[2019] UKUT 0405 (TCC)

Appeal numbers: UT/2018/0113
UT/2018/0114

VAT –(1) HMRC barred from taking part in appeal against denial of input tax credit on purchases – need to prove underlying supply in order to claim input tax – decisions in Mahageben and Stroy trans considered – barring order set aside – (2) HMRC not barred from taking part in appeal against denial of zero-rating – need for sufficient evidence of export in order to obtain zero-rating – Teleos considered – appeal against decision not to bar dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

INFINITY DISTRIBUTION LIMITED
(In Administration) **Appellant/ Respondent**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents/ Appellants

TRIBUNAL: The Honourable Mr Justice Marcus Smith
Judge Thomas Scott

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 16 and 17 July 2019

Ian Bridge, instructed by Keystone Law, for Infinity Distribution Limited

Jonathan Kinnear QC and Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for HMRC

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DECISION

A. BACKGROUND

1. In 2006, the Commissioners for Her Majesty's Revenue and Customs (the "Commissioners") notified Infinity Distribution Limited ("Infinity"), a company now in administration, that Infinity had been refused the right to deduct input tax on various invoices for the supplies to Infinity of two types of mobile phone (the "Invoices").

2. The Commissioners took the view that the Invoices were not valid invoices because they failed to comply with Regulation 14(1)(g) and (h) of the Value Added Tax Regulations 1995 (the "VAT Regulations").

3. In the course of this decision, we will have occasion to refer to various legislative provisions. For convenience, they are set out in Annex 1 hereto, as they were in force for the periods relevant to this appeal. So far as material, Regulation 14(1) of the VAT Regulations requires that a VAT invoice provide the following particulars (amongst others):

> (1) A description sufficient to identify the goods or services supplied: Regulation 14(1)(g).
>
> (2) For each description, the quantity of goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in any currency: Regulation 14(1)(h).[1]

4. The basis for the Commissioners' decision was that, although each Invoice identified specific types of mobile phone, no such supplies could in fact have been made to Infinity, because, at the relevant times, no or else an insufficient number of such phones had been manufactured and released. In short, the phones did not (according to the Commissioners) exist for them to be supplied. The Commissioners subsequently determined that there were no grounds on which they could exercise their discretion to allow the input tax deductions.

5. Later in 2006, the Commissioners notified Infinity that its claims to zero-rating on its own supplies of various mobile phones to other Member States of the European Union had been refused. The Commissioners' position was that there was no information which proved that these goods had been physically removed or exported from the United Kingdom; that the information supplied by Infinity was inadequate; and that the supplies therefore failed to satisfy the relevant conditions for zero-rating. The Commissioners took particular account of Infinity's use of Magic Transport BV ("Magic Transport") to ship the supplies. Magic Transport was known to be a fraudulent freight forwarder. The Commissioners did not consider that Infinity had acted in good faith and had taken every reasonable measure to ensure that its supply did

[1] See Annex 1-C(2).

not lead to participation in tax evasion, and so the Commissioners determined that Infinity's claims to zero-rating on its own supplies must be refused.

6. Infinity appealed against both decisions of the Commissioners. We shall refer to Infinity's appeal against the Commissioners' decision that the Invoices were not valid invoices[2] as the "Invalid Invoice Appeal". We shall refer to Infinity's appeal against the Commissioners' refusal to permit zero-rating on certain exports by it of mobile phones[3] as the "Zero-Rating Appeal".

7. Neither the Invalid Invoice Appeal nor the Zero-Rating Appeal has yet reached a substantive hearing before the First-tier Tribunal (Tax Chamber) (the "FTT"). The procedural history is relevant to an understanding of the nature of this appeal to us:

> (1) In 2012, the FTT gave case management directions in both appeals. These included directions to strike out certain witness evidence adduced by the Commissioners, which evidence went to both appeals.
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> (2) The Commissioners appealed that decision. Their appeal was heard by the Upper Tribunal (Peter Smith J) in 2015. The appeal was dismissed.[4]
>
> (3) The Commissioners appealed the decision of Peter Smith J to the Court of Appeal. That appeal was heard in October 2016 (Arden, Underhill and Briggs LJJ).[5]
>
> (4) The essence of the dispute between the Commissioners and Infinity was a question of what each party had to establish – in terms of fact – in order to determine each appeal. The Commissioners had explicitly disavowed any allegation of fraud against, or knowledge of fraud on the part of, Infinity. Nevertheless, the Commissioners contended that they should prevail in the case of each appeal. Infinity contended that the Commissioners were, in substance, but improperly and by the "back door", alleging fraud; and that the Commissioners must either plead fraud or knowledge of fraud explicitly or else have the appeals determined against them.
>
> (5) The Court of Appeal noted that these questions raised "serious and difficult issues" as to the basis on which input tax credit and zero-rating could be denied by the Commissioners, as well as the related questions going to the burden of proof and the pleading of such matters. The Court of Appeal took the view that such questions were best not resolved at an interlocutory stage. Rather, they should be left to the substantive appeals. Briggs LJ (with whose judgment Arden and Underhill LJJ agreed) stated:

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[2] See paragraph 2 to 4 above.

[3] See paragraph 5 above.

[4] [2015] UKUT 0219 (TCC).

[5] [2016] EWCA Civ 1014.

"1. As Mr Jeremy Benson said when opening this appeal from the Upper Tribunal (Tax and Chancery Chamber), its outcome may be reached alternatively by a short route, or a long route. On its face, it is about aspects of a case management decision by the [FTT] to refuse to allow the deployment of items of evidence, on grounds of relevance and prejudice. But the skeleton arguments, both here and in the UT, raise serious and difficult issues about the basis upon which Her Majesty's Revenue and Customs may refuse to allow deductions of VAT or zero rating in the context of intra-community exports, issues as to the burden of proof and issues as to the adequacy or otherwise of HMRC's pleaded case in these appeals. If [Infinity's] arguments on these issues are correct, and there will not be found, or implied, any view of mine either way on those issues, then this would, on the face of it, justify the striking out of all or the main part of HMRC's case, rather than merely selected parts of the evidence in support. No strike out application of that kind has been made in these proceedings and it is probable that the resolution of the underlying legal issues would be better achieved once the relevant facts have been found, rather than on the artificial and arid battleground constituted by assumptions that one side's or the other's pleaded case is true.

2. It became clear to us during the hearing of this appeal that it could, and indeed should, more proportionately, justly and reliably be determined by taking the short rather than the long route to its solution, without deciding the underlying and difficult legal issues, but rather assuming, without deciding or expressing any view, that HMRC might succeed in their case about them at trial."

(6) Briggs LJ went further at [29]:

"…It is not in my view good or appropriate case management to decide an objection to the admissibility of part of the evidence in support of a pleaded case in that way. For as long as a party has a positive pleaded case to which evidence upon which it wishes to rely is relevant, then it seems to me that it ought to be admitted unless and until that case is itself struck out or abandoned. Where the question whether the pleaded case is fundamentally objectionable (or, as it used to be said, demurrable) depends, as here, upon a difficult question of legal analysis calling for sophisticated argument and mature reflection, then to argue it for the first time on an appeal against that case management decision (as happened here) seems to me to put the cart before the horse, and to involve a disproportionate and potentially unsatisfactory diversion from the management and preparation of the case for final hearing. As Arden LJ suggested during the course of argument, for as long as a party has a pleaded case which has not been struck out, then case management for the final hearing should not generally exclude evidence supportive of it."

(7) One might think that this would have resulted in swift and decisive progress towards a substantive hearing, which is plainly what the Court of Appeal envisaged. Instead, in October 2017, Infinity applied to the FTT for an order that the Commissioners be barred from taking further part in the Invalid Invoice Appeal and the Zero-Rating Appeal, and that both appeals be determined summarily in Infinity's favour. Infinity thus – rather belatedly – made an application in effect to strike out the Commissioners' statement of case.

(8) That application came before the FTT. The FTT (Judge Tony Beare) held that:[6]

> (a) In relation to the Invalid Invoice Appeal, the Commissioners were barred from taking further part in the proceedings. The Invalid Invoice Appeal was summarily determined in favour of Infinity.
>
> (b) In relation to the Zero-Rating Appeal, Infinity's application to bar the Commissioners from taking further part in the proceedings was dismissed.

8. The Commissioners now appeal against the first element of that decision, and Infinity appeals against the second element. Both appeals take place with the permission of the FTT.

B. APPLICATIONS TO STRIKE OUT IN THE FTT

9. The applications by Infinity to the FTT fell to be considered under Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Under Rule 8(3)(c), the FTT "may strike out the whole or part of the proceedings if…the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding".

10. Rule 8(7) provides that this rule applies to a respondent (in this case, the Commissioners) as it applies to an appellant, except that the reference to striking out must be read as a reference to the barring of the respondent from taking further part in the proceedings. Under Rule 8(8), if a respondent is and remains barred, then the Tribunal "need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent".

11. Infinity's applications before the FTT therefore involved two questions. The first question was whether or not the Commissioners' case had a reasonable prospect of succeeding; and, if it did not, whether the Commissioners should be barred from taking part in the appeal. The second question, which only arose if the FTT decided to bar the Commissioners, was whether the FTT should exercise its discretion to determine the appeals summarily against the Commissioners.

12. Since the FTT rejected Infinity's application in relation to the Zero-Rating Appeal, this second stage question arose only in respect of the Invalid Invoice Appeal. In relation to the Invalid Invoice Appeal, the FTT – having decided that the Commissioners' case had no reasonable prospect of success – then considered whether the delay by Infinity in bringing the application and/or the argument that the issues were best dealt with at the substantive appeal meant that it should not exercise its discretion to debar HMRC and summarily determine the appeal in favour of Infinity. It determined that they did not.

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[6] [2018] UKFTT 0249 (TC).

13. On the assumption that the first question in relation to the Invalid Invoice Appeal was correctly decided against the Commissioners and that the Commissioners' case therefore had no reasonable prospect of success, the FTT's exercise of discretion in relation to the second question (whether the appeal should summarily be determined against the Commissioners) was not challenged by the Commissioners in this appeal. We consider that aspect of the FTT's decision no further.

C. STRUCTURE OF THIS DECISION

14. Circumstances thus require us to take the "long route", eschewed by the Court of Appeal in favour of the "short route". It is appropriate that we consider the two appeals discretely.

15. We begin with the Invalid Invoice Appeal, where the Commissioners are appealing against the FTT's decision. This appeal is considered in Section D below.

16. Thereafter, in Section E, we consider Infinity's appeal in relation to the FTT's decision in the Zero-Rating Appeal.

17. Section F describes how this appeal is to be disposed of.

D. THE INVALID INVOICE APPEAL

(1) The decision of the FTT

18. The FTT, as has been described,[7] determined the Invalid Invoice Appeal against the Commissioners.

19. Before the FTT, Infinity contended that the Invoices met the requirements of Regulation 14(1)(g) and (h) of the VAT Regulations[8] in that they did state on their face the particulars required by the Regulations, namely:

> (1) A description sufficient to identify the goods or services supplied (Regulation 14(1)(g)); and
>
> (2) 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 (Regulation 14(1)(h)).

20. This, according to Infinity, was sufficient to comply with the Regulations. According to Infinity, the mere fact that (for example) the goods described in the Invoices did not exist at the time of the relevant supply and could not therefore have been the items that were the subject of the purported supply was insufficient, by itself, to invalidate the Invoices.

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[7] See paragraph 7(8)(a) above.

[8] Set out in Annex 1-C(2).

21. According to Infinity, in order successfully to prevent reliance on the Invoices for the purposes of a deduction of input tax, the Commissioners had to show that Infinity either knew or should have known that the goods in question did not exist at the time of the relevant supply. That, of course, was not an allegation the Commissioners had pleaded in their statement of case.

22. The Commissioners contended that knowledge on the part of Infinity was irrelevant: provided that it could be demonstrated that the goods in question did not exist at the time of the relevant supply, then the Invoices were invalid irrespective of Infinity's state of mind. For that reason, the evidence adduced by the Commissioners went to the question of whether the supply of the mobile phones recorded in the Invoices was possible and did not seek to consider whether Infinity knew or ought to have known that this was the case. As we noted in paragraph 2 above, the basis for the Commissioners' original decision that the Invoices were invalid was that, although each Invoice identified particular mobile phones, no such supplies could in fact have been made, because, at the relevant times, either none or an insufficient number of such phones had been manufactured and released.

23. The FTT reviewed the authorities cited to it by the parties. Although the FTT considered that there was some case-law in the United Kingdom favouring the approach contended for by the Commissioners, two decisions of the Court of Justice of the European Communities ("CJEU") persuaded the FTT that Infinity's contentions were correct and that the Invalid Invoice Appeal must be allowed. These cases were:

> (1) Case C-80/11, *Mahageben kft v. Nemzeti Ado-es Vamhivatal Del-dunantuli Regionalis Ado Foigazgatosaga* and Case C-142/11, *Peter David v. Nemzeti Ado-es Vamhivatal Del-dunantuli Regionalis Ado Foigazgatosaga*, which we shall refer to as "*Mahageben*";[9] and
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> (2) Case C-642/11, *Stroy trans EOOD v. Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite*, which we shall refer to as "*Stroy trans*".[10]

It will be necessary to review the case law considered by the FTT, which we do below.

24. The FTT accepted the logical consequences of its interpretation of the law. In [6] of its decision, the FTT noted that, were Infinity's contentions to succeed, as they did before the FTT, then there would be no need for any evidence to be presented in order to determine the Invalid Invoice Appeal, "because there is no dispute between the parties as to the fact that [Infinity] holds invoices in the form prescribed by Regulation 14(1)".

25. It also followed that the Commissioners' failure to plead actual or constructive knowledge of the non-existence of the relevant mobile phones on the part of Infinity was fatal to the Commissioners' case, empowering the FTT (as it did) to bar the

[9] [2012] STC 1934.

[10] EU:C:2013:758.

Commissioners from taking further part in the proceedings and to determine the appeal summarily in Infinity's favour.

26. Before turning to the substance of the Commissioners' appeal against the FTT's decision, it is necessary to deal with a preliminary objection taken by Infinity to the scope of the Commissioners' appeal before us.

(2) A preliminary objection

27. Shortly before the hearing of this appeal, Infinity raised an objection to one of the grounds of appeal put forward by the Commissioners' in their written submissions to us. This objection was set out in a letter from Infinity's representative to the Commissioners dated 8 July 2019. In substance, Infinity contended that it was not open to the Commissioners to contend that there was no taxable supply underlying the Invoices:

> "…it appears that you intend to advance an argument which has not been previously advanced…and…is not in accordance with the Commissioners' pleaded case in the appeals to date…Specifically, Ground 1 of your skeleton cites the assertion that "no taxable supply" was received by [Infinity]. A review of the Commissioners' statement of case, submissions in the interlocutory hearings in the matter before the First Tier Tribunal, Upper Tribunal, Court of Appeal and again in the First Tier Tribunal last year (and the judgments promulgated thereafter) confirms that this has historically never been the Commissioners' position in the appeals. To date [the Commissioners have] always set out [their] case as being non-compliance with Regulations 14(1)(g) and (h) of the VAT Regulations".

28. The Commissioners disputed that this was a new argument obliging them to amend their pleadings. We agree. We consider Infinity's objection to be ill-founded and reject it for the following reasons:

(1) The Commissioners' statement of case, filed in 2010, makes clear the Commissioners' contention that a failure to satisfy Regulation 14 can arise as a result of the claimed supply never having taken place. For instance, under the heading "The Commissioners' Case", the statement of case asserts (at paragraphs 23*ff*) that Infinity had not established that supplies to it of the Sony Ericsson P990 phones took place and/or that the supplies of those phones could not have taken place in the relevant VAT periods.

Indeed, the Commissioners' original decision letter, which was the subject and cause of Infinity's appeal, put the position thus:

> "If any goods were traded at all, they were not Sony Ericsson P990 phones."

Similar statements are contained in the statement of case in relation to the other model of phone (Samsung Serenes) on which input tax credit had been refused.

It is clear that part of the Commissioners' case for refusing input tax credit was and is that the supplies shown on the Invoices had not been shown to have taken place.

(2) The FTT's decision, which we have described,[11] itself makes clear that the "no supply" issue was at the heart of HMRC's case. At [27] of its decision, the FTT held:

"…the fact that invoices satisfying the formalistic requirements of Regulation 14(1) may incorrectly describe the goods and quantity of goods supplied because the relevant goods were not actually supplied is not a bar to deducting the relevant input tax if [Infinity] did not have actual or constructive knowledge of the fraud."

(3) The Commissioners contended that this was an error of law on which it sought permission to appeal. Permission to appeal was granted in respect of this ground.

(3) Determination of the Invalid Invoice Appeal

(a) The legislation

29. The FTT did not consider the legislation in reaching its decision. However, the starting point must be the applicable, European Union, legislation: the Sixth Council Directive of 17 May 1977, Directive 77/388/EEC (the "Sixth Directive"). Being a Directive, it is implemented into English law by way of implementing legislation.

30. It is clear from Articles 17 and 18 of the Sixth Directive that the Directive deals separately with the existence of the right to deduct and the exercise of that right. Thus, Article 17[12] is entitled "Origin and scope of the right to deduct". It sets out when that right to deduct "shall arise". The right to deduct is stated by Article 17(2)(a) to arise in respect of VAT "due or paid in respect of goods or services supplied or to be supplied" to the taxable person.

31. By contrast, Article 18[13] is headed "Rules governing the exercise of the right to deduct" and – as the title would suggest – describes what a taxable person must do to in order to exercise a right arising under Article 17.

32. According to Article 18, in order to exercise a right which has arisen in the circumstances set out in Article 17, the taxable person must hold an invoice drawn up in accordance with Article 22(3).[14] Article 22(3) includes a requirement that the invoice shows "the quantity and nature of the goods supplied".

33. We turn, then, to the relevant domestic legislation. Section 24 of the Value Added Tax Act 1994 ("VATA")[15] defines input tax as VAT on "the supply to [a taxable person] of any goods or services" used for the purpose of his business (section 24(1) VATA), with the allowability of any input tax credit being determined by regulations: sections

[11] See paragraphs 18 to 24 above.

[12] Set out in Annex 1-A(2).

[13] Set out in Annex 1-A(3).

[14] Set out in Annex 1-A(4).

[15] Set out in Annex 1-B(1).

25(2) and 26(1).[16] At the relevant time, Regulation 14(1)(g) of the VAT Regulations required that a VAT invoice should state "a description sufficient to identify the goods or services supplied".[17]

34. It is clear that both the EU and the domestic implementing legislation proceed on the basis that there is a distinction between *(i)* a right to input tax arising and *(ii)* that right being claimed as a credit. The right to deduct – i.e. to claim a credit – only arises where there has been a supply. There is nothing in the legislation to state or suggest that the right can be exercised in cases where there has not been an actual supply giving rise to input tax in the first place.

35. Indeed, put this way, Infinity's proposition regarding the legislation only has to be stated to be rejected: it is fundamentally inconsistent with the legislative scheme. We see nothing in the scheme of the legislation, whether at the EU level or in its domestic implementation, to suggest that a mere "formalistic" compliance (as the FTT termed it) with the requirements as to invoices – entirely detached from the reality of the case – is sufficient to justify a deduction.

(b) The case-law

Earlier decisions of the CJEU

36. The Commissioners contended that our conclusion as to the approach taken by the legislation was supported by authority, both of the FTT in this jurisdiction and in the EU. We consider only the relevant EU case-law: ultimately, this is a question of EU law, and we are not bound by decisions of the FTT.

37. The Commissioners relied on three decisions:

(1) Case C-536/03, *Antonio Jorge v. Fazenda Publica*.[18] The CJEU stated:

> "24 Article 17(1) of the Sixth Directive provides that the right to deduct arises at the time when the deductible tax becomes chargeable. Article 10(2) of that directive provides that such is the case as soon as the goods are delivered or the services performed (Case C-400/98, *Breitsohl*, [2000] ECR I-4321 at [36]). It must be borne in mind that under Article 10(1)(b) of the Sixth Directive, the tax is chargeable 'when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay'.
>
> 25 It follows that, in the system of the Sixth Directive, the event giving rise to the tax, its chargeability and the possibility of deduction are linked to the actual performance of the delivery of goods or of the provision of services, except in the

[16] Set out in Annex 1-B(2) and Annex 1-B(3).

[17] Annex 1-C(2).

[18] [2005] ECR I-4463.

case of payments on account, where the tax becomes chargeable on receipt of payment…"

(2) Case C-152/02, *Terra Baubedarf-Handel GmbH v. Finanzamt Osterhok-Scharmbeck.*[19] The CJEU stated:

"38 The answer to the national court's question must therefore be that for the deduction referred to in Article 17(2)(a) of the Sixth Directive the first subparagraph of Article 18(2) of the Sixth Directive must be interpreted as meaning that the right to deduct must be exercised in respect of the tax period in which the two conditions required by that provision are satisfied, namely that the goods have been delivered or the services performed and that the taxable person holds the invoice or the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice."

(3) Case C-342/87, *Genius Holding BV v. Staatssectrtaris van Financien.*[20] the CJEU considered the argument that Article 17(2)(a) of the Sixth Directive "must be interpreted as meaning that any tax mentioned in the invoice must be deducted".[21] Its conclusions were as follows:

"13 It must be inferred from the changes made to the above-mentioned provisions that the right to deduct may be exercised only in respect of taxes actually due, that is to say, the taxes corresponding to a transaction subject to value added tax or paid in so far as they were due.

…

15 According to Article 18(1)(a), to exercise his right to deduct, the taxable person must hold an invoice, drawn up in accordance with Article 22(3), which requires the invoice to state clearly the price exclusive of tax and the corresponding tax at each rate, as well as any exemptions. In accordance with that provision, mention of the tax corresponding to the supply of goods and services is an element in the invoice on which the exercise of the right to deduct depends. It follows that that right cannot be exercised in respect of tax which does not correspond to a given transaction, either because that tax is higher than that legally due or because the transaction in question is not subject to value added tax.

…

19 The answer to the first question should therefore be that the right to deduct provided for in the Sixth Directive does not apply to tax which is due solely because it is mentioned on the invoice."

38. These cases all lend support to the conclusion we expressed in paragraphs 29-35 above, that there can be no right to a deduction without a supply. However, none of these decisions was addressing precisely the factual situation nor the specific question arising in this appeal. Moreover, these cases all pre-date the decisions in *Mahageben*

[19] [2004] ECR I-5553.

[20] [1991] STC 239.

[21] At [9].

and *Stroy trans*, on which the FTT placed significant reliance and which Infinity contended had clarified and developed the law in this regard.

Later decisions of the CJEU

39. We shall consider *Mahageben* and *Stroy trans* in due course, although it is appropriate to observe now that we do not consider that they stand for the proposition advanced by Infinity and accepted by the FTT. More to the point, the law has been put beyond doubt by two decisions of the CJEU, both of which post-date the FTT's decision: Case C-459/17, *SGI and Valeriane SNC v. Ministre de l'Action et des Comptes Publics*, which we shall refer to as "*SGI*";[22] and Case C-712/17, *EN.SA Srl v. Agenzia delle Entrate*, which we shall refer to an "*EN.SA*".[23]

40. In *SGI*, the French tax authorities had refused the taxpayers the right to deduct input tax shown on invoices "on the ground that, *inter alia*, those invoices did not correspond to any actual delivery".[24] The taxpayers accepted that various of the transactions had not occurred. SGI had contended before the French courts that, in the absence of any serious indication that the transactions involved fraud, it was not obliged to verify that those transactions were actually carried out. Distinguishing this situation from that before the Court in *Stroy trans* (which, as we shall describe, was based on different facts), the CJEU described the question before it as follows:

"22 By contrast, in the cases in the main proceedings, the right to deduct was denied because the goods at issue had not actually been supplied to the companies at issue in the main proceedings. The referring court asks whether, in such circumstances, in order to deny a taxable person the right to deduct VAT, it is sufficient to establish that the goods and services have not actually been supplied to that taxable person, or whether it is also necessary to establish that that taxable person knew, or ought to have known, that the transaction at issue was connected with VAT fraud."

41. The CJEU concluded as follows:

"**Substance**

30 By its question, the referring court asks, in essence, whether Article 17 of the Sixth Directive must be interpreted as meaning that, in order to deny a taxable person in receipt of an invoice the right to deduct the VAT appearing on that invoice, it is sufficient that the authorities establish that the transactions covered by that invoice have not actually been carried out or whether those authorities must also establish that taxable person's lack of good faith.

31 As a preliminary point, it must be noted, first, that Directive 2006/112, which entered into force on 1 January 2007, repealed the Sixth Directive without making material changes compared with that earlier directive. Since the relevant provisions of the Sixth Directive

[22] EU:C:2018:501.

[23] EU:C:2019:374. See also, relatedly, Case C-664/16, *Vadan v Agentia Nationala de Administrare Fiscala*, EU:C:2018:933 at [39] to [44].

[24] At [14].

essentially have the same scope as those of Directive 2006/112, the case-law of the Court relating to that latter directive also applies to the Sixth Directive.

32 Second, it follows from the documents before the Court that, in this case, it is not disputed that SGI, Valériane and the suppliers of the goods at issue are taxable persons, within the meaning of the Sixth Directive.

33 Third, the question referred is based on the premise that the goods at issue in the main proceedings, to which the input VAT relates, have not actually been delivered.

34 Article 17(1) of the Sixth Directive provides that the right to deduct arises at the time when the deductible tax becomes chargeable. This takes place, pursuant to Article 10(2)[25] of that directive, when the goods are delivered or the services are performed.

35 It follows that, in the VAT system, the right to deduct is connected to the actual delivery of the goods or performance of the services at issue (see, by analogy, order of the President of the Court of 4 July 2013, *Menidzherski biznes reshenia*, C-572/11, not published, EU:C:2013:456, at [19] and the case-law cited).

36 Conversely, when there is no actual delivery of the goods or performance of the services, no right to deduct may arise.

37 From that point of view, the Court has already stated that the exercise of the right to deduct does not extend to a tax which is due solely because it appears on an invoice (see order of the President of the Court of 4 July 2013, *Menidzherski biznes reshenia*, C-572/11, not published, EU:C:2013:456, at [20] and the case-law cited).

38 The good or bad faith of a taxable person seeking deduction of VAT has no bearing on the question whether there has been a delivery, for the purposes of Article 10(2) of the Sixth Directive. In accordance with the objective of that directive, which aims to establish a common system of VAT based, *inter alia*, on a uniform definition of taxable transactions, the concept of 'supply of goods' in Article 5(1) of that directive is objective in nature and must be interpreted without regard to the purpose or results of the transactions concerned and without it being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person or for them to take account of the intention of an economic operator other than that taxable person involved in the same chain of supply (see, to that effect, judgment of 21 November 2013, *Dixons Retail*, C-494/12, EU:C:2013:758, at [19] and [21] and the case-law cited).

39 In that regard, it must be remembered that it is for the person seeking deduction of VAT to establish that he meets the conditions for eligibility (judgment of 26 September 1996, *Enkler*, C-230/94, EU:C:1996:352, at [24]).

40 It follows that the existence of a right to deduct of VAT is conditional on the corresponding transactions having actually been carried out."

42. *SGI* was endorsed and followed by the CJEU in *EN.SA*:

"24 However, when the purchase of goods or services is fictitious, it cannot be connected in any way to the taxable person's output transactions. As a result, when there is no actual delivery

[25] See Annex 1-A(1).

of goods or performance of services, no right to deduct can arise (judgment of 27 June 2018, *SGI and Valériane,* C-459/17 and C-460/17, EU:C:2018:501, at [36]).

25 It is, therefore, inherent in the VAT scheme that a fictitious transaction cannot give rise to an entitlement to deduct that tax."

43. If there were any doubt about the law, the position is made clear by *SGI* and *EN.SA.* Without an actual supply, no right to input tax credit arises. In applying this principle, the good or bad faith of the recipient of the supply is nothing to the point: if an invoice records a transaction which has not in fact taken place, it cannot be relied on to claim credit for the input tax shown on that invoice.

(c) Mahageben and Stroy trans

44. We turn to the decisions in *Mahageben* and *Stroy trans*. Our conclusion is that these decisions are not authority for the proposition that, even where there is no taxable supply, the taxpayer may deduct input tax unless it can be shown that the taxpayer knew or should have known that there was no taxable supply. Rather, they are simply determining the scope of the principle articulated in the conjoined decisions of the CJEU in Case C-439/04, *Axel Kittel v. Belgium* and Case C-440/04, *Belgium v. Recolta Recycling SPRL* ("*Kittel*").[26] We begin with the decision in *Kittel* itself.

Kittel

45. In *Kittel*, the CJEU held that a taxable person who knew or should have known that, in purchasing goods, he was taking part in a transaction connected with the fraudulent evasion of VAT, lost the right to deduct input tax on those goods.

46. Whereas in the cases we have so far been considering, it is for the taxpayer to establish that there was a supply, it is well established that if the taxing authorities (here: the Commissioners) seek to deny input tax on the basis of *Kittel*, it is for the Commissioners to plead the point, and it is the Commissioners who bear the burden of proof.

47. It is important to appreciate that the *Kittel* jurisdiction pertains where a taxable supply has already been established or is not contested. *Kittel* holds that in such a case, provided the taxable person knew or should have known that, in purchasing goods, he was taking part in a transaction connected with the fraudulent evasion of VAT, that person loses the right to deduct input tax that he otherwise would have.

A consideration of *Mahageben* and *Stroy trans*

48. The FTT relied heavily on a statement in *Mahageben* that "…the right to deduct can be refused only where it can be established, on the basis of objective evidence, that the taxable person concerned knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of supply". Viewed in

[26] EU:C:2006:446.

isolation, we can see how those words might have supported the FTT in its conclusion: but the words must be seen in context. The relevant paragraph in its entirety is as follows, with emphasis added:

"52 **In that regard, it is apparent from the order for reference and, in particular, the first question, that the questions referred in Case C-80/11 are, like those referred in Case C-142/11, based on the premises that the substantive and formal conditions provided for by Directive 2006/112 for the exercise of the right to deduct are fulfilled, in particular the condition which requires the taxable person to be in possession of an invoice which confirms that the goods were actually supplied and which complies with the requirements of that directive.** Accordingly, in the light of the response given in paragraph 50 of the present judgment, which also applies in the case of the supply of goods, the right to deduct can be refused only where it is established, on the basis of objective evidence, that the taxable person concerned knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of supply."

49. The question before the CJEU in *Mahageben* was not whether an actual supply was needed in order for a right to credit to arise, because that was assumed as a premise. Rather, the question was (broadly) whether credit could nevertheless be denied on the basis of *Kittel* in circumstances where the relevant alleged fraud was upstream of the trader in question.[27]

50. *Stroy trans* is to similar effect, as the CJEU pointed out in *SGI* at [45] (emphasis added):

"45 Lastly, it must be stated that the judgments of 31 January 2013, *Stroy trans* (C-642/11, EU:C:2013:54) and of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55), were delivered in factual circumstances which are substantially different to those of the cases at issue in the main proceedings. **Against a background in which it had not been established that the delivery of goods on which the right to deduct of the taxable persons concerned was based had not actually taken place**, both those judgments concerned, first, whether the tax authorities could conclude that there were no taxable deliveries on the sole ground that no document had been submitted by the suppliers when the deliveries at issue were made and, second, whether the taxable persons in receipt of those invoices were entitled to rely on the lack of rectifications by the tax authorities for the issuers of contested invoices in order to maintain that the transactions at issue had actually been carried out."

(4) Conclusion

51. For the reasons we have given, the Commissioners' appeal in relation to the Invalid Invoice Appeal is allowed.

[27] See the similar reading of *Mahageben* by the Court of Appeal in *R (Seabrook Warehousing Limited) v. Revenue & Customs*, [2019] EWCA Civ 1357 at [144].

E. THE ZERO-RATING APPEAL

(1) The basis for the Commissioners' denial of zero-rating

52. The legislation in relation to zero-rating, which gives effect to the relevant provisions of the Sixth Directive (as it then was), is set out in: section 30(8) VATA;[28] Regulation 134 of the VAT Regulations;[29] and in Public Notice 725, tertiary legislation parts of which have the force of law.[30]

53. As we have described, the Commissioners refused to permit Infinity to zero-rate certain of its exports of mobile phones.[31] The Commissioners' statement of case justifies this decision in the following terms:

"37 The available evidence points to the following conclusions in respect of the decision letter dated 11 December 2006:

(i) that the goods were not removed or exported from the UK;

(ii) that the conditions for zero-rating of the supplies of goods to VAT registered customers in other member states of the European Union have not been met (set out in section 4 of Public Notice 725…).

38 The Commissioners rely upon the following:

(i) Magic Transport BV, the freight forwarder, has been shown by Dutch Fiscal authorities to have had residential, rather than business, premises, with no facilities for the receipt, examination or storage for the quantity of mobile phones shown on the Appellant's invoices.

(ii) The owner of Magic Transport BV was arrested and interviewed by the Dutch Fiscal authorities and admitted to fabricating evidence of the arrival of non-existent shipments of goods. He stated that Magic Transport BV falsified CMRs (a consignment note supplied under the Convention relative au Contrat de Transport International de Merchandises par Route – Convention on the Contract for the International Carriage of Goods by Road) in return for payment, and that all consignments for which he stamped CMR notes were part of a carousel fraud scheme to defraud the UK tax authorities.

(iii) The judgment dated 2 July 2008 of Groningen Court, Full Bench (Criminal Division), North Fraud Division, Amsterdam, the Netherlands, in the criminal case against the owner of Magic Transport BV, Harmen Klaas van den Bor, found Mr Van den Bor guilty of the following criminal offences:

> "*Participating in a criminal organisation whose purpose is to commit crimes."*

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[28] Annex 1-B(4).

[29] Annex 1-C(4).

[30] Annex 1-D(1).

[31] See paragraph 5 above.

"Acting as a co-perpetrator in forgery, committed several times"

"Money laundering, committed several times".

(iv) Easy Trading Communications SL, a customer of [Infinity], was deregistered by the Spanish fiscal authorities with effect from 18 November 2005. It had been operating from a lawyers' bureau, which was incompatible with the operation of a wholesale business.

(v) Scopex BV, a customer of [Infinity], was deregistered with effect from 1 December 2005 by the Dutch authorities. Its company address was a trust office appears to have been used as a mailbox only.

(vi) A further customer of [Infinity] is Universal Handels. Information received from the authorities in Austria states that the supplies invoiced to several European customers by the Austrian company did not take place. The goods were sent back to Great Britain directly.

(vii) There are a number of discrepancies and inconsistencies regarding the dates of the pick-up of goods, the journey times of the alleged freight haulage and the invoices and CMRs supplied which do not support the Appellant's claims that the relevant goods were in fact removed or exported from the UK.

(viii) One example of this is that in relation to the Appellant's invoice 2175, the CMR is stamped and dated by Magic Transport BV in the Netherlands 3 days before the goods are transported from the UK.

39 Accordingly, the Commissioners do not consider that [Infinity] acted in good faith and/or that they took every reasonable measure to ensure that their supply did not lead to their participation in tax evasion, in accordance with the ECJ decision in *Teleos plc and Ors v. The Commissioners of Customs and Excise*, C-409/04."

(2) Infinity's contentions

54. Infinity's contentions, both before the FTT and before us, were predicated on an argument that the test for refusing to allow zero-rating – articulated in Case C-409/04, *Teleos v. The Commissioners of Customs and Excise* ("*Teleos*")[32] – was the same as that in *Kittel*, which test we have described in paragraphs 45 to 47 above. As will be seen, these tests are framed in quite similar terms. The question which arises from Infinity's contention is where the burden of proof lies. In *Kittel*, it is clear and uncontroversial that the burden rests on the taxing authority, here the Commissioners. That, Infinity contended, was also the case where the taxing authority refused to allow zero-rating. It was for the taxing authority to show that the taxpayer could not satisfy the requirements set out in *Teleos.*

55. More specifically, Infinity's contentions were essentially as follows

[32] The decision of the CJEU is reported at EU:C:2007:548. The earlier opinion of the Advocate General, on which the CJEU relied, and which we cite extensively below, is at EU:C:2007:7.

(1) The effect of *Teleos* was that unless Infinity could be shown to have actual or constructive knowledge of fraud, it was entitled to zero-rate the relevant supplies regardless of whether the goods actually left the United Kingdom and regardless of whether the relevant export documents were false.

(2) The burden of proof in relation to any allegation of actual or constructive knowledge of fraud lay on the Commissioners, and not on Infinity.

(3) The Commissioners' plea , culminating in paragraph 39 of its statement of case (which we have quoted at paragraph 53 above), was an improper pleading, because it did not unequivocally assert that Infinity had actual or constructive knowledge of fraud.

(3) The decision of the FTT

56. As we have described, the FTT rejected Infinity's application. However, it did so on a nuanced basis. The FTT accepted Infinity's essential argument that *Teleos* was simply an application of the principle in *Kittel* to zero-rating. In short, the FTT accepted Infinity's prime contention, which was that the test in *Teleos* was materially the same as the test in *Kittel*, with the result that the burden of proof rested on the Commissioners.

57. However, considering the Commissioners' statement of case and the evidence adduced by the Commissioners,[33] the FTT did not consider that the Commissioners' case was such that it ought to be struck out pursuant to Rule 8(7) of the FTT Rules. In short, the FTT considered that – even accepting that the burden of proof rested on the Commissioners – that burden was capable of being discharged, such that the substantive appeal ought to be heard.

(4) Determination of the Zero-Rating Appeal

(a) Introduction

58. We consider that the FTT was correct to refuse Infinity's application to bar the Commissioners from participating in the Zero-Rating Appeal and that Infinity's appeal against that decision must, accordingly, fail. However, we consider that the FTT fell into error in equating *Teleos* to *Kittel* and that Infinity's appeal should have been dismissed on that ground. Had the burden of proof been on the Commissioners, we agree with the FTT that the Commissioners would have been capable of discharging that burden; however, the burden rested not on the Commissioners but on Infinity.

59. We begin with a consideration of the decision in *Teleos*.

[33] We have set out the relevant parts of the Commissioners' statement of case in paragraph 53 above. The evidence of the Commissioners is also summarised in paragraph 5 above.

(b) The decision in Teleos

60. Teleos supplied mobile telephones to a Spanish company. The telephones were to be removed from the United Kingdom to either France or Spain. Teleos placed the goods at the purchaser's disposal at a warehouse in the United Kingdom, with the purchaser being responsible for arranging their transport to the specified Member State. Teleos received stamped and signed CMRs, which were prima facie valid evidence that the telephones had reached the specified destinations.

61. Initially, the Commissioners accepted those documents as evidence that the goods had been exported from the United Kingdom and that the supplies were zero-rated. Repayments of input tax were made accordingly.

62. After carrying out subsequent checks, the Commissioners discovered that, in certain cases, the destination stated on the CMRs was false, that the carriers did not exist or did not transport mobile telephones and/or that the registration numbers were of non-existent vehicles. The Commissioners concluded that the telephones had never left the United Kingdom and assessed Teleos to VAT, reversing the repayments of input tax that had been made.

63. The Commissioners acknowledged that Teleos was in no way involved in any fraud. There was no reason for Teleos to have doubted the information contained in the CMRs or the authenticity of the CMRs. Teleos had made diligent and detailed inquiries to establish the legitimacy of the purchaser, and no additional relevant evidence could have been obtained in practice.

64. One of the questions referred to the Court was as follows:

"In the relevant circumstances, where a supplier acting in good faith has tendered to the competent authorities in his Member State, after submission of a repayment claim, objective evidence which at the time of its receipt apparently supported his right to exempt goods under Article 28c(A)(a) and the competent authorities initially accepted that evidence for the purpose of exemption, in what circumstances (if any) may the competent authorities in the Member State of supply nevertheless subsequently require the supplier to account for VAT on those goods where further evidence comes to their attention that either (a) casts doubt upon the validity of the earlier evidence or (b) demonstrates that the evidence submitted was materially false, but without the knowledge or the involvement of the supplier?"

65. We begin with the opinion of Advocate General Kokott. As the Advocate General observed this question was "concerned with the problem of what the legal consequences for the tax treatment of a supply are if it subsequently transpires that the documents and the reality do not correspond".[34] The Member States intervening in the proceedings were unanimously of the view that the taxpaying supplier must always prove that the conditions for zero-rating have in fact been met. If the evidence which initially appeared valid turned out, on verification, to be false, the necessary proof would not have been

[34] At [19] of her opinion.

provided and so zero-rating should be retrospectively refused.[35] The Advocate General pointed out that because zero-rating was an exemption from VAT by way of derogation, it was to be construed narrowly.[36] That was the logic behind giving Member States "that margin for manoeuvre" in laying down the formal requirements for proving that the conditions for exemption have been met.[37]

66. However, the practicalities of obtaining such proof must be taken into account:

"66. While frontier controls still existed, taxable persons could rely in proving the export of the supplied goods on the documents issued by the customs authorities. After the disappearance of the internal frontiers, taxable persons no longer have this particularly reliable means of proof at their disposal. Instead, proof that goods were taken across the frontier can in general be provided henceforth only by the declarations of private parties.

67. Particularly suitable for that purpose is a consignment note drawn up in accordance with the provisions of the Convention on the Contract for the International Carriage of Goods by Road (CMR) and on which the recipient has noted receipt of the goods in another Member State."

67. Where an apparently valid and reliable CMR subsequently turned out to be false, one option would be to retrospectively deny zero-rating, as the Member States contended would be appropriate.[38] However, the Advocate General reached the view that this would lead "to a disproportionate burdening of the supplier and thus to an obstacle to the free movement of goods".[39] While it would meet the objective of preventing loss of tax revenue through criminal behaviour, it would lead to an unreasonable allocation of risk between the supplier and the revenue authority in relation to the criminal conduct of a third party, which would offend the principle of proportionality.[40] In delineating the risk to be borne by the supplier in such a situation, the supplier should be able to avoid a retrospective denial of zero-rating provided certain precautions were taken:

"75 Certainly the supplier is under an obligation to do all in his power to ensure that the intra-Community supply is properly carried out. If, by contract, he leaves the transport of the goods to another Member State to the acquirer, he must — as stated in the explanations accompanying the first question — in certain circumstances bear the consequences of non-performance of that obligation by the acquirer.

[35] Opinion at [61].

[36] Opinion at [63].

[37] Opinion at [64].

[38] Opinion at [71].

[39] Opinion at [72].

[40] Opinion at [74].

76 The seller must also satisfy himself of the seriousness of his business partner. The objective of preventing tax evasion justifies heavy requirements being involved in fulfilling that obligation. It is for the national court to decide whether the supplier has fulfilled it."

68. The Advocate General struck the balance between these competing interests as follows:[41]

"If the supplier, acting in good faith, presents objective proofs that the goods supplied by him have left the State of origin and the authorities of that State thereupon exempt the supply from tax in accordance with Article 28c(A)(a) of the Sixth Directive, payment of the tax cannot be retrospectively demanded from the supplier in the circumstances of the main dispute in this case if it turns out that the proofs presented contained false information but the supplier neither knew nor could have known anything of it. That does, however, apply only where the supplier has done everything in his power to ensure the proper application of the provisions on VAT."

69. The CJEU closely followed the Advocate General's opinion in its judgment. However, it might be said that the CJEU's formulation of the balance between the competing interests of revenue authority and taxpayer was framed slightly differently, with a more explicit requirement on the supplier to avoid participation in tax evasion. The relevant passage from the judgment is as follows:

"63. Since it is no longer possible for taxable persons to rely on documents issued by the customs authorities, evidence of intra-Community supplies and acquisitions must be provided by other means. Whilst it is true that the regime governing intra-Community trade has become more open to fraud, the fact remains that the requirements for proof established by the Member States must comply with the fundamental freedoms established by the EC Treaty, such as, in particular, the free movement of goods.

64. In that regard, it is also important to point out that, under Article 22(8) of the Sixth Directive, the Member States may impose the obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

65. Moreover, according to the Court's settled case-law, which is applicable to the main proceedings by way of analogy, it would not be contrary to Community law to require the supplier to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (see, as regards 'carousel' type fraud…

66. Accordingly, the fact that the supplier acted in good faith, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that supplier can be obliged to account for the VAT after the event.

67. By contrast, as the Commission observes, once the supplier has fulfilled his obligations relating to evidence of an intra-Community supply, where the contractual obligation to dispatch or transport the goods out of the Member State of supply has not been satisfied by the purchaser, it is the latter who should be held liable for the VAT in that Member State.

[41] Opinion at [86].

68. The reply to the third question referred must therefore be that the first subparagraph of Article 28c(A)(a) of the Sixth Directive is to be interpreted as precluding the competent authorities of the Member State of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for VAT on those goods where that evidence is found to be false, without, however, the supplier's involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion."

70. Thus, the proposition established by *Teleos* is that a supplier may retain the benefits of zero-rating which subsequent discoveries have shown not to satisfy the legislative requirements if, in the words of the CJEU, the supplier can demonstrate that the supplier took "every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion".

71. Although the burden of proof is not expressly mentioned by either the Advocate General or the CJEU, we regard it as clear from their reasoning that the burden rests on the supplier and not on the taxing authority. That is because the supplier's ability to hold onto a credit that is not objectively justified was seen – both by the Advocate General and CJEU – as a derogation from what ought, ordinarily, to be the case. In short, *Teleos*, correctly understood, amounts to a defence to what would otherwise be a justifiable claim on the part of the taxing authorities to deny zero-rating to the supplier and to recover the tax underpaid.

72. Two further points should be made. First, it is clear from the decision of the CJEU in *Mecsek-Gabona Kft v Memzeti Ado Foigazgatosaga* (Case C-273/11 [2013] STC 171) that an entitlement to zero-rating can be denied on the basis of the doctrine in *Kittel*, with the burden of establishing such a denial resting on the taxing authorities. Second, *Teleos* is relevant only to a situation where the evidentiary requirements for zero-rating are apparently satisfied within the applicable time limits but it subsequently transpires that those requirements were not met. The burden of proving that the relevant requirements are satisfied within the applicable time limits rests, in the usual way, on the taxpayer.

(5) Disposition

73. We do not consider that *Kittel* and *Teleos* can be equated. *Kittel*, as we have described, is relevant where the existence of a supply has been established, such that the right to deduct input tax on the part of the supplier exists, but where, nevertheless, in view of the supplier's actual or constructive knowledge of a fraud on the revenue authority, it is appropriate that the right to deduct input tax be removed. Since this is, in effect, a derogation from the taxpayer's entitlement, it is easy to see why the burden of proof must rest on the taxing authority.

74. By contrast, where an entitlement to zero-rate does not strictly exist because, by reference to the objective circumstances, supplies did not leave the Member State of origin for another Member State, one can see a strong case for saying that the tax underpaid should be paid, whatever the supplier's understanding. That was recognised

by both the Advocate General and the CJEU in *Teleos*. However, both the Advocate General and the CJEU considered that the strict legal position should be subject to what we call a defence, where the supplier can demonstrate that the supplier took "every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion".

75. We consider that it is an essential part of the CJEU's reasoning that the burden of proof rests on the supplier in this regard, and that this is an essential difference between *Kittel* and *Teleos*.

76. Accordingly, we affirm the decision of the FTT not to bar the Commissioners from participating in the Zero-Rating Appeal, and Infinity's appeal is dismissed. However, we do so for reasons different to those articulated by the FTT.

F. CONCLUSIONS AND DISPOSITION

77. For the reasons we have given:

(1) The Invalid Invoice Appeal is allowed. The Commissioners thus succeed in their appeal.

(2) The Zero-Rating Appeal is dismissed. Infinity thus fails in its appeal. Although we have concluded (differing from the FTT) that the burden of proof, in zero-rating cases, rests on the supplier and not on the revenue authority, we should stress that we do not disagree with the FTT's assessment that even if the burden of proof was reversed, this would not be a case where the Commissioners' statement of case should be struck out.

MR JUSTICE MARCUS SMITH

JUDGE THOMAS SCOTT

Release date: 30 December 2019

ANNEX 1

RELEVANT LEGISLATIVE PROVISIONS

A. SIXTH COUNCIL DIRECTIVE OF 17 MAY 1977 ON THE HARMONISATION OF THE LAWS OF THE MEMBER STATES RELATING TO TURNOVER TAXES – COMMON SYSTEM OF VALUE ADDED TAX: UNIFORM BASIS OF ASSESSMENT (77/388/EEC)

(the "Sixth Directive")

(1) Article 10: Chargeable event

…

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed…

(2) Article 17: Origin and scope of the right to deduct

1. The right to deduct shall arise at the time the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person…

(3) Article 18: Rules governing the exercise of the right to deduct

1. To exercise his right to deduct, the taxable person must:

(a) in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with Article 22(3);…

(4) Article 22: Obligations under the internal system (as amended by Council Directive 2001/115/EC of 20 December 2001)

…

3.

(a) Every taxable person shall ensure that an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party, in respect of goods or services which he has supplied or rendered…

…

(b) Without prejudice to the specific arrangements laid down by this Directive, only the following details are required for VAT purposes on invoices issued under the first, second and third subparagraphs of point (a):

…

—the quantity and nature of the goods supplied or the extent and nature of the services rendered;

B. THE VALUE ADDED TAX ACT 1994

("VATA")

(1) Section 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 purpose of any business carried on or to be carried on by him.

…

(6) Regulations may provide –

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

(2) Section 25: Payment by reference to accounting periods and credit for input tax against output tax

(1) A taxable person shall –

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

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

(3) Section 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 subsection (2) below...

(4) Section 30: Zero-rating

(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section –

(a) no VAT shall be charged on the supply: but

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

…

(8) Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where –

(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both –

(i) the removal of the goods from the United Kingdom; and

(ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in

relation to that member State, to the provisions of section 10; and

(b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.

C. THE VALUE ADDED TAX REGULATIONS 1995

(the "VAT Regulations")

(1) Regulation 13

(1) Save as otherwise provided in these Regulations, where a registered person –

(a) makes a taxable supply in the United Kingdom to a taxable person, or

(b) makes a supply of goods or services other than an exempt supply to a person in another member State, or

(c) receives a payment on account in respect of a supply he has made or intends to make from a person in another member State,

he shall provide such persons as are mentioned above with a VAT invoice (unless, in the case of that supply, he is entitled to issue and issues a VAT invoice pursuant to section 18C(1)(e) of the Act and regulation 145D(1) below in relation to the supply by him of specified services performed on or in relation to goods while those goods are subject to a fiscal or other warehousing regime).

(2) The particulars of the VAT chargeable on a supply of goods described in paragraph 7 of Schedule 4 to the Act shall be provided, on a sale by auction, by the auctioneer, and, where the sale is otherwise than by auction, by the person selling the goods, on a document containing the particulars prescribed in regulation 14(1); and such a document issued to the buyer shall be treated for the purposes of paragraph (1)(a) above as a VAT invoice provided by the person by whom the goods are deemed to be supplied in accordance with the said paragraph 7.

(2) Regulation 14

(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) an identifying number,

(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,

…

(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,

…

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

(m) the unit price.

(3) Regulation 29

"(1) Subject to paragraphs (1A) and (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;

…

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct.

(4) Regulation 134

Where the Commissioners are satisfied that –

(a) a supply of goods by a taxable person involves their removal from the United Kingdom,

(b) the supply is to a person in another member State,

(c) the goods have been removed to another member State, and

(d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A of the Act, for VAT to be charged by reference to the profit margin on the supply,

the supply, subject to such conditions as they may impose, shall be zero-rated.

D. PUBLIC NOTICE 725

(1) Paragraph 4.3: When can a supply of goods be zero-rated?

The text in this box has the force of law.

A supply from the UK to a customer in another EC Member State is liable to the zero-rate where:

You obtain and show on your VAT sales invoice your Customer's EC VAT registration number, including the 2-letter country prefix code, and

The goods are sent or transported out of the UK to a destination in another EC state, and

You obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4.