set out at [24] above which focused on the question of whether a supply had taken place. However, that is clearly not the end of the matter; paragraph 6 of the statement of practice referred to at [23] above makes it clear that is not merely a question of establishing that a supply has taken place but also that a taxable supply as occurred, which means that HMRC must be satisfied that on the evidence the supply was made by a taxable person, whether or not that person was registered for VAT. Old Mill clearly was not a taxable person after it was dissolved as a result of which most of the supplies allegedly made by Old Mill could not, in the absence of any evidence of any other taxable person having made the supplies, justify the exercise of the discretion in respect of those supplies.

42. As the FTT found at [42] of the Decision, neither was Ms Robinson able to provide any satisfactory evidence as to the first three questions set out in Appendix 2 to the statement of practice, as set out at [26] above. Therefore, in the absence of any documentary evidence other than the invalid invoices in relation to the supplies allegedly made by Old Mill before it was dissolved, such as a supplier statement, or any evidence of a supply by any other taxable person, then there was no basis on which HMRC could properly have exercised its discretion in relation to those supplies.

43. Therefore, even if I had permitted Mr Robinson to argue the case on a different basis to that which he did before the FTT, the appeal was bound to fail. As Mr Watkinson put it in his skeleton argument, had the FTT asked the question now posed by Mr Robinson, that is was there a taxable supply of the fuel on which Mr Robinson claims the input tax now claimed, the only possible answer would have been "no". There was no evidence before the FTT that the fuel supplied was chargeable to VAT and accordingly no basis on which input tax could have been claimed.

Disposition

44. The appeal is dismissed.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 11 October 2017