[2016] UKFTT 643 (TC)

TC05376

Appeal number: TC/2014/02384
TC/2014/04107

VALUE ADDED TAX – credit for input tax – section 24 Valued Added Tax Act 1994 – did the appellant incur VAT on the supply of goods and services – no – regulations 13, 14 and 29 Value Added Tax Regulations 1995 – did the appellant hold valid VAT invoices issued by the person supplying the goods/services – no – did HMRC properly exercise its discretion to allow the input tax based on other evidence – yes – should the assessment be discharged/reduced – no – penalties – Schedule 24 Finance Act 2007 – was the appellant careless – yes – was HMRC's decision not to suspend the penalty properly made – no – should the penalty be suspended – no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

GURCHARAN SINGH trading as SMETHWICK CARPET & FURNITURE WAREHOUSE — **Appellant**

- and -

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

TRIBUNAL: Judge Robin Vos
Elizabeth Bridge

Sitting in public at City Centre Tower, Birmingham on 20 July 2016

Mr S J Vaghela, accountant of Vaghela & Co. (Services) Ltd. for the Appellant

Mrs Lisa Fletcher, Appeals Officer of HM Revenue & Customs for the Respondents

Background

1. The appellant, Mr Gurcharan Singh, is a sole trader selling carpet and furniture from a warehouse in Smethwick, Birmingham. It is not an affluent community and the carpets are generally factory soiled or remnants and the furniture is of low value so that these items are affordable to local residents.

2. In his VAT return for the 01/12 period of account, the appellant claimed credit for input VAT of £39,152 representing VAT on significant building work/refurbishment at the warehouse costing £195,760 exclusive of the VAT.

3. As a result of concerns raised by an inspection of the VAT invoices relating to this work, the HMRC officer, Michael Willetts, sought further evidence supporting the claim for credit for the input tax. Based on the evidence he received, he was not persuaded that the invoices related to a taxable supply received by the appellant from the companies that had issued the invoices and therefore disallowed the input tax claimed in a notice of assessment dated 17 January 2014. This decision was upheld on review.

4. On 27 June 2014, HMRC assessed a penalty of £20,554.80 on the basis that the appellant had made a deliberate inaccuracy in his VAT return. Following an appeal, the penalty was reduced to £8,809.20 on the basis that the appellant's conduct was careless but not deliberate.

5. The appellant appealed to the Tribunal against the disallowance of the input tax on 29 April 2014, principally on the basis that the appellant had received taxable supplies from the companies which had issued the invoices and that those invoices had been paid.

6. The appellant also appealed against the original (deliberate) penalty on 28 July 2014. There is no formal notice of appeal against the amended (careless) penalty which was assessed on 14 May 2015.

7. The two appeals have been treated by the Tribunal as separate appeals, the appeal against the disallowance of the input tax being given reference TC/2014/02384 and the appeal against the penalty being given the reference TC/2014/04107. As it was clearly in the interests of fairness and justice to do so, we heard both appeals together.

Late appeal against the penalty/failure to appeal the revised penalty

8. The appeal against the original penalty appears on the face of the notice of appeal to be late as the notice of appeal states that the appellant was offered a review which was not accepted on 28 May 2014 (in which case the appeal should have been made by 28 June 2014) but the appeal was not made until 28 July 2014. In fact, the penalty was not actually assessed until 27 June 2014. The appellant appealed against

the penalty to HMRC on 8 July 2014 but also lodged an appeal with the Tribunal on 28 July 2014.

9. Despite this muddle, HMRC was content for the Tribunal to treat the appellant as having appealed against the revised penalty of £8,809.20 (which was not assessed until 14 May 2015).

10. Although we have no valid notice of appeal in relation to the revised penalty we agree that, in the circumstances, it is in the interests of fairness and justice to admit the appellant's appeal against this revised penalty and, in accordance with Rule 7 of the Tribunal procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 to waive the requirement for a notice of appeal.

Evidence

11. We had before us a bundle of documents and correspondence produced by HMRC.

12. We also had witness statements from the appellant and two friends/associates of the appellant, Mr Rakesh Kumar Gupta and Mr Karam Singh as well as a witness statement from the HMRC Officer who made the decision to refuse the claim for the input tax, Mr Michael Willetts. All four individuals gave oral evidence and were cross-examined.

13. Mr Willetts was a helpful and credible witness. We have no hesitation in accepting his evidence.

14. There were some inconsistencies in the evidence given by the appellant, Mr Gupta and Mr Karam Singh which we will refer to later. This has in some circumstances affected the weight which we have given to those parts of their evidence.

When can input tax be claimed

15. Section 24 Value Added Tax Act 1994 ("VATA") defines input tax (to the extent relevant) as:

> "24(1)(a) VAT on the supply to [the trader] of any goods or services."

16. It is apparent therefore that there cannot be a claim for input tax by the appellant unless he has paid VAT on the supply to him of goods or services.

17. Section 26 VATA provides further requirements relating to credit for input tax. It reads as follows:

> "26 **Input tax allowable under section 25**
>
> (1) the amount of input tax for which a taxable person is entitled to credit at the end of any period shall

be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within sub-section (2) below;

(2) the supplies within this sub-section are the following supplies made or to be made by the taxable person in the course or furtherance of his business –

(a) taxable supplies;"

18. There is no suggestion that, if the appellant has received the taxable supplies he claims to have received, they are not attributable to taxable supplies made or to be made by him in accordance with s 26(2)(a) VATA.

19. It is however necessary to consider whether the input tax is allowable under the Value Added Tax Regulations 1995 ("VATR") being the regulations referred to in s 26(1) VATA.

20. The key regulation in question is regulation 29(2) VATR which (to the extent relevant) reads as follows:

"29(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."

21. The document required to be provided under regulation 13 (referred to in regulation 29(2)(a)) is a valid VAT invoice issued by the person making the taxable supply.

22. Regulation 14 sets out certain requirements relating to VAT invoices:

"**Contents of VAT invoice**

14

(1) Subject to paragraph (2) below and regulation 16 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) an identifying number,

(c) the time of the supply,

(d) the date of the issue of the document;

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

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

(g) …

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

(i) 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,

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

(k) …

(l) each rate of VAT chargeable and the amount of VAT chargeable, expressed in sterling, at each such rate,

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

23. These requirements boil down to the following:

(1) The appellant must have paid VAT in respect of taxable supplies (s 24 VATA).

(2) The appellant must hold a valid VAT invoice issued by the person who made the supplies (regulation 29(2)(a) VATR);

or

(3) the appellant must provide such other evidence of the VAT he claims to have paid as HMRC may consider acceptable (the proviso to regulation 29(2) VATR).

24. The burden of proof is on the appellant to show that these requirements are satisfied.

25. Strictly speaking the appeals are under s 83(1)(c) (an appeal against the amount of any input tax which may be credited to a person) and/or s 83(1)(p) (an appeal against an assessment or the amount of an assessment).

26. Whilst the Tribunal generally speaking has a full appellate jurisdiction in relation to the amount of an assessment (which would include the question as to whether the appellant has in fact paid VAT in respect of a taxable supply) and can therefore come to its own conclusion as to whether the input tax should be allowed, Mrs Fletcher on behalf of HMRC drew our attention to the fact that the Tribunal only has a supervisory jurisdiction in relation to the question as to whether alternative evidence of the charge to VAT should be allowed under the proviso at the end of regulation 29(2) VATR.

27. This was confirmed by the Upper Tribunal in *Best Buys Supplies Limited v HMRC* [2012] STC 885 where, commenting on another case, *Kohanzad v HMRC* [1994] STC 967 (which dealt with the equivalent provisions under the previous VAT regulations) the Tribunal said [at 49]:

> "Although the jurisdiction of the F-tT was appellate since the appeal was against a decision as to the amount of input tax to be credited within s 83(c) and an assessment within s 83(p), it was common ground that the jurisdiction in respect of the decision of the Commissioners under regulation 29(2) not to allow the input tax which was not covered by valid invoices was supervisory in that the F-tT could not substitute its own decision but could only decide whether the discretion had been exercised reasonably. The burden of proof was on the appellant to satisfy the F-tT that the decision was incorrect, see *Kohanzad*[1994] STC 967 at 969. The F-tT had no power to substitute its own decision as to the exercise of the discretion, nor did it have power, as in s 16(4)(b) of the Finance Act 1994, to direct the Commissioners to review the original decision."

28. The Tribunal went on to say [at 53]:

> "The reference in *Kohanzad* to exercising a "supervisory jurisdiction" is shorthand for the fact that the Tribunal cannot substitute its own discretion for that of the Commissioners but can only consider whether the discretion was exercised reasonably."

29. Mr Justice Warren (the Chamber President as he then was) agreed with this approach in *HMRC v G B Housley Limited* [2015] UKUT 0071 where he said [at 11]:

> "For my part, I do not consider that there can be any doubt about the nature of the proceedings. In relation to the statutory appeal against the assessment, the F-tT has a truly appellant function. It (and, on appeal, the Upper Tribunal) will either uphold the assessment or discharge it. But in relation to the decision in

> relation to the Proviso, the F-tT's function and jurisdiction are purely supervisory. In other words, the F-tT is to examine whether the discretion has been properly exercised. … but it is not for the F-tT to substitute its own view for that of HMRC."

30. When exercising its supervisory jurisdiction, the Tribunal must consider the information available to HMRC at the time the relevant decision was taken (in this case, 17 January 2014 when Mr Willetts made his original decision and 1 April 2014 which is when that decision was upheld on review). This is clear from the comments of Mr Justice Warren in *G B Housley* [at 61].

The facts

31. Bearing all of these considerations in mind, we now turn to consider the facts of this case.

32. The appellant has been carrying on his business under the name of Smethwick Carpet & Furniture Warehouse from premises at 357 St Pauls Road, Smethwick since December 2005.

33. The appellant can speak Punjabi and some English but cannot read or write either of those languages.

34. The premises are rented from a company called Pelco Holdings Limited. The lease was not documented. The rent has always been about £15,000 a year.

35. There is a separate part of the premises which is set aside and used by a business carried on by the appellant's wife, Kiran Fashions. This has been the case since at least July 2008.

36. The warehouse originally had an asbestos roof which leaked. At some point between July 2008 and July 2012, the asbestos roof was replaced with a new steel roof.

37. During the period 1 February 2007 – 30 April 2008, the appellant received loans for the purposes of his business from friends/associates totalling £140,500.

38. The appellant's sales reported on his VAT returns for the period from 1 February 2010 – 31 January 2012 total £193,220.

39. The two companies which purport to have made the taxable supplies in question to the appellant, Beeches Construction Limited ("Beeches") and Naher 1 Site Build Limited ("Naher") have not declared any output tax since they were registered for VAT in 2010.

40. These represent the facts in respect of which there is no real dispute. We go on to make further findings of fact in the sections below.

What work was carried out at the premises

41. The appellant provided HMRC with six invoices, two from Beeches and four from Naher. The invoices describe the following work:

Date of invoice	**Supplier**	**Description of work**
4 May 2011	Beeches Construction Limited	Supply of building material and labour for extension work and removal of waste material
9 June 2011	Naher 1 Site Build Limited	Extension work at 357 St Pauls Road
15 August 2011	Beeches Construction Limited	Supply of carpet stand and fitting and internal decoration work
15 August 2011	Naher 1 Site Build Limited	Supply of roof material including steel and fabrication work
10 October 2011	Naher 1 Site Build Limited	Supply of nine new electronic shutters and fixing
27 October 2011	Naher 1 Site Build Limited	Supply of roof gutter material and fixing

42. Mr Willetts visited the appellant's warehouse on 28 June 2012 as part of his investigations. Mr Willetts gave evidence that, during the course of that meeting, the appellant appeared to indicate that the extension consisted of an area at the front of the warehouse with a canopied cover and where the walls were, in effect, the roller shutters. This is confirmed by Mr Willetts' contemporaneous notes of his visit.

43. On 15 April 2013, Mr Vaghela, in answer to a question put to him by Mr Willetts, stated in correspondence that the extension work refers to the premises occupied by Kiran Fashions and that the appellant had advised Mr Vaghela that the building works were completed by the end of March 2012 and that Kiran Fashions commenced trading from April 2012. As we have already found, Kiran Fashions was trading from these premises in July 2008.

44. On 1 May 2013, Mr Vaghela wrote to Mr Willetts informing him that in fact no extension work had been carried out at the property and that the invoices which referred to the extension work in fact related to labour costs for the work to the roof. We therefore find as a fact that no extension work was carried out.

45. We have found as a fact that the roof of the warehouse was replaced at some point between July 2008 and July 2012. This is based on photos taken from Google Street View taken at those two different dates which show clearly that the building still had the old roof in July 2008 but has a new roof in July 2012.

46. The appellant gave evidence that this work was done between May 2011 – October 2011. This evidence is supported by Mr Gupta and Mr Karam Singh and was not disputed by HMRC. We therefore find as a fact that the roof of the warehouse was replaced during this period.

47. Mr Willetts inspected the shutters at the building during his visit in June 2012. His evidence was that the shutters did not appear to be newly installed. He told us that the shutters seemed to have been painted some time ago and that, at the time of his visit, the paint was flaking off. Some support for this can be derived from the Google Street View photos. In the July 2008 photos, the shutters look relatively new and are unpainted. In the July 2012 photos, the shutters are painted blue.

48. The only evidence we have that the shutters were replaced is the invoice dated 10 October 2011 and the appellant's own evidence. Mr Gupta and Mr Karam Singh did not give any evidence as to the specific work done other than mentioning that the work related particularly to the roof.

49. There is one other factor we have taken into account based on the Google Street View photos. It is apparent from these photos that some of the shutters are significantly larger than others. Yet the invoice specifies that each of the nine shutters costs the same amount (£3,000). This seems to us unlikely given the different sizes of the shutters.

50. Based on the evidence we have before us, we are not satisfied on the balance of probabilities that the shutters were replaced in 2011.

51. The final work referred to in the invoices relates to the supply of a carpet stand and internal decoration work.

52. Mr Willetts gave evidence that there were a number of carpet stands in the warehouse although he could not of course identify which, if any, of those carpet stands was the new one. He did not dispute that some internal redecoration had taken place.

53. The appellant confirmed in his evidence that the supplies had been made. We do not have any evidence to the contrary and so we accept that a carpet stand was supplied and fitted and that some internal decoration work was carried out.

Are the invoices valid VAT invoices

54. In reviewing the invoices, Mr Willetts noted a number of points which gave him reason for concern. These were as follows:

(1) The invoices issued by Beeches had the name of that company spelt incorrectly. They are headed Beeches Costruction Limited rather than Beeches Construction Limited.

(2) Mr Willetts obtained from HMRC's records copies of invoices issued by Naher during the period January/March 2011 (i.e. not long before the invoices

in question. These are in a completely different format to the invoices produced by the appellant to Mr Willetts, contain a different mobile telephone contact number and show Naher's address as 23 Greenland Crescent (the address held by HMRC in its records for Naher) as opposed to 23 Green Lane Crescent shown on the invoices produced to Mr Willetts by the appellant.

(3) Both the invoices issued by Beeches and Naher contain three identical mistakes in the name and address of the appellant:

(a) The word "furniture" is spelt without the letter "r".

(b) There is a full stop after the number 357 in 357 St Pauls Road.

(c) The word "road" is spelt with a small "r" rather than a capital letter.

These mistakes indicated to Mr Willetts that the invoices may have been produced by the same person even though Beeches and Naher are apparently unconnected companies.

55. HMRC does not however rely on these discrepancies in the context of the validity of the invoices. Instead, referring to regulation 14 VATR, Mrs Fletcher submitted that the invoices contained the following defects:

(1) None of the invoices specify the time of supply (or tax point) as required by regulation 14(1)(b) VATR. This of course is important as it is relevant to which period of account the transaction relates to and therefore which VAT return it should be included in.

(a) In some circumstances, the tax point is the date of the invoice. However, where work is being carried out, the time of the supply is usually when the work is finished, although if payment is made or an invoice is issued in advance of the supply, the time of the supply may be the date of the payment of the invoice.

(b) The appellant gave evidence (supported by Mr Gupta and Mr Karam Singh) that the work was completed in early November 2011. He also gave evidence that he made weekly payments to the builders throughout the entire period the work was carried out.

(c) Based on this, it seems unlikely that the dates of the invoices are also the time of supply and this is sufficient on its own to invalidate all of the invoices and so to mean that, when the appellant claimed the input tax, he did not satisfy regulation 29(2)(a) VATR and could therefore only rely on an exercise of HMRC's discretion under the proviso to that regulation.

(2) The two invoices (dated 4 May 2011 from Beeches and 9 June 2011 from Naher) which refer to the extension work are clearly invalid as a result of regulation 14(1)(g) as we have found that the extension work was not carried out and the description of the supplies is therefore incorrect.

(3) The invoice dated 15 August 2011 from Naher refers to "supply of roof material including steel and fabrication work". This is very general. It could conceivably satisfy regulation 14(1)(g) VATR but certainly does not satisfy

regulation 14(1)(h) which requires the invoice to describe the quantity of goods supplied.

(4) The invoice dated 15 August 2011 from Beeches relates to the "supply of carpet stand and fitting and internal decoration work". Again, this is very general. In our view, it falls foul of regulation 14(1)(g) in that the description is insufficient to identify the carpet stand supplied and regulation 14(1)(h) as it does not identify the extent of the services supplied as there is no attempt to specify the nature or quantity of the internal decoration work which was done.

(5) The invoice dated 10 October 2011 issued by Naher relates to the shutters. As we are not satisfied that the shutters were supplied, the description cannot be correct and this invoice is therefore invalid on that basis.

(6) The final invoice is dated 27 October 2011 and is issued by Naher. It relates to the "supply of roof gutter material and fixing". This does not comply with regulation 14(1)(h) VATR as it does not give details of the quantity of the goods supplied, even if it could be said to identify the goods supplied in sufficient detail.

56. Mr Vaghela submitted that the invoices were valid VAT invoices but he did not address in his argument these specific points. He did make the point that the appellant does not speak good English and cannot read properly and could not therefore be expected to pick up on these points. However, the validity of the invoice itself does not depend on whether the person claiming the input tax notices the mistakes/defects.

57. We therefore accept Mrs Fletcher's submission that the VAT invoices are invalid and that, in the absence of a valid VAT invoice, HMRC was correct to consider whether to allow the input tax based on other evidence of the charge to VAT in accordance with the proviso at the end of regulation 29(2) VATR.

Should HMRC have exercised its discretions to allow credit for the input tax based on alternative evidence

58. We need to look at what information Mr Willetts had in front of him when he made his original decision on 17 January 2014 and also what information the Review Officer had in front of her when she made her decision on 1 April 2014. There is no evidence that the information held by HMRC was any different at either of these dates. The only piece of correspondence we have seen between January 2014 and 1 April 2014 is a letter from Mr Vaghela requesting the review.

59. As explained in paragraphs 26-29 above, we cannot substitute our own decision for that taken by HMRC. Our job is to decide whether HMRC has exercised its discretion reasonably.

60. For the reasons outlined at paragraphs 54 and 55 above, Mr Willetts was concerned that the invoices did not accurately reflect the work which had been carried out nor that the supplies had been made by the companies which appeared to have issued the invoices. He therefore asked the appellant for evidence that he had paid the invoices.

61. Mr Vaghela stated in correspondence that the invoices had been paid in cash using funds lent to the appellant by a number of friends/associates. Together with two amounts of £10,000 borrowed by way of overdraft from Royal Bank of Scotland and HSBC respectively, Mr Vaghela's letters identified six loans to the appellant ranging from £20,000 to £65,000 and totalling £237,000 (excluding the two overdrafts). The total amount of the invoices is £234,912 including VAT.

62. Mr Willetts verified with Mr Vaghela that the loans which the appellant now said he had received (totalling £257,000 including the overdrafts) were in addition to the loans made to him in 2007/08. The result of this is that the appellant has borrowed £397,500 for the purposes of his business between 2007 – 2011.

63. As noted previously, Mr Willetts was aware that the appellant's sales for the two years between January 2010 and January 2012 totalled £193,220. Mr Willetts asked Mr Vaghela what plans there were to repay the loans and was told that they would be repaid as and when the appellant can afford to do so without any fixed time limits.

64. Mr Willetts asked if any other evidence was available of the payment of the invoices and was told that some receipts had been provided to the appellant for the payments he had made but that the appellant had misplaced these.

65. Mr Willetts also asked for information about the builders who had issued the invoices. He was told by Mr Vaghela that both of the builders were recommended by business associates of the appellant and that the appellant had contacted the builders himself and obtained verbal quotes. He was also told that the appellant had had meetings with other builders but that the quotes provided by these other builders were more expensive than the two who were instructed to carry out the work. No documentary evidence was available of any of these discussions or quotes.

66. The only other evidence held by HMRC is the appellant's purchase daybook for the quarter ended 31 January 2012. This lists the six invoices in question although states that they were paid by cheque rather than in cash. Mr Vaghela subsequently explained that this was just a mistake when the purchase daybook was completed.

67. Mr Willetts confirmed in his evidence that he had taken all of this information into account in reaching his decision on 17 January 2014 that credit for the input tax relating to the six invoices should not be allowed. He reached this decision on the basis that he did not consider that the appellant had supplied satisfactory evidence to show that he had received from Beeches and Naher the taxable supplies described in the invoices.

68. The question for us is whether, on the basis of the information available at the time, this is a conclusion which no reasonable officer of HMRC could have reached.

69. Mr Vaghela argued that this was the case for the following reasons:

(1) It is accepted that the roof has been replaced and so the major works at least have been done.

(2) The materials and labour have been supplied by the contractor engaged by the appellant.

(3) The work was carried out to the appellant's satisfaction.

(4) The appellant used the cash he had borrowed to pay the invoices.

(5) There is no reason why the appellant would have paid these amounts if the work had not been done.

(6) Although the cost of the work was very high, this was because of the high cost of removing asbestos and should not lead to an inference that the work was not carried out.

(7) The appellant is illiterate and cannot be expected to spot mistakes in the invoices and should not be penalised for shortcomings in the invoices.

(8) The appellant's decision to spend money replacing the roof when he did not own the property was a commercial decision taken due to his inability to find any alternative premises in the right place.

70. In summary, Mr Vaghela suggested that the real issue is the credibility of his client and that it is contrary to natural justice to disallow the input VAT when the appellant has in fact made the payments.

71. Some of the points made by Mr Vaghela are based on evidence which was only put forward at the hearing and which was not available to Mr Willetts when he made his decision. A good example of this is the reason why the appellant decided that it made sense commercially to spend approximately £200,000 (exclusive of VAT) on the work which he says was done. We discuss this further below but we cannot take that information into account in reaching our conclusion as to whether Mr Willetts' decision was within the range of reasonable decisions as it is not information which he had in front of him when he made that decision.

72. Mrs Fletcher argued that Mr Willetts' decision was a reasonable one. She referred to the following points based on Mr Willetts' evidence as to how he had reached his decision:

(1) The shutters did not appear to be new and the paint was flaking off causing him to doubt whether they had in fact been replaced.

(2) The appellant had accepted that there was in fact no extension contrary to what was stated in the VAT invoices.

(3) It was not credible that the appellant would borrow (or that the lenders would lend) £257,000 when there was no apparent basis on which the appellant could repay these loans.

(4) It was not credible that a tenant rather than an owner would agree to pay almost £235,000 in order to carry out the works in question.

(5) There was no audit trail or documentary evidence to show that the appellant had in fact paid the amounts shown on the invoices nor that whoever

had done the work was in fact either of the companies who appear to have issued the invoices.

73. In our view, Mr Willetts' decision is one which, on the basis of the information before him, an officer of HMRC could have reached. There are good reasons why Mr Willetts had concerns about the invoices and there is simply insufficient evidence that all of the works which were said to be carried out had been carried out, that, to the extent that they had been carried out, the companies which issued the invoices had made the relevant supplies or that the appellant had paid the amounts shown in the invoices including the VAT shown to be due. There is therefore plenty of scope for an officer of HMRC to take the view that he does not have sufficient evidence of the charge to VAT which the appellant says he has incurred.

74. As will be apparent from what we say below, we would have reached the same conclusion as Mr Willetts, even with the benefit of the additional information and evidence which has been provided to the tribunal.

75. Our conclusion on this point is enough to dispose of this appeal. It does however depend on our finding that the VAT invoices do not comply with regulation 14 VATR. If they do, the proviso to regulation 29(2) VATR is irrelevant. Instead, the appellant would succeed if he could persuade us that, on the balance of probabilities, he had in fact received from Beeches and Naher the taxable supplies described in the invoices and had paid those invoices, including the VAT element. In case we are wrong about the validity of the VAT invoices, we consider this question briefly.

Did the appellant receive supplies from Beeches and Naher

76. We are satisfied that the appellant did receive some supplies. The roof was replaced, he did receive a new carpet stand and some decoration was done.

77. There is some confusion as to who the appellant engaged to do the work. When Mr Willetts met the appellant at the warehouse in June 2012, the appellant told Mr Willetts that Naher had been recommended to him and that he had not dealt directly with Beeches.

78. In May 2013, Mr Vaghela reported in a letter to Mr Willetts that the appellant had advised Mr Vaghela that both builders were recommended by business associates, that the appellant had contacted the builders, had met with them at the warehouse, that they had both provided him with further quotes and that further meetings and telephone conversations had taken place until a deal was struck with both of them.

79. In his witness statement, the appellant confirmed that he had engaged both Beeches and Naher.

80. However, in his oral evidence, the appellant told us that he had only ever dealt with a Mr Sajid Singh. He had been referred to Mr Sajid Singh by one of his carpet customers and had met him in a local pub. The appellant thought that Mr Sajid Singh represented Beeches Construction but could not say this for certain. His evidence was

that he had not dealt at all with the other company (presumably Naher) which had, in effect, acted as a sub-contractor arranged by Mr Sajid Singh.

81. There is no documentary evidence showing the negotiations between the appellants and whoever carried out the work. There are no written estimates or quotes and no written agreements as to the work which was going to be carried out.

82. There is also no evidence that Mr Sajid Singh has any connection with either Beeches or Naher. Mr Willetts gave evidence that the sole director of Beeches was a Mr Sarabjit Singh Atwan and that the sole director of Naher was a Mr Jabir Singh Naher. There is no evidence that either of these individuals is the Mr Sajid Singh who the appellant was dealing with.

83. We have already mentioned (in paragraph 54) the discrepancies in the invoices purportedly issued by Beeches and Naher. These discrepancies raise a very significant question mark as to whether they were in fact issued by the companies in question.

84. Taking all of these factors together, we are very far from being satisfied that Beeches and Naher made any of the taxable supplies in respect of which input tax is being claimed.

Has the appellant paid VAT in respect of any taxable supplies

85. The appellant's evidence is that he borrowed cash from friends/business associates and used this cash to pay Mr Sajid Singh. The payments took place every week on a Friday evening. Sometimes there were payments at other times, for example, if there were materials that needed to be paid for in the middle of a week.

86. The evidence we have for these loans comprises the following:

(1) The appellant's evidence that he borrowed the money.

(2) Letters from the four individuals who made loans produced after the event.

(3) Letters from the two companies which made loans dated about the time the loans would have been made.

(4) Evidence from Mr Gupta and Mr Karam Singh that they were aware that the appellant had borrowed the money.

87. The appellant's witness statement refers to borrowing "from friends and business associates, in small amounts". In his oral evidence he initially told us that he had borrowed from 22 people with one loan being about £50,000 and the remaining loans being between £5,000 - £20,000. When asked how this tied in with the information provided by Mr Vaghela (that he had borrowed from four individuals and two companies), he told us that his reference to 22 people was the total number of people he has borrowed money from in relation to his business rather than just those people he borrowed money from in relation to the payment of the invoices in question.

88. Nothing was put in writing at the time the loans were made by the four individuals although we do have letters signed in 2012 confirming retrospectively that the loans had been made. We also have letters from the two companies dated 29 September and 5 October 2011 confirming the loans which those companies have made. We have significant concerns about these letters.

89. Mr Karam Singh stated the following in his witness statement:

> "9 I recall Mr G Singh telling me how he was financing the refurbishment costs. He told me that he was borrowing the funds from friends and business associates. I am aware of the Asian culture and tradition of helping each other with cash loans and as long as one repaid the borrowed amount, no interest was charged. I know this as I have also borrowed cash amounts in the past when funds were needed in the business.
>
> 10 Mr G Singh did not ask me to assist him at the time, but I would have helped him if he had."

90. Mr Karam Singh confirmed when giving evidence that he had signed one of the letters evidencing loans totalling £20,000 which he had made to the appellant for the purposes of the refurbishment of the business premises – i.e. Mr Karam Singh had in fact made a loan to the appellant contrary to what he appeared to be saying in his witness statement.

91. Mr Karam Singh's explanation of this is that the help he was referring to in paragraph 10 of the witness statement was not financial help but other help and told us that both he and the appellant helped each other out in their businesses whenever help was needed.

92. The letters written by the two companies which say they have made loans to the appellant are typed in a different font but otherwise are in exactly the same format and contain numerous identical spelling and grammatical errors. It is, in our view, more likely than not that these letters were written by the same person even though they purport to come from different companies.

93. There is significant doubt in our minds as to whether Mr Karam Singh made the loan of £20,000 referred to in his letter dated 10 September 2012 given that the clear implication from his witness statement is that he did not make a loan to the appellant.

94. There is also significant doubt in our minds as to whether the two companies made the loans of £65,000 and £47,000 respectively referred to in their letters of 29 September 2011 and 5 October 2011 given our concerns over the appearance of these letters which are not on headed paper and which seem to have been produced by the same person.

95. We have not heard from the other three individuals who made loans. We just have copies of the letters which they have signed. As they have not given evidence

and in the light of our concerns about the other letters, we place very little weight on the letters which they have provided.

96. We also take into account the point mentioned by Mr Willetts which is that the appellant has apparently borrowed almost £400,000 between January 2007 and October 2011 with no obvious means of repaying those loans, nor indeed any plan for doing so other than Mr Vaghela's assertion (presumably on the basis of information provided by the appellant) that the verbal agreement with the lenders is to repay them as and when the appellant can afford to do so and without any fixed time limits.

97. The appellant (supported by Mr Gupta and Mr Karam Singh) has given evidence that it is well established in Asian culture/tradition for individuals to help each other financially on word of mouth and on a handshake which is regarded as a bond. However, we question whether it is likely that the individuals and companies in question would make loans of this sort of size with no apparent concern as to how and when they would be repaid.

98. Whilst it is possible that the appellant did receive some loans, we are not persuaded on the balance of probabilities that he received loans totalling the amounts he claims to have borrowed.

99. Turning to the payments to Mr Sajid Singh, we heard evidence from the appellant that payments were made each week whilst the works continued. The appellant told us that the payments were normally around £10,000/£11,000 based on the amount of work which the appellant, with advice from Mr Gupta and Mr Karam Singh, considered to have been done over the week in question.

100. The appellant's evidence is supported by Mr Gupta and Mr Karam Singh. Both of them say that they visited the appellant's premises pretty much every day and were there most, if not all, Friday evenings when the money was handed over. Mr Gupta recalls the appellant paying £5,000 - £10,000 each week. Mr Karam Singh's recollection is slightly different in that he told us that the payments were "under £10,000". The reason they knew the amounts is that the money was counted out in front of them.

101. There are therefore some small discrepancies as to the amounts paid each week but they are not all that significant.

102. Assuming a payment of £10,000 was made every week during the six months (May 2011 – October 2011) during which we were told the work was carried out, the total would indeed be close to the figure of £235,000 which is the approximate amount of all of the invoices.

103. Mr Gupta's witness statement says that he saw the appellant paying the builders "on several nights on Fridays".

104. Mr Karam Singh says in his witness statement that he saw the appellant paying the builders "on several occasions" although he told us in his oral evidence that he witnessed the payments being made every week. He did however go on to say in his

oral evidence that he was not in fact always there but that if he was not there, Mr Gupta would have been there.

105. We also heard evidence as to why the appellant, who was renting the premises for about £15,000 per annum, was willing to pay £235,000 to carry out the work rather than asking the landlord to do this or moving to alternative premises.

106. The appellant discussed with the landlord the possibility of the landlord paying for the work to be done but was told that the rent would be increased to £40,000 - £45,000 per annum if the landlord paid for the repairs.

107. The appellant also gave evidence that he had looked for alternative premises but had not been able to find anywhere suitable in an appropriate location. In his mind, he therefore had no alternative from a commercial perspective but to pay for the work to be done assuming he wanted his business to continue.

108. The appellant told us that he had obtained other quotes for the work which ranged from £300,000 - £500,000. On this basis, £235,000 seemed reasonable. The reason the work was so expensive was that disposing of asbestos is itself an expensive business. Mr Gupta who is himself a builder gave evidence that, in his view, the job was worth £500,000 and that the cost of destroying asbestos was approximately £100 per sheet and that there were around 1,000 sheets of asbestos on the roof of the building.

109. We were told by the appellant that he assumed that the reason that Mr Sajid Singh was prepared to do the work for significantly less than the other contractors he had spoken to was that it was a cash job. It was apparently Mr Sajid Singh who insisted on payment in cash.

110. There is no other evidence of the payments which were made. The appellant and Mr Sajid Singh apparently both wrote down in their own books the amounts paid each week and how much remained outstanding. However, these records were not produced either to HMRC or to the Tribunal.

111. We find ourselves in a similar position to Mr Willetts. We are not satisfied that the appellant borrowed all of the money he claims to have borrowed. Whilst we have evidence that a number of cash payments were made on Friday evenings (some of which were under £10,000 and some of which were over £10,000), we have no evidence to tell us exactly how much was paid and whether the amounts paid included any VAT. It seems surprising from a commercial point of view that the appellant would be prepared to pay even £200,000 (if the VAT is excluded) to carry out the repairs when he was only paying £15,000 in rent and his turnover for 2010 and 2011 was approximately £95,000 per annum. We know that some of the work described on the invoices was not carried out.

112. Taking all of this into account, we have reached the same conclusion as Mr Willetts (despite the additional information which we had before us and which he did not have when he made his decision) which is that there is insufficient evidence for us to conclude either that the taxable supplies received by the appellant were provided by

Beeches and/or Naher or that the amounts paid by the appellant to whoever provided the services included the VAT claimed.

113. Therefore, even if the VAT invoices had not been defective as a result of the requirements of regulation 14 VATR, we would not have allowed the appeal against the assessment dated 17 January 2014 and, in particular, HMRC's refusal to allow credit for the input tax which the appellant claims to have paid.

Penalties

114. HMRC have levied a penalty under schedule 24 Finance Act 2007 ("FA 2007") for a careless inaccuracy in the appellant's VAT return for the 01/12 period of account.

115. As we have described, the penalty was originally assessed on the basis that the inaccuracy was deliberate but was amended on appeal to a penalty for a careless inaccuracy.

116. HMRC have the burden of showing that the penalty has been properly charged.

117. Having decided that HMRC were right to disallow the input tax, there is no doubt that the VAT return for the 01/12 period was inaccurate.

118. Mrs Fletcher submits that the appellant's behaviour was careless in that he failed either to obtain or to retain sufficient evidence to support his claim for credit for input tax.

119. Mr Vaghela argued that the appellant had not been careless given that he continues to maintain that he received taxable supplies from Beeches and Naher, obtained what he thought were valid VAT invoices and paid those invoices. He again made the point that his client is effectively being penalised for being illiterate and therefore not spotting the mistakes in the invoices.

120. We agree with Mrs Fletcher. If a trader is not capable of keeping his own records, he should arrange for somebody else to do so. In this case, the appellant could easily have made sure that he had records which would support his claim for credit for the input tax in question. He could, for example, have made sure he had a written estimate from the contractors showing the work which was to be carried out. He could have obtained receipts for the cash payments which he says he made. He could have made sure that the loans made by his friends/associates were documented in some way, however informal.

121. When considering whether somebody has been careless, it is necessary to look at what a reasonable trader intending to comply with his tax obligations would have done. In our view, a reasonable taxpayer would have obtained and retained sufficient records to demonstrate what work had been done, who had done it and how much had been paid and not simply relied on the VAT invoices. If the trader was not willing or able to do this himself, he would have employed somebody else to do it on his behalf.

122. The appellant has therefore in our view been careless.

123. The penalty range for a careless inaccuracy is a minimum of 15% and a maximum of 30%. HMRC have allowed a 50% discount (i.e. 50% of the difference between 15% and 30%) so the penalty charged is 22.5% of the tax at stake (£39,152) making a penalty of £8,809.20.

124. In accordance with paragraph 9 of schedule 24 to FA 2007, HMRC based their reduction on the quality of the taxpayer's disclosure in relation to the inaccuracy. In this case, HMRC have allowed a 20% reduction for helping HMRC quantify the inaccuracy and a 30% reduction for giving access to information/records. They have not allowed any reduction for telling HMRC about the inaccuracy given that the appellant still does not accept that there has been an inaccuracy.

125. Taking into account all of the circumstances, we agree that a 50% reduction is appropriate and uphold the amount of the penalty.

126. In the case of a penalty for a careless inaccuracy HMRC is also required to consider whether the penalty should be suspended. Mr Willetts did consider this. His evidence was that he did not consider it appropriate to suspend the penalty as, in order to set conditions for the suspension, it is necessary to understand how the inaccuracy occurred and that he had been unable to understand what had caused the error in this particular case.

127. The Tribunal may only order HMRC to suspend a penalty if it thinks that HMRC's decision not to suspend the penalty was flawed when considered in the light of the principles applicable in proceedings for judicial review. Essentially this means that we must be satisfied either that Mr Willetts did not take into account all of the relevant circumstances or that he reached a conclusion which no reasonable officer of HMRC could have reached.

128. In our view, Mr Willetts' decision is flawed as it is clear to us that the reason for the inaccuracy (as submitted by Mrs Fletcher) is that the appellant did not keep adequate records to back up his claim for credit for the input tax which he claims to have suffered. We do therefore have the power to order HMRC to suspend the penalty. However, we do not have to do so. We have a discretion.

129. In this particular case, we have decided not to order HMRC to suspend the penalty. In reaching this conclusion we have taken into account the following:

(1) Our concerns over the authenticity of the letters evidencing the loans which the appellant claims to have received.

(2) Our concerns relating to the authenticity of the VAT invoices.

(3) The fact that the VAT invoices describe work which it was admitted was not carried out but which the appellant initially insisted had been carried out.

130. Whilst the penalty could be suspended on condition that the appellant ensures that in future he obtains and keeps appropriate records supporting any claim for credit

in relation to input tax he has suffered, our view is that, bearing in mind the factors we have identified, the deficiencies in this case were sufficiently serious that a penalty is appropriate and that these sorts of conditions would not necessarily help the appellant avoid future careless inaccuracies in his tax returns.

Summary

131. In summary, our decision is as follows:

(1) The six invoices on which the appellant relies for his claim to input tax are not valid VAT invoices.

(2) HMRC's decision not to allow the input tax based on other evidence was one which a reasonable officer of HMRC could have come to in the circumstances.

(3) Even if the invoices were valid VAT invoices, the appellant has not shown on the balance of probabilities that the work was carried out by the companies which issued the invoices nor that the VAT shown on the invoices has been paid.

(4) The appellant did make a careless inaccuracy in his VAT return and the penalty has therefore been properly imposed.

(5) The amount of the penalty is appropriate.

(6) HMRC's decision not to suspend the penalty was flawed.

(7) It is not however appropriate in the circumstances for the penalty to be suspended.

132. All of the appellant's appeals are therefore dismissed.

133. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 19 SEPTEMBER 2016