TC08026

VAT – assessment to recover disallowed input tax – section 24 of the Value Added Tax Act 1994 and regulations 13 and 14 of the Value Added Tax Regulations 1995 - whether input tax correctly disallowed – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00968

BETWEEN

KNIGHTSBRIDGE ACCOUNTANTS LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE NATSAI MANYARARA
GILL HUNTER

The hearing took place on 25 November 2020. With the consent of the parties, the hearing was held remotely by video using the Tribunal's own video hearing system. A face-to-face hearing was not held because it was not in the public interest during the pandemic to hold a face-to-face hearing and we decided that it was in the public interest for the hearing to go ahead remotely.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Ishmael Musah, Manager, for the Appellant

Ms Olivia Donovan, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant appeals against assessments of VAT ('the Assessments') (i) in the sum of £62,666, in respect of VAT for the period 04/17 (issued on 15 January 2019); and (ii) in the sum of £1,033, in respect of VAT for the period 01/18 (issued on 25 March 2019). The Assessments were issued pursuant to s 73(1) of the Value Added Tax Act 1994 (hereinafter referred to as 'VATA').

2. The Assessments followed HMRC's decision to disallow input tax in respect of three invoices, as follows:

(1) An invoice ('the Standard Life invoice') dated 20 April 2017, in the sum of £288,000 (including VAT in the sum of £48,000), in relation to the sale of a property now known as Knightsbridge House, situated at Rooley Lane, Bradford ('the Property'). The invoice was issued to the Appellant;

(2) An invoice dated 3 March 2017, in the sum of £88,000 (including VAT in the sum of £14,666.67), from Waterfords Solicitors ('the Waterfords invoice'). The invoice was issued to the Appellant; and

(3) An invoice dated 15 December 2017, in the sum of £6,200 (including VAT in the sum of £1,033), from I AM SOLD Limited ('the IAS invoice'). The invoice is unclear as to whom it was issued.

BACKGROUND

3. On 30 April 2017, the Appellant submitted a VAT return for the period 04/17 and this showed that a repayment of £60,172.10 was due. A compliance check ('the Inspection') was conducted by HMRC on 2 July 2018, for the purposes of checking the Appellant's VAT returns and records, as well as checking the systems that were in place to accurately record the Appellant's VAT transactions. Mr Musah, Manager, was present during the Inspection. Shortly before the Inspection, Officer Adele Terry emailed questions relating to the Inspection to Mr Musah. Mr Musah provided an A4 folder of VAT records during the Inspection and Officer Terry took photographs of the Waterfords invoice, the IAS invoice and an invoice from Sweeney Schofield, which related to professional fees relating to the purchase of the Property. The Standard Life invoice was provided later.

4. Following various exchanges of correspondence and requests for further information, HMRC issued a schedule of VAT assessments that HMRC intended to raise having made the decision to disallow input tax on the Standard life invoice, the Waterfords invoice and the IAS invoice. On 15 January 2019, HMRC issued the Assessments; in the sum of £1,033 (initially for the period 01/17) and in the sum of £62,666 (for the period 04/17). The Appellant's notice of appeal was submitted on 14 February 2019. HMRC then issued

amended Assessments on 25 March 2019, reflecting the fact that the sum of £1,033 was for the period 01/18 and not 01/17.

HMRC'S CASE

5. HMRC's case can be summarised as follows:

6. In respect of the decision to disallow input tax:

Standard Life invoice

(1) Enquiries with Land Registry show that the Property is owned by Knightsbridge Holdings ('KBH'), and not the Appellant. The Property is also listed amongst KBH's assets at Companies House and the mortgage is in KBH's name.

(2) The Appellant and KBH are two separate legal entities. While a sales invoice was made out to the Appellant, the supply was made to KBH, as KBH is the legal owner of the Property and secured funding for the Property.

(3) The Appellant is therefore not entitled to claim input tax in respect of the purchase of the Property, even if the Property is used by the Appellant to carry out its business activities.

Waterfords invoice

(4) The description of "legal fees as agreed" is not sufficient to show that the supply was made to the Appellant for the purposes of its business.

(5) HMRC sought further information from the Appellant and the Appellant advised that the fees related to a commercial/maritime dispute with a shipping line. The evidence provided by the Appellant in this respect is not sufficient to confirm that the supply was closely linked to taxable supplies made by the Appellant.

(6) The description of the invoice is not sufficiently clear to identify the goods or services supplied, as required by reg 14(1)(g) of the Value Added Tax Regulations 1995 (hereinafter referred to as 'the VAT Regulations').

IAS Invoice

(7) The customer name has been scored through, as has the description of the goods/services supplied. It is unclear to whom the supply was made. There is insufficient evidence to show the nature of the goods/services supplied, or that the supply of goods/services was in the course or furtherance of any business carried on by the Appellant.

(8) Insufficient evidence has been produced to confirm that the supply made by IAS was made to the Appellant or that the goods/services supplied were for the purpose of any business carried on, or to be carried on, by the Appellant. The invoice does not amount to a valid VAT invoice.

7. Regulation 29 of the VAT Regulations allows HMRC to consider alternative evidence, other than VAT invoices. No further reliable evidence has been provided.

8. Section 73(1) VATA gives HMRC the power to raise assessments to best judgment, on all of the information available. HMRC carried out checks of the Appellant's VAT returns and records.

APPELLANT'S CASE

9. The Appellant's arguments can be summarised as follows:

Standard Life invoice

(1) The Appellant has beneficial ownership of the Property (formerly known as Megabyte House and now known as Knightsbridge House) and the Appellant made the mortgage application.

(2) At the point of completion, the lending bank insisted on the Property being registered with Land Registry in the name of KBH. HMRC's published VAT Notice 7.4.2 ('the VAT Notice') gave rise to a legitimate expectation that there would not be any issues with claiming input tax as the Appellant is the beneficial owner of the Property.

(3) The Property is used by the Appellant and that is where the Inspection took place and is where all of the Appellant's taxable activities take place. Unused parts of the Property are rented out by the Appellant and the Appellant receives the weekly rent.

Waterfords Invoice

(4) The Appellant sources and buys items for interested parties on a purchase and supply basis. The business records from 04/15 to 01/18 refer to this type of business.

(5) Two of the Appellant's consignments were mistakenly shipped to Guyana, instead of Ghana. The Appellant employed solicitors to resolve the issue with the carrier in France.

(6) The invoice was issued to the Appellant because it is the Appellant who instructed solicitors. The Appellant has provided proof of payment.

(7) The Appellant has had so many disputes with HMRC about this part of the Appellant's business in the past. The principle of estoppel should apply to these proceedings.

IAS invoice

(8) The Appellant purchased office property from I AM SOLD, which is an Auction House.

(9) The Appellant paid VAT on the invoice.

THE HEARING

Documents

10. The following documents were provided for the hearing:

(1) HMRC's Skeleton Argument;

(2) HMRC's Documents Bundle consisting of 265 pages ('the Documents Bundle');

(3) Appellant's Bundle of documents consisting of 178 pages ('the Appellant's Bundle'); and

(4) Various additional exhibits relied on by the Appellant (as set out in Mr Musah's witness statement dated 20 September 2020 - included in the Appellant's Bundle).

11. Both parties confirmed that they had the same documents.

Evidence and submissions

12. Ms Donovan proceeded by opening HMRC's case, as set out in the Statement of Case. She cross-referred us to the documents included in the Documents Bundle. We then heard evidence from Officer Adele Terry and Mr Ishmael Musah.

13. In her oral evidence, Officer Terry accepted that the Standard Life invoice relates to the Property and she accepted that this was where the Inspection took place. She added however that the connection between the Appellant and KBH had not been explained to her at the time of the Inspection and that Land Registry documents and Companies House registration showed KBH owned the Property. Whilst she acknowledged that the HSBC bank statements showed a weekly rent being paid into the Appellant's bank by the Umbrella Group, she added that Mr Musah did not make the rental income clear to her at the time of the Inspection. In relation to the VAT Notice 7.4.2, her evidence was that she is not an expert in land and property but only deals with the VAT side of things.

14. In relation to the Waterfords invoice, Officer Terry's evidence was that this showed a substantial amount of VAT without providing a breakdown of the services actually provided

to the Appellant and the connection between any services and the Appellant's business activities. She further added that Mr Musah had been provided with numerous opportunities to provide further information but had failed to do so. In conclusion, Officer Terry said that she was perplexed at the suggestion by Mr Musah that she had bullied him during the Inspection.

15. In his oral evidence, Mr Musah said that Officer Terry had bullied him by not putting the questions that she wanted to ask in writing, before arriving for the Inspection, and by failing to respond to his emails. He added that Officer Terry had not asked him about the connection between the Appellant and KBH. He accepted that KBH would have to have registered for VAT in order to claim VAT. He further added that the Appellant's business activities include sourcing and selling products all over Europe. The Waterfords invoice arose out of litigation when one of the Appellant's consignments were shipped to Guyana instead of Ghana.

16. In respect of the Property, Mr Musah's evidence was that a solicitor had been instructed to prepare a Trust Deed in 2017 but that this had not been executed yet. He added that the reason why KBH owned the Property was because the bank wanted title to be in the name of a holding company in order for the commercial mortgage to be provided.

17. In her closing submissions, Ms Donovan submitted that KBH and the Appellant are separate legal entities and the Appellant cannot claim input tax in respect of the Standard Life invoice. In relation the Waterfords invoice, she submitted that the invoice did not give a description of the services provided and there was no direct and immediate link between the Appellant's activities and the Waterfords invoice. In relation to the IAS invoice, she submitted that an amended invoice had been provided by Mr Musah shortly before the hearing and this was different from the invoice provided at the Inspection. She added that the original invoice had been scored through. The Assessments were therefore made to best judgment in the absence of any other reliable evidence.

18. In reply, Mr Musah submitted that HMRC agree that the Appellant occupies the Property to carry out taxable activities. He added that the Appellant had established beneficial ownership of the Property in light of the VAT Notice 7.4.2. The Appellant, he submitted, therefore had a legitimate expectation that input tax could be claimed. In respect of the Waterford invoice, he submitted that all that the Appellant was required to show was that the Appellant had paid the invoice. He added that the Appellant's bank statements show that payment was made to Waterfords Solicitors by the Appellant. Finally, in relation to the IAS invoice, his submission was that HMRC had sufficient time to verify the contents of the invoice and HMRC could have contact the person who issued the invoice.

19. He concluded by submitting that the Appellant has provided all of the necessary evidence to satisfy the VAT Regulations.

20. At the conclusion of the appeal hearing, we reserved our decision.

Discussion

21. This is an appeal by the Appellant against assessments of VAT ('the Assessments') (i) in the sum of £62,666 in respect of the period 04/17; and (ii) in the sum of £1,033 in respect of the period 01/18, made pursuant to s 73(1) VATA. The issue raised in this appeal is whether HMRC were correct to disallow input tax on three specific invoices, namely the Standard Life invoice, the Waterfords invoice and the IAS invoice (referred to at para 2 above).

22. The chronology and background facts are not in dispute between the parties, save that the parties differ in view as to the conclusions we should reach as a result.

23. The Appellant is a limited company and its main business activities include tax consultancy, auditing, bookkeeping, combined office administration/support. The Appellant's other activities include buying and selling goods sourced from Europe. Mr Dumitru Sabou is the director and Mr Ishmael Musah is the manager (and former director). The majority of the Appellant's shares are held and controlled by Knightsbridge Holdings Ltd ('KBH'). Whilst Mr Musah's written evidence was that the Appellant and KBH were part of a VAT group, this was not the case at the time of the Assessments. This is because by his own written evidence, Mr Musah said this, in response to a direct question from Officer Terry, in an email dated 2 July 2018 sent shortly before the Inspection, in relation to the Appellant's connection with other companies:

> *"Associated businesses?* ***No***
>
> *Inter-company transactions?* ***No****"*

24. The Appellant first registered for VAT on 6 August 2011, under the business name "Myaccounts.com Limited". On 30 April 2017, Mr Musah submitted a VAT return for the period 04/17 and this showed that a repayment of £60,172.10 was due to the Appellant. On 2 July 2018, Officer Adele Terry and Senior Officer Andy Kellow visited the Appellant's premises for the purposes of undertaking a VAT compliance check ('the Inspection'). Mr Musah requested that Officer Terry provide any questions that she wished to ask in writing, prior to the Inspection. On the day that the Inspection took place, Officer Terry emailed questions to Mr Musah, for the purposes of establishing the nature of the Appellant's VAT activities. Officer Terry asked Mr Musah to clarify, *inter alia*, the following (Mr Musah's answers are in bold):

> *"Main business activities?* ***Bookkeeping and export of farm machinery from France. We anticipate closure of our bookkeeping aspect. We believe MTT will spell the end for normal day-to-day bookkeeping. So will be specialising in aspect enquiry, consultancy and business start-ups mentoring.***
>
> *Other business activities?* ***Farm machinery dealership***

25. Mr Musah however responded *"Not Vat* [sic] *relevant"* to a large number of Officer Terry's questions.

26. During the Inspection, Mr Musah provided an A4 folder of VAT records. The folder included the Waterfords invoice, the IAS invoice and an invoice from Schofield Sweeney. The invoice from Schofield Sweeney related to professional fees incurred by Schofield Sweeney in connection with the finance to purchase the property now known as Knightsbridge House ('the Property'). The Waterfords invoice referred to *"legal fees as agreed"* and was in the sum of £88,000 (including VAT in the sum of £14,666.67). Mr Musah's explanation was that the legal fees related to a commercial dispute that the Appellant was involved in. The IAS invoice was in the sum of £6,200 (including VAT in the sum of £1,033). The invoice was torn and there were ink marks over the name of the recipient. Officer Terry took photographs of the invoices as Mr Musah did not permit Officer Terry to take the invoices away.

27. Following requests for further information, a Standard Life invoice was provided, which related to the purchase of the Property. The invoice showed that the purchase price was £288,000, (including VAT in the sum of £48,000). The Appellant's annual accounts for the year ended 31 August 2017 did not however show any additions for property assets held.

28. Officer Terry then emailed Mr Musah again, on 30 July 2018, with further questions. Mr Musah responded to Officer Terry's email on 13 September 2018. Mr Musah's responses are in bold:

> *"4. Funding for the business, please advise how the property, Knightsbridge House, Rooley Lane, Bradford, BD4 7SQ was purchased?* ***Source of the funding for Knightsbridge house not specific to our vat returns. If you think I am wrong, please prove me wrong.***
>
> *5. Who purchased the property, Knightsbridge House, Rooley Lane, Bradford, BD4 7SQ?* ***Who purchased the property not vat specific or even relevant? However this should be axiomatic considering we occupy it and reaping all the risk and reward.***
>
> *6. Who owns the property, Knightsbridge House, Rooley Lane, Bradford, BD4 7SQ?* ***Not specific to our vat returns.***
>
> *7. I asked about Waterfords Solicitors fees of £88000. Please confirm what these legal fees actually relate to and provide a breakdown of the costs incurred?* ***It was for a legal fee on a commercial dispute case. No break down was given.***
>
> *8. Please also provide evidence of payment to Waterfords Solicitors.* ***Attached.***
>
> *9. Please confirm if any part of the property at Knightsbridge House, Rooley Lane, Bradford, BD4 7SQ is rented out?* ***Yes parts are rented out.***

10. Who is it rented to? ***Who is rented out to is outside the scope of vat as we do not charge vat on the rent….***

29. When Officer Terry informed Mr Musah that information obtained by HMRC from Companies House and Land Registry showed that the Property was purchased and owned by KBH, by an email dated 15 October 2018, Mr Musah said this:

"……..Knightsbridge Bradford Holding (KBH) never purchased the building. It may as well be the registered keeper but never the legal owner.

Our relation? If we answer that what is next? what we had for dinner and how often we wash our clothing?

"Going forward I intend NOT to respond to questions not concerning what the notice state especially if we think the questions are intended to snoop on our business affairs unnecessarily…" [sic]

30. By a further email dated 29 October 2018, Mr Musah added the following:

"Mortgage deed in the name of Knightsbridge Accountants. Providing Knightsbridge paid for it. I also confirm the building has been used by Knightsbridge Accountants. I trust we can agree on this and I do not need to evidence it."

31. Mr Musah then provided a Debenture, in the name of the Appellant, in respect of the Property. Mr Musah also provided bank statements to show that amounts were paid to Waterfords Solicitors from the Appellant's bank account. HMRC subsequently disallowed input tax on the Standard Life invoice, the Waterfords invoices and the IAS invoice. Assessments of VAT were then issued by HMRC, to recover the amounts disallowed.

VAT Assessment: Best Judgment

32. The Assessments in this appeal were made by HMRC to best judgment. The issue before the Tribunal is whether or not the VAT claimed was properly recoverable by the Appellant as input tax and not whether the Assessments were made to best judgment. We have nevertheless set out the principles applicable to assessments to best judgment, for the purposes of clarity, in light of Mr Musah's submissions in relation to Officer Terry's conduct.

33. The power given to HMRC under statute (s 73 VATA) is to make an assessment to their best judgment on such information as is available. Case law has established that this allows for a margin of error, as opposed to an educated guess. The meaning of the phrase "to the best of their judgment" has been the subject of some adjudication. The starting point to the sphere of litigation that has arisen is the case of *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, where the classic test was laid down by Woolf J (as he then was), at page 292, as follows:

"…… What the words 'best of their judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the Commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

34. He added this, at page 296:

"If they do make investigations then they have got to take into account material disclosed by those investigations.

35. Woolf J also drew three conclusions in relation to the obligation that is upon HMRC. Firstly, there must be some material before HMRC on which they can base their judgment. Secondly, HMRC are not required to do the work for the taxpayer in order to form a conclusion as to the amount of tax due. Thirdly, HMRC are required to exercise their powers in such a way that they make a value judgment on the material which is before them.

36. The test to be applied in interpreting s 73(1) VATA is now adequately set out in *Commissioners of Customs and Excise v Pegasus Birds Ltd* [2004] STC 1509, where Lord Justice Carnwath provided the following guidance, at [38]:

"38. In the light of the above discussion, I would make four points by way of guidance to the tribunal when faced with 'best of their judgment' arguments in future cases:

(i)The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the commissioners' exercise of judgment at the time of the assessment.

(ii)Where the taxpayer seeks to challenge the assessment as a whole on 'best of their judgment' grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.

(iii)<u>In particular the tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the commissioners</u>. The tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done.

(iv)There may be a few cases where a 'best of their judgment' challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing."

[Emphasis added]

37. It is necessary for us to deal with the allegations that have been made by Mr Musah against Officer Terry. Mr Musah only served his witness statement just under a week before the appeal hearing and no formal complaints or allegations of bullying from Officer Terry had ever been made by him before then. Whilst Mr Musah's witness statement referred to allegations of bullying by Officer Terry, we find that Mr Musah has been unable to fully particularise such allegations by reference to any specific incidents, apart from saying that Officer Terry failed to respond to his emails and turned up on the day of the Inspection without emailing her questions in advance.

38. In respect of Mr Musah's allegations concerning Officer Terry's behaviour, we find that actions such as not responding to an email cannot be classified as 'threatening' or 'bullying'. We further find that it is surprising that Mr Musah did not launch a formal complaint with HMRC if he felt that he was being bullied and threatened by Officer Terry. The absence of any complaint by Mr Musah strongly suggests that such conduct was not displayed by Officer Terry. It is indeed quite remarkable that Mr Musah has only felt the need to raise allegations against Officer Terry in his witness statement. We are satisfied that Officer Terry did not act capriciously or vindictively. Indeed, the evidence before us supports a finding that Mr Musah was quite indignant about what he believed HMRC were putting him through and his communication with HMRC and with Officer Terry was often curt. This extended to the manner in which approached cross-examination of Officer Terry.

39. The threshold for making a "best judgment" assessment is a low one. The correct test is whether there has been an honest and genuine attempt to make a reasoned and reasonable assessment: see *Pegasus Birds Ltd* at [22], (per Carnwath LJ) and [77], (per Chadwick LJ). HMRC only need to consider the information before them in a fair way and come to a decision which is reasonable (and not arbitrary) as to the amount of tax due.

40. In *Rahman v Customs and Excise Commissioners* [1998] STC 826, at p 835, Lord Justice Carnwath said this:

"……the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment is missing; or is 'wholly unreasonable'. In substance those tests are indistinguishable from the familiar *Wednesbury* principles (see *Associated Provincial*

Picture Houses ltd v Wednesbury Corp [1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment."

41. Ultimately, an assessment requires to be made to best judgment in the sense that it has to be prepared in good faith. This must however be balanced against the well-established rule that the primary obligation is on the taxpayer to make a return himself and HMRC are not required to do the work for the taxpayer. It is trite law that in an appeal against an assessment to tax, the burden is on the Appellant to show that the sums charged to tax by the assessment are excessive. This was confirmed by Mustill LJ in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635, at p642, as follows:

"The starting point is an ordinary appeal before the [Tribunal]. Here, however unacceptable the idea may be to the ordinary member of the public, it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an assessment to impose on the taxpayer the burden of proving that it is wrong: *Haythornwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657"

42. This is also evident from the case *Pegasus Birds Ltd*, where Carnwath LJ said this:

"[14] Generally, the burden lies on the taxpayer to establish the correct amount of tax due:

'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right.'

43. An assessment to best judgment may be shown to be inaccurate because later evidence from the Appellant shows a more accurate picture. It is not enough for the Appellant to show that the assessment did not reach the standard required of a reasonably competent officer. The Appellant must satisfy the Tribunal that the assessment was *"wholly unreasonable"*. This means that the assessment must be shown to be outside of the parameters of what could have been reasonable if all the material before HMRC had been fairly considered. Case law has established that if the officer making an assessment uses, or relies on, incorrect or flawed material provided by another officer, that must be relevant to his exercise of best judgment on behalf of HMRC.

44. We are satisfied, having had the benefit of hearing the oral evidence and reading all of the documents submitted in support of the appeal, that Mr Musah did not provide a majority of the documents that were requested by HMRC following the Inspection. Mr Musah's responses to some of the questions from Officer Terry concerning the Appellant's activities and the invoices in question were that the information was not VAT related. The fact that Mr Musah subsequently provided some information up until the week before the hearing cannot

retrospectively displace the Assessments made by HMRC on the information available. In any event, whether the Assessments were made to best judgment is not a live issue before us.

45. The Assessments followed an Inspection by HMRC, on 2 July 2018. Officer Terry, who conducted the Inspection and issued the Assessments in this appeal, gave oral evidence before us. Having heard Officer Terry giving evidence, we are satisfied that she gave evidence in a clear and straightforward manner, without equivocation. We are further satisfied that she was a truthful and reliable witness. Her evidence included a detailed witness statement, which highlighted her experience. She further provided sufficient detail about the events leading up to the Inspection, as well as the events on the day of the Inspection itself, up to and including the issuing of the Assessments. Officer Terry has been employed by HMRC since 10 November 2003 and she has been a VAT Assurance Officer since 2013. She visited the Appellant's premises following the submission of the Appellant's VAT return for 04/17.

46. In her oral evidence, which we accept having had the benefit of seeing all of the invoices and the documents provided by HMRC, Officer Terry said that whilst the Standard Life invoice relating to the purchase of the Property was in the Appellant's name, Companies House records obtained by HMRC showed that KBH was the owner of the Property and had the mortgage on the Property and not the Appellant. Two further charges on the Property, dated 20 April 2017 and 30 August 2018, related to mortgages with HSBC and then with Lloyds Bank. An email from Senior Officer Andy Kellow included an attachment from Land Registry, which further confirmed that the owner of the Property was KBH. Officer Terry further added that the Waterfords invoice was not particularised in relation what the legal fees actually related to. The Waterfords invoice further did not provide a breakdown of the costs incurred and there had been no evidence to show that the Appellant had made payment to Waterfords, at the time of the Inspection.

47. Finally, in relation to the IAS invoice, Officer Terry's evidence was that the name of the person to whom the supply was made had been scored through and the IAS invoice therefore failed to meet the requirements of reg 14(1)(e) of the VAT Regulations. Furthermore, the description of the goods supplied had been scored out and therefore the invoice also failed to meet the requirements of reg 14(1)(g) of the VAT Regulations.

48. We have had the benefit of seeing all three invoices, as well as the documentation received from Companies House and from Land Registry. Having accepted Officer Terry's evidence as being reliable, we further accept that the summary of the invoices provided by her is correct.

49. Mr Musah has challenged the decision to refuse the claims to input tax. Mr Musah also gave evidence before us and he adopted the contents of his witness statement. Having heard Mr Musah giving oral evidence, we find that he was a difficult witness to follow in the sense that he had a tendency to give evidence in a long-winded manner, often with little or no regard to the question actually put, before coming back to the point when reminded to do so.

We have had the benefit of seeing the documentation provided by Mr Musah a week before the hearing, all of which is included in the Appellant's Bundle.

50. In relation to the use of the supply for the purposes of the taxable person's business, it is trite law that the correct test is that a supply will be treated as being used for the purpose of the business of a taxable person if there is "a direct and immediate link" between the supply and one or more output transactions, or between the supply and the taxable person's economic activity as a whole. The provisions of law relating to supplies by a business are set out at s 14 and s 24 VATA and reg 13 and reg 14 of the VAT Regulations.

51. Section 14 VATA provides that:

> *"**14 Contents of 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, [the reference "margin scheme: works of art", "margin scheme: antiques or collectors' items", "margin scheme: second-hand goods", or "margin scheme: tour operators" as appropriate]*
>
> *(o) where a VAT invoice relates in whole or part to a supply where the person supplied is liable to pay the tax, [the reference "reverse charge"]]"*

52. Section 24 VATA deals with input tax and output tax as follows:

"***24 Input tax and output tax***

(1)Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say-

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

(b)VAT on the acquisition by him from another member State of any goods; and

(c)VAT paid or payable by him on the importation of any goods from a place outside the member States,

Being (in each case) goods or services used or to be used for the purposes of any business carried on or to be carried on by him."

53. Regulation 13 of the VAT Regulations requires a taxable person to provide an invoice when supplying goods or services to another taxable person. Regulation 14 specifies that the invoice has to show the name and address of the supplier and the customer. It must also contain a description of the goods or services provided. Section 24 VATA is however the starting point. As is evident from s 24(1) VATA, in order to recover input tax as a credit against output tax, it is necessary for a taxable person to firstly show that the VAT was paid on the supply to him of goods or services and, secondly, that the goods or services are used or to be used for the purpose of his business. Regulation 29 enables HMRC to consider alternative evidence, other than VAT invoices.

54. We proceed to consider the contents of the invoices which resulted in the decision to disallow input tax, together with the arguments raised by Mr Musah in support of the Appellant's appeal.

Standard Life invoice and Beneficial interest

55. In respect of the Property, Mr Musah relied on the VAT Notice to submit that the Appellant was the beneficial owner of the Property.

56. The Appellant is occupying the Property to carry out taxable business and also rents out other parts of the Property to The Umbrella Group. The case presented on the Appellant's behalf is that although the Property is in KBH's name, the Appellant raised the mortgage and therefore has beneficial ownership of the Property. In further amplification of this submission, Mr Musah relies on the VAT Notice, which provides, *inter alia*, that:

"7. Other land transactions

7.1 Beneficial owners of land or buildings

For VAT purposes, a beneficial owner who directly receives the benefit of the proceeds from selling, leasing or letting land or buildings is treated as being the

person selling, leasing or letting the land or buildings. This is the case even though that person is not the legal owner. An example of this is a bare trust where a trustee is the legal owner of the land, but the beneficial ownership belongs to another person. The beneficial owner is treated as the person making the grant.

If the beneficial owner is making taxable supplies above the registration threshold they will have to register for VAT. They will then need to account for the VAT due on the supply and can claim any input tax that arises, subject to the normal rules."

57. The Notice relied on by Mr Musah is HMRC's interpretation of para 40, Schedule 10, VATA. Paragraph 40, Schedule 10 VATA provides that:

*"**40. Benefit of consideration for grant accruing to a person other than the grantor***

(1) This paragraph applies if the benefit of the consideration for the grant of an interest in, right over or licence to occupy land accrues to a person ("the beneficiary") other than the person making the grant.
(2) The beneficiary is to be treated for the purposes of this Act as the person making the grant.
(3) So far as any input tax of the person actually making the grant is attributable to the grant, it is to be treated for the purposes of this Act as input tax of the beneficiary."

58. We bear in mind that HMRC Guidance is not an exhaustive code or a comprehensive edict. It is trite law that guidance and kindred instruments do not have the status of law and, thus, are subservient to primary legislation and secondary legislation.

59. Paragraph 40, Schedule 10, VATA has a very narrow application, in specific circumstances. It is intended to deal with a situation whereby a person makes a grant of any interest in a building, for consideration, the benefit of which accrues to another person and, if the conditions are met, the input tax incurred by the person actually making the grant is treated as input tax of the beneficiary of the grant. In this case, KBH has not made a grant in respect of the building, for consideration, from which the Appellant can benefit. KBH appears to have taken title to the Property and subsequently made it available to the Appellant for its use, free of charge, therefore even if the action of making the property available could be construed as a grant, there is no consideration.

60. For example, had KBH made the grant to The Umbrella Group, for consideration that accrued to the Appellant, the Appellant would be the beneficiary of that supply and would be entitled to reclaim input tax incurred by KBH that related to that grant. But this is not what happened in the appeal before us. Even if the Appellant was able to be treated as the beneficial owner for the purposes of the purchase of the Property by KBH, it granted a lease to The Umbrella Group to allow it to occupy part of the building. That grant was not subject to the option to tax therefore it was an exempt grant so that even if the supply of the building could be treated as made to it, some of the input tax incurred by KBH on the purchase would relate to the exempt lease of the building to The Umbrella Group.

61. We find that the lack of any evidence of an option to tax by the Appellant and its treatment of the rent as exempt from VAT in the invoices issued by it clearly implies that any supplies it may have made in exchange for the rental payments were themselves exempt supplies, for VAT purposes.

62. In relation to the argument that the Appellant is entitled to recover input tax having raised the mortgage for the Property, in the Supreme Court case of *Revenue and Customs Commissioners v Airtours Holidays Transport Ltd* [2016] 4 WLR 87, the issue on appeal was whether the appellant, Airtours Holidays Transport Ltd (formerly MyTravel Group plc), was entitled to recover, by way of input tax, VAT charged by PricewaterhouseCoopers LLP in respect of services provided by PwC and paid for by Airtours. At [44], Lord Neuberger considered the speech of Lord Millett in *Customs and Excise Comrs v Redrow Group Plc* [1999] 1 WLR 408, 418G, where he said *"[o]nce the taxpayer has identified the payment the question to be asked is: did he obtain anything - anything at all - used or to be used for the purposes of his business in return for that payment?".* Lord Neuberger added that if one takes that question at face value, then it can be said with some force that Airtours obtained a substantial benefit from paying PwC's invoices, namely the potential (and, as it turned out, the eventual actual) financial support of the Institutions for its restructuring.

63. Lord Neuberger considered however that Lord Millett's observation cannot be taken at face value. He proceeded to refer to Lord Reed explanation in *R & C Comrs v Loyalty Management UK Ltd* [2013] STC 784, at [66]- [67], where Lord Reed said this:

> "66. [T]he speeches in *Redrow* should not be interpreted in a manner which would conflict with the principle, stated by the Court of Justice in the present case, that consideration of economic realities is a fundamental criterion for the application of VAT. … [T]he judgments in *Redrow* cannot have been intended to suggest otherwise. On the contrary, the emphasis placed upon the fact that the estate agents were instructed and paid by Redrow, and had no authority to go beyond Redrow's instructions, and upon the fact that the object of the scheme was to promote Redrow's sales, indicates that the House had the economic reality of the scheme clearly in mind. When, therefore, … Lord Millett asked, 'Did he obtain anything - anything at all - used or to be used for the purposes of his business in return for that payment?', [that question] should be understood as being concerned with a realistic appreciation of the transactions in question.
>
> 67. Reflecting the point just made, it is also necessary to bear in mind that consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part. The speeches in *Redrow* should not be understood as excluding that possibility. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot be

> excluded *a priori*. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply."

64. Lord Hope made the same point in *Loyalty Management UK Ltd,* at [110]:

> "I think that Lord Millett went too far [at p 418G] when he said that the question to be asked is whether the taxpayer obtained 'anything - anything at all' used or to be used for the purposes of his business in return for that payment. Payment for the mere discharge of an obligation owed to a third party will not, as he may be taken to have suggested, give rise to the right to claim a deduction. A case where the taxpayer pays for a service which consists of the supply of goods or services to a third party requires a more careful and sensitive analysis, having regard to the economic realities of the transaction when looked at as a whole."

65. This approach reflects the approach of the Supreme Court in *WHA Ltd v R & C Comrs* [2013] STC 943 where, at [27], Lord Reed said that *"[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point"*. Lord Reed assessed the VAT consequences by reference to the reality. As Lord Neuberger said in *Secret Hotels2 Ltd v Revenue and Customs Comrs* [2014] STC 937, at [35], *"when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts."*

66. From case law cited above, it appears clear that where the person who pays the supplier is not entitled under the contractual documentation to receive any services from the supplier, then, unless the documentation does not reflect the economic reality, the payer has no right to reclaim, by way of input tax, the VAT in respect of the payment to the supplier.

Standard Life invoice

67. Whilst the Standard Life invoice was made to the Appellant, we find that the supply by the seller of the Property was to KBH. This is because Land Registry and Companies House reveal that the owner of the Property is KBH. Further records from Companies House also revealed that there had been two charges on the Property; the first of which is dated 20 April 2017 and the second of which is dated 30 August 2018. Both charges relate to mortgages (the former with HSBC and the latter with Lloyd's Bank). In both instances, the borrower was recorded as being KBH. Furthermore, the Appellant's annual accounts for the relevant year did not show any additions for property held.

68. The fact that the Appellant is occupying the Property for taxable purposes does not take the Appellant's case any further. This is because the Appellant could be occupying the premises as a licensee of KBH, rather than as a beneficial owner. Mr Musah's evidence was that the intention in purchasing the Property in the name of KBH was to then create a deed of trust identifying the Appellant as beneficial owner. Mr Musah has not however provided any evidence to show that this is so and the extent of his evidence was that a solicitor was instructed to draft a deed of trust in 2017, but the matter had not been followed up. We find that if there was ever any intention to create a trust, then this would have been concluded within the three years that has now lapsed. The only additional document that has been provided in relation to the Property is a Debenture, which postdates the sale. We find that the Appellant's use of part of the building to carry out taxable business is not an activity envisaged by para 40, Schedule 10, VATA.

69. We hold that the Appellant is not therefore entitled to recover input tax on the Standard life invoice.

Waterfords Invoice

70. Mr Musah further provided HSBC bank statements, which showed payment being made to Waterfords Solicitors.

71. The case presented on the Appellant's behalf is that the Waterfords invoice arose as a result of a commercial dispute that the Appellant was involved in. The dispute is said to have arisen after two containers were mistakenly shipped to Guyana, instead of Ghana. Mr Musah submits that solicitors were instructed to resolve the issue with the carrier in France. The invoice includes the following information:

"Legal Fees as agreed	*£73,333,33*
Add VAT @ 20%	*£14,666.67*
Total Due	*£88,000.00*

Payment would be appreciated within 14 days of this invoice

Please as a reference for payment insert: Knightsbridge"

72. We find that the Waterfords invoice fails to adequately identify the nature of the services provided to the Appellant. The description of "legal fees as agreed" does not identify what the legal fees related to, or what the breakdown of the services provided was.

73. In the CJEU case of *Finanzamt Koln-Nord v Becker* (C-104/12), the company made an unsuccessful claim for recovery of input tax on legal fees incurred in defending criminal

proceedings brought against its managing director. The court held, at [19]-[23], that the existence of a direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct is necessary before the taxable person is entitled to deduct input tax. This is because the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them is part of the cost components of the taxable output transactions giving the right to deduct.

74. The court continued by saying that it is also accepted that a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and one or more output transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are components of the price of the goods or services which he supplies. With regard to the direct and immediate link which must exist between an input and an output transaction, the court held that it would not be realistic to attempt to be more specific. The court concluded by saying that it is apparent from the case law that, in the context of the direct-link test, all of the circumstances surrounding the transaction must be considered.

75. We find that it is not plausible that a firm of solicitors would fail to provide a breakdown of the services provided when being engaged for legal proceedings. We further cannot reconcile the invoice requesting a lump sum of £88,000 with the bank statements showing smaller debits to Waterfords Solicitors. There is no suggestion that more than one invoice was issued by Waterfords Solicitors, or an agreement to pay in instalments, and it is not therefore clear why there was more than one credit to Waterfords Solicitors (neither of which was for £88,000). Mr Musah has not provided any further documentation to show what specific dispute the fees related to or indeed whether the dispute was connected to the Appellant. This was despite being given numerous opportunities by HMRC to provide such information.

76. We further find that there is no reason why Mr Musah would not be able to provide correspondence from Waterfords Solicitors, setting out what the retainer included, or indeed any documentation from the legal proceedings that he said commenced in France, if that is where proceedings were initiated and concluded pursuant to the contractual agreement. We find that if the Waterfords invoice related to legal proceedings following a commercial dispute, it would have been an obvious and relatively simple matter to produce further evidence.

77. We hold that the invoice does not satisfy the requirements of the VAT Regulations. This is because the description of *"Legal fees as agreed"* is not sufficiently clear to identify the goods or services supplied, as required by reg 14(1)(g) of the VAT Regulations.

IAS invoice

78. The Appellant's case is that the IAS invoice relates to the reservation price for the purchase of property from an Auction House, during an office refurbishment. We find that the IAS invoice does not satisfy the requirements of the VAT Regulations. This is because the IAS invoice is unclear in terms of whom it is addressed to. Furthermore, part of the invoice was torn, so as to obscure the information that was included in the invoice and the invoice was largely illegible, given that there were ink marks on the invoice. This was the case in relation to the copy of the invoice included in the Documents Bundle. We further find that there is a significant divergence between the invoice that was presented during the Inspection and that which Mr Musah has now included in the Appellant's Bundle, which was only provided a week before the hearing. Having had sight of both invoices, we are unable to place any reliance on the invoices as representing a clear and accurate description of the goods or services provided, or indeed to whom any goods or services were provided.

79. We therefore hold that the invoice does not meet the requirements of the VAT Regulations.

80. Having considered all of the evidence, we are satisfied that HMRC were correct to disallow input tax on the three invoices, for the reasons we have given above. We further find that there has been no other competing evidence of sufficient cogency to displace the Assessments. Whilst Mr Musah has provided some further evidence in support of the appeal, and whilst his line of cross-examination rested on seeking Officer Terry's agreement to the suggestion that the information that he only provided shortly before the hearing was sufficient to discharge the issues, we are satisfied that the Assessments issued by HMRC were reasonable and were calculated to the best of judgment on the information available at the time of the decision. We are satisfied that Mr Musah was afforded the opportunity to provide any relevant information that would assist HMRC. Therefore, even taking the Appellant's case at its highest, we find that Mr Musah has been unable to provide any evidence of sufficient reliability or cogency to displace the conclusions reached by HMRC.

Legitimate expectation argument

81. Mr Musah submits that the Appellant had a legitimate expectation that the Property would not be an issue, in relation to VAT. He based his submission on his understanding of the VAT Notice, which we have already dealt with above. For completeness, we have given thought to Mr Musah's arguments and we are satisfied that the First-tier Tribunal ('FTT') does not have the jurisdiction to deal with, or give effect to, any legitimate expectation which Mr Musah seeks to establish in relation to any credit for input tax. This is because the right of appeal given by s 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation, which includes any provision which, directly or indirectly, has an impact on the amount of any credit due. Legitimate expectation is a matter for remedy by way of judicial review in the Administrative Court.

82. The FTT is a creature of statute and its jurisdiction is wholly derived from statute. The FTT has no general supervisory jurisdiction over the decisions of HMRC: *HMRC v Hok Ltd* [2012] UKUT 363 (TCC). The FTT was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA') for the purposes of exercising the functions conferred on it by virtue of the TCEA. This point was made clear by the House of Lords in *Customs and*

Excise Commissioners v J H Corbitt (Numismatists) Ltd [1981] AC 22. The point was also made by Jacob J in *Customs and Excise Commissioners v National Westminster Bank plc* [2003] STC 1072, where he adopted what had been said by Moses J in *Marks and Spencer plc v Customs and Excise Commissioners* [1999] STC 205, at 247c, as follows:

> "….in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the commissioners then it is clear that the tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the commissioners and it has no jurisdiction in relation to supervision of their conduct."

83. It is clear that the legislation (TCEA) does not confer any judicial review function on the FTT. It is also clear s 83(1) VATA does not confer a general supervisory jurisdiction and there is no other provision of VATA which confers such a jurisdiction in relation to the legitimate expectation which Mr Musah seeks to rely on.

Estoppel argument

84. Lastly, Mr Musah submits that HMRC continue to raise issues with the Appellant's business activities and that the Appellant's problems with HMRC have been the subject of adjudication in the past. He therefore submits that the principle of estoppel should apply.

85. The Supreme Court case of *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 concerned the relevance and application of the principles of *autrefois acquit, res judicata* and abuse of process, in the context of successive proceedings before a regulatory or disciplinary tribunal. The question in the appeal being 'what is the legal effect of the conclusion that the second complaint raised is the same as the first?' The substance of the underlying conduct was the same in the case of both complaints. At [45], the Supreme Court cited Lord Atkin's words in *Workington Harbour & Dock Board v Trade Indemnity Co Ltd (No 2)* [1938] 2 All ER 101, 43 Com Cas 235:

> "[45] Lord Atkin described the position concisely at pp 105-106:
>
> "The question will always be open whether the second action is for the same breach or breaches as the first, in which case the ordinary principles governing the plea of res judicata will prevail…….There are solid merits behind the maxim nemo bis vexari debet pro eadem causa."

86. The maxim illustrates what Lord Bridge described in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 as a fundamental principle in the law. It is a fundamental principle which applies to successive proceedings. That is that nobody should be vexed twice in respect of one and the same cause. If an action succeeds, the cause of action merges in the judgment and is extinguished. A second action cannot be brought on that cause of action, not because there is an estoppel, but because there is no longer a cause of action:

see [26] of Lord Clark's judgment in *Coke-Wallis*, referring to *Thoday v Thoday* [1964] P 181; [1964] 1 All ER 341.

87. Whilst Mr Musah raises estoppel, we have not however been provided with any unappealed judgments relating to the same issues as we are concerned with in the appeal before us. We therefore fail to understand how Mr Musah submits that estoppel applies. Whilst Mr Musah may have dealt with HMRC in relation to VAT in the past, we are satisfied that there are no decisions from any court or tribunal that have considered the same issues that are in the appeal before us. We therefore find that this argument, too, must fail. Accordingly, having regard to the findings of fact and in light of the applicable law, we uphold the Assessments and dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

88. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

RELEASE DATE: 09 FEBRUARY 2021