[2015] UKFTT 0433 (TC)

TC04610

Appeals numbers: TC/2011/2076 & 2077

VAT – refusal of input tax claims – whether valid VAT invoices – reg 14 VAT Regs 1995 – alternative evidence – reg 29 – whether HMRC reasonable to refuse – appeals allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

DEADOC CONSTRUCTION LIMITED **Appellants**
UNDERGROUND PIPELINE SOLUTIONS LIMITED

- and -

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

TRIBUNAL: Judge Peter Kempster
Mr Mohammed Farooq

Sitting in public at Priory Courts, Birmingham on 16 & 17 December 2014

Mr Ian Bridge of counsel, instructed by Smith & Williamson, for the Appellant

Mr Vinesh Mandalia of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. Deadoc Construction Limited ("DCL") appeals against an assessment to VAT in the amount of £56,636, representing a disallowance by the Respondents ("HMRC") of reclaimed input tax in the VAT periods 11/06 to 02/09. Underground Pipeline Solutions Limited ("UPSL") appeals against an assessment to VAT in the amount of £47,489, representing a disallowance by HMRC of reclaimed input tax in the VAT periods 10/07 to 01/09.

Law

2. Section 24 VAT Act 1994 provides (so far as relevant):

> "… (6) 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;
>
> …
>
> (6A) Regulations under subsection (6) may contain such supplementary, incidental, consequential and transitional provisions as appear to the Commissioners to be necessary or expedient."

3. Regulation 29 of the VAT Regulations 1995 (SI 1995/2518) provides (so far as relevant):

> "… (2) At the time of claiming deduction of input tax … 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."

4. Regulation 13 of the VAT Regulations provides (so far as relevant):

> "(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 …

…

(5) The documents specified in paragraphs (1), (2), (3) and (4) above shall be provided within 30 days of the time when the supply is treated as taking place under section 6 of the Act, or within such longer period as the Commissioners may allow in general or special directions."

5. Regulation 14 of the VAT Regulations (quoted below as in force at the relevant time and so far as relevant) stipulates the contents of a VAT invoice:

"(1) Subject to paragraph (2) below and regulation 16 and save as the Commissioners may otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars—

(a) a sequential number based on one or more series which uniquely identifies the document,

(b) the time of the supply,

(c) the date of the issue of the document,

(d) the name, address and registration number of the supplier,

(e) the name and address of the person to whom the goods or services are supplied,

(f) ...

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

(h) for each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in any currency,

(i) the gross total amount payable, excluding VAT, expressed in any currency,

(j) the rate of any cash discount offered,

(k) ...

(l) the total amount of VAT chargeable, expressed in sterling,

(m) the unit price.

(n) where a margin scheme is applied under section 50A or section 53 of the Act, a relevant reference or any indication that a margin scheme has been applied,

(o) where a VAT invoice relates in whole or part to a supply where the person supplied is liable to pay the tax, a relevant reference or any indication that the supply is one where the customer is liable to pay the tax.

…"

HMRC Statement of Practice

6. HMRC's policy on the exercise of their discretion under reg 29 in relation to "such other evidence of the charge to VAT as the Commissioners may direct" was revised in April 2007 and the revised Statement of Practice on "VAT Strategy: Input Tax deduction without a valid VAT invoice" includes the following:

> "3. ... If you are a VAT registered business, and you have been issued with an invoice that is invalid, you should be able to return to your supplier and ask them for a valid VAT invoice that complies with the legislation. If for some reason you cannot, this Statement of Practice sets out whether or not you may be entitled to input tax recovery. In most cases, provided businesses continue to undertake normal commercial checks to ensure their supplier and the supplies they receive are 'bona fide' prior to doing any trade, it is likely they will be able to satisfy HMRC that the input tax is deductible.
>
> …
>
> **What do I do if I have an invalid VAT invoice?**
>
> 11. The simplest thing is to ask your supplier to issue a valid VAT invoice (suppliers are legally obliged to do this). If a taxable supply has taken place but a revised invoice cannot be obtained HMRC may apply their discretion to allow recovery of input tax.
>
> …
>
> **Invalid Invoice and HMRC's Discretion.**
>
> 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 supplies/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
>
> ...
>
> **How will HMRC apply their discretion?**
>
> 17. For supplies of goods not listed at Appendix 3, claimants will need to be able to answer most of the questions at Appendix 2 satisfactorily.

In most cases, this will be little more than providing alternative evidence to show that the supply of goods or services has been made (this has always been HMRC's policy).

18. For supplies of goods listed at Appendix 3, claimants will be expected to be able to answer questions relating to the supply in question including all or nearly all of the questions at Appendix 2. In addition, they are likely to be asked further questions by HMRC in order to test whether they took reasonable care in respect of transactions to ensure that their supplier and the supply were 'bona fide'.

19. As long as the claimant can provide satisfactory answers to the questions at Appendix 2 and to any additional questions that may be asked, input tax deduction will be permitted.

20. Decisions on when to disallow VAT claims will only be made after an independent central review of the case has been carried out.

…

Appendix 2

Questions* to determine whether there is a right to deduct in the absence of a valid VAT invoice

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? For example:

- How was contact made?
- Do you know where the supplier operates from (have you been there)?
- How do you contact them?
- How do you know they can supply the goods or services?
- If goods, how do you know the goods are not stolen?
- How do you return faulty supplies?

*This list is not exhaustive and additional questions may be asked in individual circumstances

Appendix 3

Supplies of goods subject to widespread fraud and abuse

…"

Evidence

7. As well as several bundles of documents we took oral evidence from the following witnesses (all of whom also adopted and confirmed formal witness statements): for the appellants, Mr Michael Deane (director); for HMRC, Mr Leslie Pitt and Mr Antony Bradshaw (both HMRC officers).

8. We dealt summarily with one procedural dispute. HMRC objected to the admissibility of some late evidence. The Appellants stated that these were copies of documents that had been found on the files of the Appellants' advisers and which had apparently been intended to be sent to HMRC; it was accepted that there was no proof that the documents had been sent to Mrs Davies (HMRC case officer). We refused to admit the late evidence on the grounds that it was not before the review officer whose decision was being disputed, but that we would give HMRC the opportunity to consider whether they would like a short break to review the new documents and see if they had a bearing on the review officer's decision. HMRC stated they would prefer to proceed as there had already been a considerable passage of time since the original decisions.

Evidence of Mr Deane

9. Mr Deane is sole director and shareholder of both DCL and UPSL. DCL has traded since 1983 as a ground works contractor in relation to drainage, foundations, utilities and paving. Its main business (80-85%) is as a subcontractor to two contractors (Volken Laser and Brindley Special Projects) engaged in the maintenance of NCP car parks, and does work for South Staffs Water. UPSL has traded since 1999 in the same line of business as DCL.

10. He had never had any invoices queried before in 30 years of trading and the disputed invoices were in similar format to those he had used over those 30 years without any problems, and were standard in the construction industry. The nature of the business was that minimal paperwork was involved. HMRC seemed to have changed their approach. He was at a loss to understand why the disputed invoices were not fully compliant.

11. The invoices did describe the supply; where this was "services provided" it was clearly from a labour provider and thus obvious what was being supplied. It was not normal industry practice to put a unit price for labour on an invoice. In most cases the invoice also identified the site in question (eg Stourport, Lincoln, Sheffield etc) or was clear that it covered "various locations".

12. The usual arrangements for carrying out work were that a gang of three or four workers would meet at the yard of the contractor (ie the customer – eg South Staffs Water) and the contractor's supervisor would allocate jobs to be carried out; a job sheet would be issued stipulating the work required (eg repair of water leak); at the end of the day the job sheet would be completed describing work done, materials used, how many men involved, and whether the repair was temporary or permanent;

the job sheet was handed in the following morning to the contractor's supervisor at the yard; the Appellants did not usually keep a copy of the job sheet; the job sheets were inspected by the supervisor, then passed to his manager and processed by the contractor to form the basis of the contractor's payment to the Appellants. All payments from contractors were by cheque and banked by the Appellants.

13. In order to maintain control over the amount of work being carried out Mr Deane kept an informal diary noting the number of men at each location each day. This allowed him to keep a check on payments from contractors, and formed an essential part of his internal controls which had been used for many years.

14. All workers are accredited for health & safety purposes (either as "mains layer" or "service layer") to allow them to carry out the works. Mr Deane would see the proof of accreditation when a worker started working for him, and that would also be shown to the contractor's supervisor; unaccredited workers would not be used by a contractor.

15. The arrangement with the contractors was unwritten; Mr Deane would hear that they were looking for workers for certain maintenance works. A number of subcontractors were used throughout the West Midlands, some of which were located by Mr Gary Singh who acted as representative of the subcontractors. Mr Deane would contact Mr Singh by mobile phone. In a typical case Mr Deane would phone any one of four to five subcontractors to tell them he needed two or three men in a gang the next day; the subcontractor would find the men and tell them to be present at the yard the next day; it was the subcontractor's responsibility to ensure their accreditation was in order. Mr Deane knew which men had worked where because he attended the yards when the jobs were allocated; he actually saw the men on site and saw the job sheets being allocated; he would make a note in his diary of which men were attending which location on any day.

16. The subcontractors would invoice the Appellants for payment. No payments were made in cash and everything went through the bank. The subcontractor would tell Mr Deane the name of the company to which payment for the labour should be made. If that company was new to Mr Deane and he had been provided with the relevant paperwork then he would check with HMRC that it was a legitimate business. This was a responsibility that he took seriously, having been told about it by Mrs Davies at a VAT visit in January 2007. For VAT he would make a verification check by telephone with the VAT office; he would write on his paperwork the date and outcome of the verification, the person spoken to and (where provided) a reference number. For income tax he telephoned the CIS verification line with the subcontractor's UTR; again, he would annotate his paperwork with the result (gross or net payment).

17. After the 2007 visit Mrs Davies asked for information on all suppliers and he provided this over the telephone. In some cases he received "veto" letters from Mrs Davies telling him he should not be using a particular subcontractor because their VAT number was not valid. He always stopped using a subcontractor if he received a veto letter. Similarly, he always acted on any letters informing him of a change of

CIS status of a subcontractor. He had received veto letters relating to Midlands Staff Exchange, VCL Group UK, Lakesite Construction, and Speedline Solutions. In some cases the letter was received some time after the company had been deregistered – for example, HMRC's letter concerning Lakesite was received in March 2009 when the company had been deregistered in November 2007 – which was too late to prevent the subcontractor having been used.

18. He had obtained a satisfactory VAT verification (by phone and in writing) on Midlands Staff Exchange; two days later Mrs Davies had telephoned to say he should not be using the VAT number that had been verified; she said she would write but nothing was received; at a subsequent visit in 2009 Mrs Davies said she had written in February 2007; Mr Davies only saw that letter for the first time in January 2010.

19. The Appellants used a SAGE accounting system. A lot of additional information had been provided to HMRC by him and the Appellants' advisers, but none of this had been accepted as sufficient alternative evidence. Mrs Davies had never said specifically what she wanted or what was wrong. He had asked his accountants what should be the description on a VAT invoice and had been told they usually just put "professional services".

20. He was unconcerned by the brief descriptions on the invoices because he would always have satisfied himself about what was covered before agreeing the invoice for payment. He would know because it would be in his diary; he had used the same system for 30 years and had never been told that it was incorrect or not adequate. Most arrangements were verbal, often using estimates; for labour some jobs were on a daily basis and others were on a measured basis ("on tape"). Some work was priced as a job – such as the "muck shift" by MJ O'Hara. He would expect to see location and number of men, but not the exact hours worked. There had never been any serious problems. Some subcontractors invoiced weekly, others took two to three weeks or longer.

21. He disagreed with the calculations used by Mr Bradshaw in the review letters. Mr Bradshaw had just calculated by number of days, which was not how the jobs had been priced. He had approached some subcontractors in 2010 to request replacement invoices with more detail; some had responded and he had given these to his accountants, and had assumed they had been provided to HMRC [Tribunal's Note – these are apparently some of the documents that were not admitted as late evidence – see [8] above.]

22. In cross-examination by Mr Mandalia for the Respondents:

(1) Mr Deane considered the description "muck shift" on one of the invoices was all he needed to know. He knew there was a job for several days involving provision of a wagon and a driver to remove soil from a site and take it to a tip. He did not know the quantities involved because the contract was priced as a job. He knew what the invoice related to when it was presented.

(2) Similarly, with an invoice from Midlands Staff Exchange he would not expect to see details of numbers of people. It could have been a mix of daily

rates and measured work. Everything would have been negotiated and agreed beforehand.

(3) Again similarly, on an invoice from Speedline Solutions he knew the job was for building a compound and putting in a drain; the subcontractor would provide a wagon and a driver, and the necessary hardcore. He would not expect to see all those details on the invoice; a price had been verbally agreed for the job and the invoice had been honoured and paid accordingly. It went without saying that an accredited operator for the plant would be provided, as that was a health & safety requirement.

(4) There had been occasions (such a long term contract in Sheffield) where time sheets had been used but on the disputed items these were just straightforward one-off jobs involving everyday work, where a single price would be agreed verbally.

(5) He was a groundwork contractor, not an accountant. He understood HMRC were saying that the invoices did not comply with the exact details of the regulations. As far as he was concerned the invoices were adequate for him to be satisfied the work had been done and the subcontractor should be paid as agreed beforehand.

(6) Not all the subcontractors were introduced by Gary Singh. Those not introduced by him included O'Hara, Cedarcroft and GCPH.

(7) It had happened that after work had been done by a subcontractor HMRC would notify the appellants that the subcontractor's CIS status had changed. When Mr Deane told the subcontractor that he would have to pay net, they would give him the name of another group company that had a gross payment permission; they would not substitute invoices but they would tell him they were changing. Also, the same workers had sometimes been used by more than one company; where one company had been the subject of a veto letter another company would supply the workers.

(8) Mr Deane accepted that in a letter to the Appellants' accountants dated 19 October 2010 Mr Bradshaw (the HMRC review officer) had given a list of possible sources of acceptable alternative evidence.

Evidence of Mr Pitt

23. Mr Pitt had taken over responsibility for this matter from his colleague, the Mrs Linda Davies (who had subsequently died), due to her serious ill health. He had been involved in the case since 2009 and was familiar with the background to the current dispute. The business of the Appellants involved the use of subcontracted labour. Mrs Davies had formed the view that certain items on which input tax had been claimed by the Appellants were not supported by valid VAT invoices. Mr Pitt concurred with that view; the disputed invoices did not meet the legal requirements for valid VAT invoices. Mrs Davies had also formed the view that there was not sufficient alternative evidence to support an input tax deduction for the disputed items. Mr Pitt also concurred with that view, and concluded that it was reasonable to disallow the disputed input tax claims for both Appellants.

24. In relation to DCL the disputed items were as follows:

(1) *Cedarcroft Construction Limited* – There was one disputed item.

(a) The description of the supply on the invoice was "For Leicester contract labour plant and material", which was not a sufficient description to identify the goods and/or services supplied and the extent of the services.

(b) The invoice did not state DCL's address.

(c) Cedarcroft's VAT registration was terminated with effect from 19 June 2008; the invoice (dated 29 August 2008) postdated the deregistration and thus the VAT registration number was invalid at the invoice date.

(d) The document did not state the time of supply, which was a legal requirement, and thus it was not known whether it took place when Cedarcroft was VAT registered.

(e) DCL did make a CIS verification enquiry on 29 July 2008 but there was no record of any VAT registration verification enquiry.

(2) *Midland Staff Exchange Limited* – There were 15 disputed items.

(a) The descriptions of the supply on the invoices were not sufficient to identify the goods and/or services supplied and the extent of the services. They were "Services rendered"; "Services rendered [date] to [date]"; "Stone up and tarmac as agreed"; "Supply of labour, plant and materials"; "Supply of labour, plant and materials at Stourport contract"; "Supply of labour, plant and materials at Measham contract"; "Supply of labour, plant and materials at Lincoln site and Sheffield site".

(b) The invoices did not state DCL's address.

(c) The invoices did not state the time of supply, which was a legal requirement, and thus it was not known whether it took place when Midland Staff Exchange was VAT registered.

(d) On 26 February 2007, which was seven weeks before the first of these disputed invoices, Mrs Davies had notified UPSL (the other Appellant and an associated company of DCL) that Midland Staff Exchange's purported VAT registration number could not be verified and thus any VAT claimed on invoices bearing that number would be disallowed.

(3) *MJ O'Hara* – There were three disputed items.

(a) The invoices did not state the time of supply, which was a legal requirement.

(b) The invoices did not state an identifying number, which was a legal requirement.

(c) One invoice did not contain a VAT registration number for the supplier, which was a legal requirement. Another invoice stated a VAT number that had been deregistered more than one month earlier.

(d) Mr Pitt had concluded that the goods or services had been supplied to UPSL, and thus no input tax arose to DCL.

(4) *GCPH Contractors Limited* – There were eight disputed items.

(a) The descriptions of the supply on the invoices were not sufficient to identify the goods and/or services supplied and the extent of the services. One invoice gave no description. On the others they were "Measham all plant for the period [month] 2007"; "Various locations March 08 plant and materials"; "Various sites labour, plant and materials March 08".

(b) One invoice contained a VAT number that was not issued to GCPH Contractors.

(c) The invoices did not state an identifying number, which was a legal requirement.

(5) *VCL Group (UK) Limited* – There were three disputed items.

(a) The descriptions of the supply on the invoices were not sufficient to identify the goods and/or services supplied and the extent of the services. They were "Supply labour plant and material work carried out as per your instructions"; "Labour plant and material".

(b) The invoices did not state the time of supply, which was a legal requirement.

(c) The invoices did not state DCL's address.

(6) *Lakesite Construction Limited* – There were four disputed items.

(a) The invoices did not contain any description of the goods or services purportedly supplied.

(b) The invoices did not state the time of supply, which was a legal requirement.

(c) The invoices did not state DCL's address.

(d) Both DCL and UPSL had made CIS verification requests to HMRC (in the period January to November 2008) in respect of Lakesite. In November 2008 Mr Pitt met with the proprietor of Lakesite, Mr Rashpal Singh, and uplifted the trading records of the company, including a schedule of sales invoices (prepared by Lakesite) covering the period of DCL's disputed items; neither DCL nor UPSL were named on the schedule; the method of invoice numbering differed from that on the invoices produced by DCL and UPSL. Mr Pitt formed the view that a taxable supply did not take place as claimed by DCL.

25. In relation to UPSL the disputed items were invoices purportedly from the following persons:

(1) *Speedline Solutions Limited* – There were seven disputed items.

(a) The VAT registration number on the invoices was fictitious, never having been issued.

(b) The invoices were faxed copies (not originals) and the fax header originated from a company (Classic UK Services Limited) that had its VAT registration cancelled in September 2006.

(c) The description of the supply on the invoice was "Plant hire/material supplies", which was not a sufficient description to identify the goods and/or services supplied and the extent of the services.

(d) The invoice did not state UPSL's address.

(e) The invoices did not state the time of supply, which was a legal requirement.

(f) The invoices did not state an identifying number, which was a legal requirement.

(2) *Midland Staff Exchange Limited* – There were five disputed items.

(a) The descriptions of the supply on the invoices were not sufficient to identify the goods and/or services supplied and the extent of the services. They included "Site clearance at Lichfield site".

(b) The invoices did not state UPSL's address.

(c) The invoices did not state the time of supply, which was a legal requirement, and thus it was not known whether it took place when Midland Staff Exchange was VAT registered.

(d) On 26 February 2007, which was seven months before the first of these disputed invoices, Mrs Davies had notified UPSL that Midland Staff Exchange's purported VAT registration number could not be verified and thus any VAT claimed on invoices bearing that number would be disallowed.

(3) *MJ O'Hara* – There was one disputed item.

(a) The description of the supply on the invoice was not sufficient to identify the goods and/or services supplied and the extent of the services, being "Muck shift at Cannock".

(b) The invoice did not state an identifying number, which was a legal requirement.

(c) The invoice did not state the time of supply, which was a legal requirement.

(4) *GCPH Contractors Limited* – There were ten disputed items.

(a) The descriptions of the supply on the invoices were not sufficient to identify the goods and/or services supplied and the extent of the services. They were "Work carried out on various sites to the value of:"; "Meashan labour plant & materials. Week ending []".

(b) The invoices did not state an identifying number, which was a legal requirement.

(c) The invoices lacked consistency as different fonts and layouts were used in the body of the documents.

(5) *VCL Group (UK) Limited* – There were five disputed items.

(a) The descriptions of the supply on the invoices were not sufficient to identify the goods and/or services supplied and the extent of the services. They were "Work carried out on various sites to the value of:"; "Measham labour plant & materials. Week ending []".

(b) The invoices did not state the time of supply, which was a legal requirement.

(c) The invoices did not state UPSL's address.

(d) Two of the invoices did not state VCL's VAT registration number, which was a legal requirement.

(6) *Lakesite Construction Limited* – There were three disputed items.

(a) The descriptions of the supply on the invoices were not sufficient to identify the goods and/or services supplied and the extent of the services. They were "As agreed by P Calflour"; "As per valuation agreed with P Calfor"; "To provide plant and materials for various contracts".

(b) The invoices did not state the time of supply, which was a legal requirement.

(c) The invoices did not state UPSL's address.

(d) One of the invoices did not state an identifying number, which was a legal requirement, and also appeared to have been printed over another document, which lacked commercial viability.

(e) The invoices lacked consistency as different fonts and layouts were used in the body of the documents.

(f) There were also the matters described in relation to the disputed items for the same supplier with DCL at [24(6)(d)] above.

26. On 25 January 2007 Mrs Davies had visited DCL and UPSL and met with Mr Deane. She was informed that the companies used a number of named subcontractors, none of whom were the suppliers listed above in relation to the disputed items; the main point of contact with the subcontractors was a man named Gary. Mr Deane was advised to verify the VAT registrations of all subcontractors. Mrs Davies made a further visit to the companies on 7 October 2009. Mr Deane was unable to answer when asked where the subcontractors were working that day; he did not mention the diaries that were subsequently produced as evidence of taxable supplies. Mrs Davies then requested further information to support the input tax claims; further copies of the invoices were provided but Mrs Davies explained that she had already seen those and was seeking further information; she suggested a further meeting. In February 2010 a letter was produced from a company called

Volkslaser, signed by a Quantity Surveyor, which was a general business reference for DCL addressed "To whom it may concern". Also in February 2010 a letter was produced from a company called Brindley Special Projects, signed by a gentleman whose position was not stated, which was a general business reference for "UPLS". Also supplied was a SAGE print dated 7 October 2009 titled "Day books: Supplier Invoices (Summary)". Further supplied were diary pages that identified locations where DCL had been working. Mrs Davies informed DCL and UPSL that she was not satisfied by the additional evidence supplied and that she would be raising appropriate assessments, which was done on 22 July 2010.

27. In cross-examination by Mr Bridge for the Appellants:

(1) It was put to Mr Pitt that HMRC's interest in Lakeside was because they felt the company may be involved in a tax fraud. Mr Pitt replied that he could not comment on Mrs Davies' interest in that company, or Speedline, as it predated his involvement in the case. The team on which he and Mrs Davies both worked were concerned with VAT noncompliance and underpayments and they would have kept an open mind on matters; possible evasion was just one aspect of the work. His remit had been to examine the disputed invoices, not to study whether there were tax losses relating to the subcontractors. A large number of invoices from other suppliers had been accepted as satisfactory; he had not reviewed the unchallenged invoices.

(2) Had he seen the Appellants' bank statements supporting payment of the invoices then he would have accepted that payments had been made but he would still require further information from the Appellants. He would not know if the subcontractors had accounted for VAT without further investigation. Some invoices were marked as having been paid in cash.

(3) While he was sympathetic that in the construction industry the paperwork might not be perfect, that meant that extra procedures were necessary and it was reasonable to expect the trader to go back to its suppliers and obtain replacement or additional information. He understood that Mr Deane had done that for some of the subcontractors. The Appellants would have been aware of their obligations and responsibilities to ensure that the correct tax was paid. There would normally be a file to support a payment that would contain documents providing adequate information for HMRC to be satisfied that the VAT was proper input tax – for example, time sheets or a job card. A quantity of South Staffs Water worksheets had been provided the day before the hearing and so had not been reviewed, but were the sort of additional documentation that Mr Pitt had been referring to.

(4) Invoice descriptions such as "plant hire" or "materials supplied" were inadequate and he would expect the trader to be able to supply extra information to support the item as proper input tax; it was necessary to establish what had been paid for.

(5) It was correct that construction services were not the type of "widespread fraud and abuse" items listed in Appendix 3 of HMRC's statement of practice.

(6) Except for the following three items, he remained of the view that there were not valid VAT invoices for the disputed items, and that it had been reasonable not to accept that adequate alternative documentary evidence had been provided. Having considered matters further, he now accepted that

(a) the text "Site clearance at Lichfield site" on the invoice to UPSL from Midland Staff Exchange dated 6 October 2007 for £1,000 including VAT did constitute an adequate description of the supply.

(b) the text "Labour plant and material for Sheffield contract" on the invoice to UPSL from VCL Group UK dated 10 October 2008 for £2,693.70 including VAT did constitute an adequate description of the supply.

(c) the text "For Leicester contract labour plant and material" and itemising "Stolen JCB bucket" on the invoice to DCL from Cedarcroft Construction dated 28 August 2008 for £3,599.87 including VAT did constitute an adequate description of the supply.

Evidence of Mr Bradshaw

28. Mr Bradshaw had conducted the formal internal reviews of the decisions to issue the disputed VAT assessments, and had upheld Mrs Davies' decisions.

29. He had commenced his review in September 2010. He had requested additional information from the Appellants. After several agreed extensions of time, a substantial bundle of commercial documents was provided along with the diaries that DCL and UPSL had jointly operated in the period 2006 – 2009. There was no breakdown or explanation provided of how the supplied information supported the subcontractor input claims that had been disallowed. He undertook over a period of four weeks a detailed scrutiny and analysis of the documents and diaries, including preparation of a spreadsheet demonstrating the number of recorded workers (over 100 per week) and work sites on each day recorded in the diaries.

30. Having considered all the above and HMRC's March 2007 revised statement of practice, the outcome of his review was to uphold the disallowance of input tax as per the disputed assessments.

31. In cross-examination by Mr Bridge for the Appellants:

(1) He had not asked any questions of Mr Deane. He had received a large box of information with no explanations, and had a limited timescale within which to complete his statutory review. He felt he understood most of what was provided and doubted if Mr Deane could assist further. He had requested some information (eg copies of phone records) that the Appellants' advisers had refused to provide. He did not consider that a meeting would have helped. There had been several meetings between Mr Deane and Mrs Davies at which the business of the Appellants had been explained and discussed.

(2) It was not correct that Mrs Davies was unaware of the diaries – they were referred to in some of the visit reports. She had decided not to accept them, but Mr Bradshaw had considered them when they were provided for the review.

(3) He accepted that it would be unfair for VAT to be paid twice, which was why valid input tax was deductible, but here there was no valid invoice or satisfactory alternative evidence.

(4) He agreed with Mrs Davies' conclusion that the disputed items were not supported by valid VAT invoices and both she and he had requested additional information, all of which had been considered and analysed. Much of the additional detail could not be reconciled with the invoices and so was concluded to be not reliable. Mrs Davies had noted that at least one supplier (Speedline) had been non-compliant; that was not to suggest fraud, and that was not a matter relevant to Mr Bradshaw's review.

32. In response to questions from the Tribunal:

(1) Mrs Davies had accepted a large number of subcontractor invoices (for example, those from McAndrew Utilities) because they had been backed by timesheets and other supporting information which gave credibility.

(2) His review had looked only at the validity of the invoices but he accepted that his review letter did refer to other items such as the deregistration of at least one subcontractor and the veto letters that had been issued. Until he had all the information he could not form a view as to whether he would accept some items as genuine mistakes.

Appellants' case

33. Mr Bridge for DCL and UPSL submitted as follows.

34. DCL now accepted that the following invoices were not compliant with reg 14. Otherwise, the Appellants maintained their appeals.

(1) Midland Staff Exchange invoices dated 13 April, 23 April, 18 May, 16 August, 27 August and 1 September 2007.

(2) GCPH Contractors invoice dated 31 July 2007.

(3) Lakesite Construction invoice dated 20 October 2008.

35. HMRC had pleaded their case solely on the grounds that the disputed invoices did not satisfy the criteria in reg 14 (g) & (h), namely:

> "(g) a description sufficient to identify the goods or services supplied,
>
> (h) for each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in any currency,"

36. It is of note that reg 14 is permissive rather than prescriptive in that it provides that HMRC "may otherwise allow" a registered person providing an invoice to do so

without the detail prescribed. A "description sufficient to identify the goods or the extent of the services" is extremely broad. An invoice which says nothing more than "supply labour" identifies the service: labour. As to the" extent of the services", the quantity of the service is a single supply of labour which has a value as is set out in the invoice. There is no requirement that the invoice does more. The Appellants had accepted that the description is inadequate in respect of those invoices where there is no description of what has been supplied. As to the "extent" in the context of a supply of labour there is perhaps a different requirement in respect of a measured job than there would be on a job attracting an hourly rate where the quantities would be perhaps measured in hours or days. Similarly the supply of plant depends upon the terms of the agreement between the parties. The supply of whatever plant will be required to undertake the work at a fixed price together with a driver (like a tipper truck for the removal of muck) would not require a description of the plant on the invoice or arguably that there need be any reference to plant - the invoice in such a case might quite properly describe the job as a single job: "muck removal".

37. HMRC's decision to refuse the disputed input tax was unreasonable for the following reasons.

(1) Mr Bradshaw had refused to meet with Mr Deane. That had resulted in Mr Bradshaw misunderstanding the business operations of the Appellants and undertaking a whole series of calculations which led him to erroneous conclusions. Further, it had denied Mr Deane the opportunity to understand what alternative evidence might be acceptable to HMRC.

(2) Mr Bradshaw had been influenced by the irrelevant consideration that there may have been a VAT loss associated with one or more of the subcontractors. That matter had never been fully and fairly put to Mr Deane.

(3) No account had been taken of the fact that Mr Deane could demonstrate that all the disputed invoices had been paid in full.

(4) Insufficient account had been taken of the due diligence work undertaken by Mr Deane in respect of the subcontractors.

(5) No account had been taken of the replacement invoices obtained by Mr Deane, which would have been produced had Mr Bradshaw agreed to meet Mr Deane.

(6) HMRC had not followed the procedure set out in their own statement of practice, in that the list of questions in Appendix 2 thereof had not been put to Mr Deane.

38. HMRC's decision failed to take account of fundamental principles of VAT enshrined in the Directives – in particular neutrality, proportionality and double recovery - as established and illustrated by the following CJEU decisions.

(1) In *Mahageben Kft v Nemzeti Ado- es Vamhivatal Del-dunantuli Regionalis Ado Foigazgatosaga* (C-80/11), and *Peter David v Nemzeti Ado- es Vamhivatal Eszak-alfoldi Regionalis Ado Foigazgatosaga* (C-142/11) one of the cases had real similarities with the instant case as it was concerned with the

provision of labour. The Court found that the fundamental right to deduct in such a situation could not be displaced other than by the proper application of the law as set out in *Kittel*. It appears that the Court accepted that the work had been undertaken and that the invoices were in compliance with requirements set out in the directive.

(2) In *Bonik EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' -Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-285/11) the Court was concerned with a Bulgarian company which supplied wheat and sunflower oil allegedly exported from Bulgaria. Checks in the supply chain led the tax authorities to conclude that no supplies had taken place to Bonik. The Court confirmed (at [28]) that whether VAT had been paid or not upstream and downstream was irrelevant to the right to deduct input tax. The Court also confirmed (at [40]) that a taxable person cannot be refused the right of deduction unless it is established on the basis of objective factors that that taxable person - to whom the supply of goods or services, on the basis of which the right of deduction is claimed, was made - knew or should have known that, through the acquisition of those goods or services, he was participating in a transaction connected with VAT fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services. This fundamental principle should have informed the exercise of discretion in the instant case but it appears not to have done.

(3) In *Stroy trans EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-642/11) the Court was concerned with a road transport company which sought deduction of input VAT on diesel. A verification of the invoices was undertaken. It proved impossible to trace the supply of the fuel and the authorities concluded that no taxable supply had occurred. The Court found *inter alia* that absent knowledge in the *Kittel* sense the VAT entered by a person on an invoice is payable regardless of whether a taxable transaction actually took place.

(4) In *Gabor Toth v Nemzeti Ado- es Vamhivatal Eszak-magyarorszagi Regionalis Adó Főigazgatósága* (Case C-324/11) the Court was concerned with a builder Mr Toth who used subcontractors. The contract required the subcontractors to record the time spent and certify the completion of the works. The subcontractor issued 20 invoices which Toth settled payment being made in cash. The subcontractor failed to pay tax. Assessments were raised against Toth on the basis that beyond a particular date the subcontractor ceased to be a taxable person and hence the invoices were not valid. In addition some invoices carried the wrong date and Mr Toth had failed to establish who were the persons carrying out the works on site. The ECJ confirmed that the right of deduction was a fundamental right which was meant to relieve a trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The Court upheld (at [38]) the finding in *Mahageben* that the *Kittel* test must be applied before the right to deduct is denied. The Court also referred to the obligation of inspection which falls on tax authorities to carry out the

necessary inspections of taxable persons in order to detect VAT irregularities in fraud and to impose penalties on the taxable person committing such irregularities or fraud. The Court (at [45]) found that a failure to check on the workers employed on a site is not an objective factor which entitles an authority to deny the right to deduct. The situation was very similar to that believed to exist in the instant case.

(5) In *Maks Pen EOOD v Direktor na Direktsia 'Obzhalvane idanachno-osiguritelna praktika' Sofia* (Case C-18/13) the Court was concerned with a supplier of office supplies. Issue was taken with VAT deductions made in respect of invoices issued by a number of its suppliers on the basis that the supplies had not taken place. It was argued that it was not enough to deny an input reclaim when other documents presented in support of the invoices were questionable. The Court reaffirmed the fundamental principle of the common system of VAT of the right to deduct input tax which may not be limited. The Court found (at [31]) that if it were simply the case that a supply was made by a party other than that named in the invoice that would not in itself be sufficient to decline an input reclaim.

(6) In *Teleos PLC and Ors v The Commissioners of Customs and Excise* (C-409/04) it was accepted that the Appellant companies did not act in bad faith and had taken all reasonable steps to ensure that by its transactions it was not participating in fraud. Although the supplies appeared not to be exempt, no intra-community supplies having taken place, nonetheless applying the Kittel test, the Court decided that the principles of legal certainty, proportionality and fiscal neutrality required that in the admitted absence of knowledge, the transactions should be treated as zero rated. Similarly in the current case, because it is not alleged that the Appellants knew of a connection to a fraudulent loss, the controversy as to whether the descriptions on the invoices are adequate cannot lead to the input tax reclaim being denied.

(7) *ldexx Laboratories Italia SRL* (C-590/13) dealt with the deduction of the reverse charge on acquisitions, rather than input tax on a supplier's invoice, but the case makes a distinction between the substantive requirements for a deduction and the formal requirements. The CJEU ruled (at [38]) that as long as the former were met, failure to comply with the latter cannot serve to deny the fundamental right to deduct. In the instant case HMRC maintain that the fundamental right to deduct can be defeated where there is no fraud by reference to a failure to comply with a formality.

Respondents' case

39. Mr Mandalia for HMRC submitted as follows.

40. HMRC made no allegation that the Appellants knew or should have known that some of their subcontractor labour suppliers had fraudulently defaulted on their VAT liabilities. HMRC's investigations had concluded that the supplies on the disputed invoices were not made by the entity described on the invoice as supplier; further that there was considerable uncertainty as to what supply took place.

41. HMRC submit that:

(1) the alleged VAT invoices produced by the Appellants to support their disputed claims are invalid in that they do not comply with reg 14(1)(g) and (h), in that they do not contain satisfactory descriptions of the services supplied and/or for each description, the quantity of the goods or the extent of the services; and

(2) no satisfactory alternative evidence has been produced by the Appellants to support their claims; thus it was open to a reasonable decision maker (Mr Bradshaw) directing himself correctly in relation to the law and the facts, to maintain the assessments for the reasons set out by him.

42. The descriptions on the disputed invoices were vague and did not sufficiently identify the goods or services supplied, or the quantity of goods or extent of services provided to the Appellants. Although Mr Deane claimed to know for every one of the disputed invoices what work was covered by it, he candidly accepted that the descriptions were not sufficient to meet the requirements of reg 14.

43. From the paucity of the information set out in the invoices relied upon by the Appellants, it is impossible to establish:

(1) Sufficiently or at all, the goods or services supplied.

(2) Where the service provided was the provision of subcontracted labour, the subcontracted labour in fact provided. For example, how many labourers, over what period and at what rate, whether that is an hourly, daily or other rate. Mr. Deane explained in cross-examination that the charge for sub-contracted labour was not for an individual, but for more than one labourer.

(3) Where the goods or services provided was the provision of plant, the particular plant supplied, over what period and at what rate, whether that is an hourly, daily or other rate.

(4) Where the goods provided were materials, a description of the particular materials supplied, and the quantity of the materials supplied.

(5) Where there is a combination of labour, plant and material, what labour, plant and material was in fact supplied.

44. The Appellants bear the burden of proof. The Tribunal should treat with caution any concessions made by Mr Pitt under cross-examination.

45. Mr. Deane accepted in cross-examination that all of the agreements with suppliers were verbal and were not supported by any written records. There are no timesheets that the Appellants could point to, or estimates for jobs to be completed. There was no proper apportionment between the two Appellants – Mr Deane ran them as a single business. Mr Deane had a pool of subcontractors that he used to fulfil contracts. There was no system in place to reliably measure or record the work done by the subcontractors. All the detail was retained by Mr Deane relying on his own memory.

46. With the level of uncertainty and vagueness within the documents relied upon by the Appellants it is impossible to be satisfied as to what if anything was actually supplied by the invoicing entity. Not only can HMRC not be satisfied, it is hard to see how the Appellants could have been satisfied with such details or rather the lack of them.

47. It is apparent from the evidence that certain common features pertain to the subcontractors used by the Appellants at this time:

(1) The Appellants had different working practices for their two main sources of sub-contracted labour.

(a) The Appellants main customers' representative liaises with the Appellants chosen or preferred subcontractor and ensures that the relevant timesheets are maintained, produced, signed off and sent to the Appellants.

(b) The Appellants' Director Mr Deane had given a person named as "Gary" the responsibility to make arrangements for all the other subcontractors' requirements. To that end, timesheets were not maintained in the same way as at (a) above.

(2) The subcontracted labour that is the subject of the disputed input tax claims was sourced for the Appellants by "Gary".

48. As stated by Sir Thomas Bingham MR in *R v Inland Revenue Commissioners, ex parte Unilever plc and related application* [1996] STC 681 (at 692):

> "The threshold of public law irrationality is notoriously high. It is to be remembered that what may seem fair treatment of one taxpayer may be unfair if other taxpayers similarly placed have been treated differently. And in all save exceptional circumstances the Revenue are the best judge of what is fair."

49. Article 178 Council Directive 2006/112/EC states that in order for a person to exercise the right of deduction, they must meet certain conditions including the holding of a valid VAT invoice. Article 180 provides that member states may authorise a person to make a deduction which is not made in accordance with art 178. Article 182 provides that member states shall determine the conditions and detailed rules for applying art 180. Contrary to the Appellants' contentions, a member state is not compelled to adopt a system under which a taxpayer has a right to deduct whenever he can prove that he has paid input tax in elation to a supply by a taxable person(absent fraud). It is well established that member states may refuse the right to deduct input tax in the absence of a valid VAT invoice, even where the taxable person seeking the right to deduct has no knowledge or means of knowledge of a connection with fraud. The Directive itself gives no right to deduction when certain conditions are not fulfilled. Instead, member states are permitted to determine the conditions and procedures under which deduction is permissible where deduction is not in conformity with the express provisions of the Directive.

50. Each of the CJEU judgments referred to by the Appellants is concerned with the principle that would apply where it was known or should have been known by the trader claiming the right to deduct input tax that the transaction in relation to which input tax was claimed "was connected with fraud committed by the supplier, or that another transaction forming part of the chain of supply prior to or subsequent to that transaction carried out by the taxable person was vitiated by VAT fraud". Each of those cases was dealing with very different situations from the present.

Consideration and Conclusions

Applicable law and approach

51. We do not agree with the Appellants' contention that the CJEU authorities cited by them establish some principle that requires the UK to give a credit for any input tax incurred in the absence of means of knowledge (or actual knowledge) of connection of the relevant transaction to VAT fraud. Rather, those cases (other than *Idexx Laboratories*) are concerned with the situation where a trader would *prima facie* be entitled to deduct input tax, but the fiscal authority refuses a deduction because of alleged knowledge or means of knowledge of connection to fraud; they are reiterations and illustrations of the principle established in *Kittel* (*Kittel v Belgium, Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 1537). In the current case HMRC have clearly stated that they do not attempt to rely on the *Kittel* doctrine to deny a deduction otherwise available to the Appellants; instead HMRC contend that there is no right to deduct in the first place because the requirement for a valid VAT invoice (see art 178(a)) has not been satisfied. *Idexx Laboratories* concerns the reverse charge provisions and the CJEU held (at [35]) that "… the formalities thus laid down by the Member State concerned, which must be complied with by a taxable person in order for the latter to be able to exercise the right to deduct VAT, should not exceed what is strictly necessary for the purposes of verifying the correct application of the reverse charge procedure …". The Appellants have not contended that the requirements of reg 14 (g) & (h) go beyond what is strictly necessary for the purposes of constituting a valid VAT invoice.

52. The approach we have adopted is a two stage process:

(1) Does a given disputed invoice satisfy reg 14? If we find that it does then we allow the appeal in respect of that particular invoice.

(2) If not, was HMRC's decision to refuse to exercise their discretion under reg 29 a reasonable one?

53. We note that this approach is that followed by the High Court in *Kohanzad v Customs and Excise Commissioners* [1994] STC 967 where Schiemann J stated (at 969):

> "Now, the effect of those provisions [ie what is now regs 14 & 29] is that, first, prima facie, a registered taxable person is not entitled to any credit in respect of input tax unless at the time of claiming such a credit he holds a tax invoice in relation to that supply, and the

> commissioners, as is well known, will from time to time send somebody to look at these invoices to see that they add up. But none the less, the second effect of the provision is that the commissioners have a discretion to allow credit for input tax, notwithstanding that the registered taxable person does not hold such a tax invoice. So, they do have that discretion."

54. In relation to the second stage of the process, from the caselaw in *Customs and Excise Comrs v J H Corbitt* (*Numismatists*) *Ltd* [1980] STC 231, *Customs and Excise Comrs v Peachtree Enterprises Ltd* [1994] STC 747 and *Kohanzad* we derive the following approach, which we understand is uncontroversial:

(1) The jurisdiction of the Tribunal in this matter is only supervisory.

(2) The Tribunal cannot substitute its own discretion for that of HMRC.

(3) The question for the Tribunal is whether HMRC's decision was unreasonable in the sense that no reasonable panel of Commissioners properly directing themselves could reasonably reach that decision.

(4) To enable the Tribunal to interfere with HMRC's decision it would have to be shown that HMRC took into account some irrelevant matter or had disregarded something to which they should have given weight.

(5) In exercising its supervisory jurisdiction the Tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of HMRC was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected.

(6) The burden of proof lies on an appellant to satisfy the Tribunal that the decision of HMRC was unreasonable.

First stage: Does a given disputed invoice satisfy reg 14?

55. In the evidence of Mr Bradshaw and Mr Pitt a number of objections were raised as to why particular invoices were in breach of the reg 14 requirements – for example, that an identifying number was missing, or that the supplier's VAT registration number was incorrect or invalid. However, the grounds pleaded in HMRC's statement of case were confined to the conditions in reg 14 (g) & (h) (ie description of the supply). That was also the rationale stated in Mr Bradshaw's review letters (there were separate review letters for each Appellant but the relevant wording is identical) (emphasis added):

> "Mrs Davies in her letter of 20 September 2010 further explained that the particular invoices used by Deadoc (to exercise their right to deduct input tax) *did not include a full description of the services supplied and were therefore not regarded as valid invoices for the purposes of input tax deduction.* Having scrutinised the invoices in question I am in agreement with Mrs Davies that the description shown on such is insufficient. I will give full particulars later in this letter."

56. Accordingly, at this first stage we confine our examination of the disputed invoices to only the requirements of reg 14 (g) & (h). We admit to some reservations in that approach because it could result in an invoice bearing, say, an invalid supplier's VAT registration number being accepted under reg14; however, that is the basis on which HMRC have chosen to contest the disputed invoices.

57. Mr Mandalia urged us to be cautious about the concessions made by Mr Pitt during cross-examination. However, we are satisfied that Mr Pitt (who is a very experienced HMRC officer) gave careful and fair consideration to the points being put to him by Mr Bridge for the Appellants, and that his answers reflected a genuine change of opinion.

58. How much detail must an invoice contain for it to satisfy reg 14 (g) & (h)? Without attempting to be definitive, our view is that it depends on the matters being invoiced. In relation to invoices for supplies of services, one example (one that was cited to us in evidence and in argument) is that of a professional firm (say, accountants) whose fee notes simply use a stock phrase such as "To professional services rendered in the period 1 March to 31 March 2015". That, it seems to us, must be adequate for the purposes of reg 14 (g) & (h). The services supplied can be identified (the professional services of a firm of accountants), as can their extent (those rendered in the month of March). Turning to invoicing of supplies of goods, one would, it seems to us, normally expect to see a narrative description of the goods that the customer could check and approve for payment – that is what reg 14 (g) & (h) requires: a description to identify the goods and give the quantity of the goods. Often the goods invoice will recite the specification from the customer's purchase order (or if only part of the order is being satisfied, such part of it as relates to the particular goods being supplied). However, we accept Mr Deane's evidence that in the line of business of construction groundworks contractors it was common practice for less information to be provided, and we look at specifics later. Of course, it may be that on receipt of an invoice the customer wishes to check or query the invoice to ascertain that it covers all and only the supplies the customer believes he is liable to pay for. Where the customer approves and pays the invoice without challenge, that is some evidence that the invoice contains a sufficient identification (reg 14 (g)) and quantification (by quantity or extent) (reg 14 (h)) of the goods or services supplied; however, we do not accept that payment of the invoice is in itself conclusive that the invoice is reg 14 compliant. Part of the purpose of reg 14 is to ensure that invoices contain sufficient information to enable an independent observer (typically HMRC) to be satisfied as to the identification and quantification of the goods and services supplied.

59. Mr Deane's evidence was that from his general knowledge of the business and the notes he kept in his diaries of men working on the various sites, he was able to be satisfied that invoices received from the subcontractors should be approved for payment. We would note that Mr Deane's recollection of the business affairs of the Appellants was apparently not as watertight as he maintained; he stated (twice) that all subcontractors were paid by cheque, not in cash, while the evidence bundle contains at least three examples where it is recorded that payment was made partly or wholly in cash (7 September 2007 £1,000 to Midland Staff Exchange; 10 October

2008 £2,693.70 to VCL Group UK; and 15 September 2006 the substantial cash sum of £7,200 to MJ O'Hara).

60. Taking all those matters together, we now apply that approach and make findings on the specific invoices in dispute. We note that the Appellants have withdrawn from their appeal the invoices listed at [34] above.

DCL disputed invoices

MJ O'Hara

61. The descriptions on these three invoices are reg 14 compliant, being "Supply of plant and material at Lichfield", and "Supply of plant, gas oil, Sept, Oct, Nov 06; material for road construction; also site accommodation and site welfare; all agreed on by [name] site manager". We consider that is sufficient.

Midland Staff Exchange Limited

62. Six invoices were conceded by DCL (see [34] above) leaving nine disputed invoices. The descriptions on four of these invoices are reg 14 compliant, being "Stone up and tarmac as agreed"; "supply of labour, plant and material at …" followed by the name of a specific site or sites (eg Sheffield), or to a contract (eg Measham). We consider that is sufficient.

63. However, five of the invoices stated "supply of labour, plant and material" but did not include the name of a site or contract, nor stipulate what period was covered by the invoice, nor any other identifying information. In these cases, we do not consider the invoices meet the requirements of reg 14 (g) & (h): invoices dated 1 December 2007; 27 December 2007; 23 January 2008; 17 February 2008; and 21 February 2008.

GCPH Contractors Limited

64. One invoice was conceded by DCL (see [34] above) leaving seven disputed invoices.

65. The descriptions on all seven invoices are reg 14 compliant. On three invoices it is "Measham – all plant – [month] 2007". On the other four the description is "Work carried out at various sites" which is less satisfactory, but the subcontractor had also identified the labour element and noted the 20% CIS withholding requirement which we consider makes the description sufficiently specific.

Cedarcroft Construction Limited

66. The description on this invoice is reg 14 compliant, being "For Leicester contract – labour, plant and material" (this was one of the concessions made by Mr Pitt during his evidence). We consider that is sufficient.

VCL Group (UK) Limited

67. These three invoices have the same problem as some of the Midland Staff Exchange invoices (above) in that they just stated "supply of labour, plant and material" but did not include the name of a site or contract, nor stipulate what period was covered by the invoice, nor any other identifying information. Therefore, we do not consider the invoices meet the requirements of reg 14 (g) & (h): invoices dated 10 July 2008; 21 August 2008; and 24 October 2008.

Lakesite Construction Limited

68. One invoice was conceded by DCL (see [34] above) leaving three disputed invoices.

69. The description on one invoice is reg 14 compliant, being "Supply of labour material and plant for Nottingham and Leicester". We consider that is sufficient.

70. However, the other two invoices have the same problem as some of the invoices from Midland Staff Exchange and VCL (above) in that they just stated "supply of labour" or "supply of labour, plant and material for various contracts" but did not include the name of a site or contract, nor stipulate what period was covered by the invoice, nor any other identifying information. Therefore, we do not consider these invoices meet the requirements of reg 14 (g) & (h): invoices dated 29 November 2008 and 30 December 2008.

UPSL disputed invoices

Speedline Solutions Limited

71. These seven invoices have the same problem as some of the DCL invoices from Midland Staff Exchange and VCL (above) in that they just stated "plant hire/material supplies" but did not include the name of a site or contract, nor stipulate what period was covered by the invoice, nor any other identifying information. Therefore, we do not consider these invoices meet the requirements of reg 14 (g) & (h): invoices dated 7 October 2006; 14 October 2006; 21 October 2006; 31 October 2006; 16 November 2006; 2 December 2006; and 29 December 2006.

Midland Staff Exchange Limited

72. The descriptions on all five of these invoices are reg 14 compliant. On two the descriptions were "Site clearance at Lichfield site" (this was one of the concessions made by Mr Pitt during his evidence), and "supply of labour, plant and material agreed by P Colford site manager", which we consider is sufficiently specific. The other three invoices stated "plant hire/material supplies but (unlike some of the invoices received by DCL from the same subcontractor) also stipulated the period of the supply covered by the invoice (by "from" and "to" dates), and we consider that makes them reg 14 compliant.

MJ O'Hara

73. The description on this invoice is reg 14 compliant, being "Muck shift at Cannock", which we consider is sufficient.

GCPH Contractors Limited

74. The descriptions on all ten invoices are reg 14 compliant. On nine invoices it is "Measham – all labour plant and materials – for the period [week or month] 2007". On some of these invoices the subcontractor had also identified the labour element and noted the 20% CIS withholding requirement. On the remaining invoice the description is "Work carried out at various sites" which is less satisfactory, but the subcontractor had also identified the labour element and noted the 20% CIS withholding requirement which we consider makes the description sufficiently specific.

VCL Group (UK) Limited

75. Three of these invoices have the same problem as some of the invoices received by DCL from the same subcontractor in that they just stated "supply labour" but did not include the name of a site or contract, nor stipulate what period was covered by the invoice, nor any other identifying information. Therefore, we do not consider these invoices meet the requirements of reg 14 (g) & (h): invoices dated 14 March 2008; 28 May 2008; and 30 June 2008.

76. The other two invoices are reg 14 compliant. One identifies the work as being that "agreed ref P Colfer" and the other specifies the Sheffield contract (this was one of the concessions made by Mr Pitt during his evidence), which we consider is sufficient.

Lakesite Construction Limited

77. The descriptions on all three invoices are reg 14 compliant. Each identifies the work as being that which was "agreed by P Calflour" (or similar spelling), which we consider is sufficient.

Summary of non-compliant invoices

78. The table below summarises the disputed invoices which we have found to be non-compliant with reg 14 (g) & (h).

Appellant	Supplier	Date
DCL	Midlands Staff Exchange	1 December 2007
DCL	Midlands Staff Exchange	27 December 2007
DCL	Midlands Staff Exchange	23 January 2008
DCL	Midlands Staff Exchange	17 February 2008
DCL	Midlands Staff Exchange	21 February 2008
DCL	VCL Group	10 July 2008

DCL	VCL Group	21 August 2008
DCL	VCL Group	24 October 2008
DCL	Lakesite Construction	29 November 2008
DCL	Lakesite Construction	30 December 2008
UPSL	Speedline Solutions	7 October 2006
UPSL	Speedline Solutions	14 October 2006
UPSL	Speedline Solutions	21 October 2006
UPSL	Speedline Solutions	31 October 2006
UPSL	Speedline Solutions	16 November 2006
UPSL	Speedline Solutions	2 December 2006
UPSL	Speedline Solutions	29 December 2006
UPSL	VCL Group	14 March 2008
UPSL	VCL Group	28 May 2008
UPSL	VCL Group	30 June 2008

Second stage: For invoices not satisfying reg 14, was HMRC's decision to refuse to exercise their discretion under reg 29 a reasonable one?

79. We have already set out at [54] above the approach we will follow in this stage. First, we wish to add one thing to our earlier comments about the basis on which the disputed invoices were refused credit for input tax. It is, of course, a matter for HMRC how they choose to plead their case. However, if they choose not to make an allegation of fraud then they must be consistent in their submissions to the Tribunal. We consider it is not open to HMRC to disavow any allegation of fraud (and thereby avoid taking on the onus of proof that would be the consequence) but then present their case on the basis that the Tribunal is invited to construe or infer a lack of good faith in the business dealings of the taxpayer. An allegation of lack of good faith is tantamount to an allegation of fraudulent behaviour; Peter Smith J in *HMRC v Infinity Distribution Limited* [2015] UKUT 0219 (TCC) (describing the principle as "well established") stated (at [8]):

> "Thus in my view it is improper for HMRC on the one hand to allege that Infinity is not fraudulent but on the other hand to allege it is not acting in good faith."

Our view that HMRC should not insinuate bad faith without specifically pleading it was also expressed by Henderson J in *Ingenious Games v HMRC* [2015] UKUT 0105 (TCC) (at [76]):

> "There has also been a recurrent theme of assurances given to the FTT, sometimes in apparently unqualified terms, to the effect that HMRC were not alleging fraud or dishonesty against anybody. While it is true, if I am right in my analysis of the law, that HMRC were under no obligation to plead a positive case of fraud or dishonesty in relation to the IFP2 Information Memorandum, it is in my view regrettable that the distinctions which I have sought to articulate in this decision do not seem to have been put clearly, if at all, to the FTT. Instead, and I am sure unintentionally, the impression given to a neutral observer by

> some of HMRC's exchanges with the FTT could be one of ambivalence, even at times evasiveness, and a willingness to wound but not to strike, in an area where openness and clarity should be at a premium unless HMRC had some good reason for wishing to spring a surprise on an unsuspecting witness."

We would emphasise that we make no criticism of Mr Mandalia's submissions to the Tribunal, and note that both the above cited Upper Tribunal decisions were delivered after the hearing of the current appeals.

80. Before undertaking the formal reviews Mr Bradshaw corresponded with the Appellants and invited them to submit additional relevant information; he also gave "a non-exhaustive list of the type of commercial documents that normally exists when businesses trade with one another" and invited copies of such documentation. He also asked for details of the Appellants' business activities, details of customers and subcontractors in the relevant period, and copies of Mr Deane's work diaries. Mr Bradshaw agreed to several extensions of time for provision of the information – this was necessary (quite apart from professional courtesy) because there is a statutory timetable for completion of a formal review. In January 2011 the Appellants' accountants gave their reply and requested a meeting before conclusion of the review "in order to assist your understanding of the information provided".

81. The Appellants have submitted that because Mr Bradshaw did not accept the request for a meeting, that was unreasonable and so affects the validity of the review. In the particular facts of this case, we do not agree. Mr Bradshaw had been waiting around three months for the requested information; he was aware of the meeting request but decided it was not necessary given the information that had been provided; as he stated in the review letters:

> "I have noted your request for a meeting to assist in my understanding of the documents and information provided. This request has not been ignored and the merits of a meeting have been considered. I have decided that despite the close working relationship between [DCL and UPSL] the nature of the documents and information is not too ambiguous that it makes it impossible to follow and require an explanation. In these circumstances I can see no merit in attending a meeting and therefore respectfully decline your invitation."

If the Appellants or their advisers had additional information that would "assist [Mr Bradshaw's] understanding of the information provided" then they had ample opportunity to supply that to HMRC. Mr Bradshaw was entitled to decline a meeting and that was not unreasonable.

82. The review letters list the additional documentation that had been supplied to Mr Bradshaw. It was voluminous but it is apparent form the review letters that there had been no attempt by the Appellants to tie all this information into the particular invoices that Mrs Davies had challenged by way of the disputed VAT assessments; it seems to have been provided on the basis that, to put it colloquially, you asked for it so here it is. The Appellants' accountants would have been aware that HMRC were seeking adequate explanations to enable HMRC to exercise their reg 29 discretion in

favour of their clients, and they had plenty of time to produce a report that did exactly that if the information was available to them. Instead they merely forwarded a large quantity of documents sourced from their clients, such as a collection of the worksheets used by one of the Appellants' customers, South Staffordshire Water plc ("SSW"). It would be unfair to describe the documents as random, but they were certainly not chosen or collated in such a way as to attempt to convince HMRC that the terms of the statement of practice were satisfied.

83. Mr Bradshaw, to his credit, took all the information supplied to him on the basis that it was the Appellants' attempt to satisfy the statement of practice. He clearly spent a large amount of time trying to tie the work done by the Appellants for their customers (eg the SSW worksheets) to the purchases from subcontractors (particularly, in the case of labour, with Mr Deane's diaries). He found he could not do so and indeed he concluded that he had detected many contradictions between the evidence provided to him and the disputed invoices – all this is explained in the review letters.

84. As already stated several times, HMRC's basis for refusal of the disputed input tax was that the requirements reg 14 (g) & (h) were not met. We consider the question for us is whether Mr Bradshaw's conclusion that the additional information supplied was not adequate, was a reasonable one in the light of HMRC's stated concern over the requirements reg 14 (g) & (h). We have no hesitation in concluding that his decision was entirely reasonable. Even by the time of the hearing of the appeals, the Appellants had apparently made no attempt to produce a convincing report or other analysis to show that the terms of the statement of practice had been met so that Mr Bradshaw's decision was wrong or, at least, unreasonable.

85. The consequence of that finding is that the appeals fail as regards the invoices listed in [78] above.

Decision

86. The appeals are ALLOWED IN PART so as to disallow the input tax claimed on only (i) the invoices listed in [34] above; plus (ii) the invoices listed in [78] above. Leave is granted to the parties to apply to the Tribunal for determination of exact figures if the parties are unable to agree.

87. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 1 September 2015