



**TC02053**

**Appeal number: TC/2010/01326**

*VALUE ADDED TAX – incorrect self-billed invoice – whether liability for understated tax is on the customer or the supplier – held it is on the supplier absent a notice under section 29 VATA – whether the assessment for the understated tax made on the supplier could be successfully appealed against on the basis that HMRC should have (but did not) exercise their power to serve notice under section 29 – held it could not – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GEMINI RITEWAY SCAFFOLDING LIMITED                      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN WALTERS QC**

**Sitting in public at Bedford Square, London on 1 November 2011**

**A Tymkow, Finance Director, and J. Hughes, Brewers, Chartered Accountants,  
for the Appellant**

**David Yates, Counsel, instructed by the Solicitor for HM Revenue and Customs,  
for the Respondents**

## DECISION

5 1. The appellant, Gemini Riteway Scaffolding Limited (“Gemini”), appeals against an assessment to output VAT raised in respect of VAT period 01/08 in the sum of £17,912 with interest. The relevant Notice of Assessment was issued by the respondent Commissioners (“HMRC”) on 22 September 2009.

10 2. This sum is the VAT content (7/47) of consideration of £146,000 received by Gemini from Haymills Contractors Limited (‘Haymills’), the main contractor in a construction project whereby a building of buildings intended for use solely as residential accommodation for students (a hall (halls) of residence) at Sussex University was/were being constructed by Haymills.

15 3. The supply by Gemini to Haymills for this consideration was a supply of scaffolding, by which is meant a supply of the hire of scaffolding and of the services of bringing the scaffolding to the construction site, erecting it and eventually dismantling and removing it.

4. About a month before the assessment, which is appealed against, was issued – on 13 August 2009 – Haymills had gone into administration.

20 5. I heard oral evidence from Mr Tymkow, Gemini’s finance director, and from Officer Phil Jemson, who was HMRC’s officer in charge of the case. There was also a bundle of documents before me.

6. From the evidence I find the following facts.

25 7. Gemini was subcontracted to supply scaffolding for two halls of residence construction projects, one at the University of Sussex (for which Haymills was the main contractor) and one at the University of Surrey (for which J.B. Leadbitter & Co. Limited (“Leadbitters”) was the main contractor).

8. Self-billing arrangements were in place in relation to both contracts. The main contractors, Haymills and Leadbitters, raised invoices on behalf of Gemini and sent those invoices to Gemini.

30 9. On 4 December 2007, Officer Jemson visited Gemini and found out that Gemini had not accounted for output VAT on supplies it had made to Haymills and Leadbitters, because neither Haymills nor Leadbitters had included VAT in the self-billed invoices which they had respectively issued to Gemini.

35 10. This was a highly unusual circumstance for Gemini, because Gemini’s practice when issuing its invoices is to include VAT in every invoiced amount. In relation to the contracts with Haymills and Leadbitters, Gemini had originally issued invoices including VAT, but then Haymills and Leadbitters had sent back self-billed invoices in response, but omitting VAT.

11. Mr Tymkow, for Gemini, assumed that Haymills and Leadbitters had been correct to omit VAT in their self-billed invoices and, by the issue of credit notes, credited them the VAT originally charged on the invoices which it (Gemini) had issued.

5 12. After Officer Jemson noted this matter at his visit on 4 December 2007, he advised Gemini (mistakenly) by a letter dated 25 July 2008, that although hire of scaffolding must be standard rated, supplies of the erection and dismantling of scaffolding should be zero-rated where the project was the construction of a hall of residence for students. He advised that a fair and reasonable apportionment was required.

10 13. This was mistaken advice because zero-rating is only available for construction services where such services are supplied 'in the course of construction' (item 2, Group 5, Schedule 8, Value Added Tax Act 1994 ("VATA")). It is only the main contractor who makes supplies 'in the course of construction'. A sub-contractor, in the position of Gemini does not make supplies 'in the course of construction' and therefore as a matter of law all of its supplies of scaffolding ought to attract VAT at the standard rate.

15 14. Mr Tymkow, for Gemini, responded to Officer Jemson's letter of 25 July 2008 stating that Haymills had paid to Gemini in respect of the Sussex University contract a total of £146,000 with no VAT added, and Leadbitters had paid to Gemini in respect of the Surrey University contract a total of £432,700 with no VAT added. He proposed an apportionment of 15% of those amounts to the hire of scaffolding, from which it would follow that VAT would be due in respect of the Haymills contract in the amount of £3832.50 and in respect of the Leadbitters contract in the amount of £11,358.38. Mr Tymkow added:

25 'I would not be happy to expose Gemini Riteway to this liability without your support in explaining to these clients what specifically the rules are, as I am certain Companies of their size and market standing would research these issues carefully before deciding to pay us no VAT at all.'

30 15. On 30 July 2008, Officer Jemson raised assessments (allocated to the 01/08 VAT period) in these amounts in response.

35 16. Mr Tymkow, for Gemini, responded that he considered that HMRC should be pursuing Haymills and Leadbitters directly for the VAT 'as clearly we cannot be liable for their non-payment'. Alternatively, he offered to raise additional invoices for the assessed VAT 'providing they are issued via [HMRC's] office with an accompanying letter explaining the situation from HMRC's standpoint'.

40 17. Officer Jemson replied stating that the responsibility for determining the VAT liability on its own supplies rested with Gemini, and suggesting that Gemini issue VAT-only invoices to Haymills and Leadbitters. Officer Jemson offered to discuss the VAT liability with Haymills and Leadbitters if necessary and allowed Mr Tymkow to pass on his details so that he could be contacted directly.

18. A VAT-only invoice was raised by Gemini against Haymills, who paid it (total £3,832) and Gemini passed the payment on to HMRC on 23 September 2008.

19. Similarly, a VAT-only invoice was raised by Gemini against Leadbitters. At first, it was not paid. Leadbitters sent to Gemini (who forwarded it to HMRC) a copy of the zero-rating certificate which it had received from the University of Surrey in relation to the project and argued that Gemini's supply should also be zero-rated.

20. On receipt of the zero-rating certificate, Officer Jemson realised the mistake of requiring VAT to be accounted for by Gemini only in relation to the hire of the scaffolding. He wrote to Mr Tymkow on 18 November 2008 to say that he had been 'under the impression that Gemini was acting as a main contractor and not a subcontractor as is clearly the case'. He concluded that the whole amount invoiced by Gemini to Haymills and Leadbitters attracted VAT, which would lead to the assessment of additional amounts of £17,912 in relation to Haymills, and £53,086 in relation to Leadbitters.

21. Officer Jemson pointed out in his letter that 'as the liability of the main contractor's supplies are taxable, albeit at the zero-rate, they should be able to recover any tax charged by Gemini as input tax, subject to the normal rules'. He reaffirmed that he was happy to discuss the matter with the main contractors.

22. On 27 April 2009, Officer Jemson wrote to Mr Tymkow saying that he understood that the main contractors on the University of Surrey contract (Leadbitters) had now paid the correct amount of VAT to Gemini. (This appears to have followed from a visit by HMRC to Leadbitters.) The assessed amount of £17,912 relating to the Haymills contract (the University of Sussex) was however still outstanding.

23. Mr Tymkow replied on 7 May 2009 saying that a VAT payment had been received from Leadbitters and that it would be accounted for in Gemini's VAT return for the VAT period 09/09.

24. It appears that no issue remains between HMRC and Gemini in relation to the Leadbitters (University of Surrey) contract.

25. However, Officer Jemson continued to write to Gemini regarding the VAT due in relation to the Haymills (University of Sussex) contract. In his letter dated 9 July 2009, he advised Mr Tymkow of the provisions of section 29 VATA, as follows:

'You have not provided me with any information to enable me to reconsider my view that tax is due on this supply, see my letter of 18 November 2008, and you may issue a VAT-only invoice to Haymills. Alternatively there is a specific provision to take into account the situation where tax is under-charged on a self-billed document and this is detailed below:

**VAT Act 1994**

**Invoices provided by recipients of goods or services**

**29. Where-**

(a) a taxable person (“the recipient”) provides a document to himself which purports to be an invoice in respect of a taxable supply of goods or services to him by another taxable person; and

(b) that document understates the VAT chargeable on the supply

5 the Commissioners may, by notice served on the recipient and on the supplier, elect that the amount of VAT understated by the document shall be regarded for all purposes as VAT due from the recipient and not from the supplier.

10 The purpose of this legislation is to ensure that a self-billing trader accepts responsibility for the correct tax liability of the supplier to which his invoice relates. The issue of a notice to both the customer and the supplier should ensure that only the customer would account for the VAT.’

26. However, in answer to a chasing letter dated 27 August 2009 from Officer Jemson, Mr Tymkow wrote (on 2 September 2009) that he had not received Officer Jemson’s letter on 9 July 2009. In his letter of 2 September 2009, Mr Tymkow informed Officer Jemson that Gemini had not issued a VAT-only invoice to Haymills  
15 ‘which in the current circumstances of their demise, would be pretty pointless’. (Haymills had gone into administration (as noted above) on 13 August 2009.)

27. Officer Jemson informed Mr Tymkow in his letter dated 15 September 2009 that Gemini ‘may be able to adjust the VAT assessed as bad debt relief on a subsequent VAT return’.

20 28. On 24 September 2009, Mr Tymkow wrote to HMRC to say that Gemini wished to appeal against the assessment in respect of the unpaid VAT relating to the Haymills contract. He stated that Gemini had been advised that pursuant to VAT Notice 700/62 the self-biller (Haymills) was responsible for the correctness of the self-billing. Gemini’s responsibility was to account for the VAT remitted by the self-biller. He  
25 stated that Gemini believed that the cash flow and administrative burden of seeking bad debt relief in the future after paying the assessment ‘cannot be a justifiable intention under the tax payer’s charter’.

29. On 6 October 2009, a letter was written by HMRC (Officer Janet Taylor, Integrated Team Manager, Local Compliance, Large & Complex Businesses) in  
30 response to Gemini’s stated intention to appeal against the assessment. This letter was an attempt to clarify HMRC’s position for Gemini’s benefit. It also informed Gemini of the avenues of appeal open to it.

30. In particular, Officer Taylor’s letter pointed out that while Haymills had been in error in not paying VAT in relation to Gemini’s invoice, Gemini had also been in  
35 error in issuing a VAT credit note to Haymills. The substance of her advice was as follows:

40 ‘Furthermore, self-billing does not change the nature or direction of a supply. It is merely a facilitation measure and does not alter the fact that tax is due on a taxable supply. I appreciate that paragraph 2.2 of Notice 700/62 Self Billing states that the recipient of the supply is responsible for ensuring that the self-billed invoice carries the correct VAT liability, **but this does not absolve Gemini Riteway from its obligation to ensure the accuracy of the self-billed invoices from Haymills in the first place** [original emphasis]. This was the decision

reached in the case of *TA Landels & Sons Ltd* (MAN/78/52), which involved circumstances very similar to that of Gemini Riteway. In this case, the main contractor and subcontractor had also been involved in a self-billing arrangement on a taxable supply. As with your case, the main contractor had excluded VAT from the payments made and the main contractor had gone into liquidation before it could reimburse the tax charged on the supply. The Tribunal found that the fact that self-billing had been used did not absolve the sub-contractor from its obligations to ensure the accuracy of the documents received from the main contractor.’

31. On 14 October 2009, Mr Tymkow asked HMRC to conduct a review. Officer Taylor wrote again to Mr Tymkow apologising for Officer Jemson’s initial error in advising that VAT was only due on the hiring element of Gemini’s supplies, but reaffirming the assessment.

32. On 11 December 2009, a review letter was sent to Gemini by Officer Miss C. Cosier, the Review Officer at HMRC Local Compliance and Reviews. She upheld Officer Jemson’s assessment. She referred to the *TA Landels & Sons Ltd.* and *Edwin Craig Shearer* tribunal decisions to the effect that the fact that self-billing had been used did not absolve the supplier from its obligation to ensure the accuracy of the payment certificates from its customer.

33. As Mr Yates, for HMRC, pointed out, a self-billed invoice can, pursuant to reg. 13(3) VAT Regulations 1995, be treated as the VAT invoice required to be provided by the supplier, but there is nothing in that regulation – or in any other provision of which the Tribunal is aware – which transfers the normal liability for VAT on a supply from the supplier to the customer because a self-billed invoice has been issued. The supplier is relieved of his normal obligation to issue a tax invoice, but that is all.

34. It is, furthermore, quite clear that Gemini’s supplies to Haymills were taxable at the standard rate. The zero-rating provisions of Group 5, Schedule 8, VATA do not cover them because (among other reasons) Gemini’s supplies were not made ‘in the course of construction of’ the relevant building(s).

35. I am in respectful agreement with the decisions of the tribunals which decided the appeals of *TA Landels & Sons Ltd.* and *Ewan Craig Shearer.* There is, in my view, no doubt that the assessment appealed against was correctly made, as a matter of law.

36. At the hearing, I explored the possibility of Gemini pursuing a public law argument in the appeal to the effect that they were unfairly penalised by the assessment because of HMRC’s conduct – which means, in context, Officer Jemson’s conduct – and, in particular, had an enforceable legitimate expectation that HMRC would exercise their powers under section 29 VATA to pursue Haymills, and not Gemini, for the VAT in issue.

37. Any such argument would raise jurisdictional issues, because it is unclear whether this Tribunal can consider or give effect to such public law arguments on an appeal against an assessment.

38. I invited further submissions on these points to be made in writing after the hearing.

39. An aspect of the matter which concerned me was that whereas in the circumstances of this case, Gemini's obligation to pay the output VAT would result in its having to find £17,912 VAT from its own resources without any real possibility of reimbursement from Haymills, if Haymills had accounted for the VAT to Gemini, it would itself have (I assume) be able to take credit for the VAT so accounted for as input tax in its own dealings with HMRC. In that sense, HMRC's action against Gemini will secure for HMRC an adventitious benefit, which, at first blush, seems unfair in all the circumstances.

40. However, I have concluded that this is, unfortunately for Gemini, merely an aspect of the VAT system which both Gemini and HMRC are bound to operate. In particular, I have concluded that there is no evidence to support the proposition that HMRC could or should be obliged to exercise their powers under section 29 VATA to pursue Haymills and not Gemini for the VAT in issue. Section 29 confers a power on HMRC to 'elect' that the amount understated shall be regarded as VAT due from the customer rather than the supplier. Although considerations of fairness to the supplier (and the customer) undoubtedly ought to enter into HMRC's consideration as to whether to exercise this power, that can only be part of their consideration which is, overall, the management and protection of the revenue which the VAT system provides.

41. In their further written submissions after the hearing (dated 22 November 2011), Brewers, Chartered Accountants, for Gemini, argue that HMRC's 'repeated assurances that they would contact Haymills on 7 August 2008, 21 August 2008 and 18 November 2008' made it 'reasonable to assume' that HMRC had assumed responsibility to notify Haymills that it should accept responsibility for the liability. I reject this submission. All that Officer Jemson was saying in these letters is that he was 'happy to discuss the matter with the main contractors'. This is miles away from agreeing that Haymills and not Gemini should be made liable for the unpaid VAT.

42. Further, they submit that questioning of Officer Jemson at the hearing had established that he had not considered the exercise by HMRC of its powers under section 29 VATA in this case. I accept that this was established.

43. Gemini reasonably complains that Officer Jemson did not consider the exercise of the section 29 VATA powers and also that delay by HMRC in approaching Haymills (as they apparently did successfully in the case of Leadbitters and as Officer Taylor indicated in her letter dated 21 October 2009 would have occurred in the case of Haymills had that company not gone into administration before arrangements for a visit could be made in accordance with HMRC's visiting programme) may well have had the result that a payment of the VAT by Haymills which might have been forthcoming (given that the VAT would have represented input tax in their hands) was not in the event forthcoming.

44. However I consider these factors are simply not weighty enough to impose as a matter of law a positive obligation on HMRC to operate section 29 VATA in this case, where the terms of section 29 VATA clearly repose in HMRC an administrative discretion on the exercise of the relevant powers.

45. In the result, I must dismiss the appeal. I sympathise with Gemini in the predicament they are in. The root cause of it, however, was accepting incorrect self-billing from Haymills, which was a matter for which Gemini was entirely responsible. It would, however, in my view be appropriate for HMRC to recognise their own failings in the case by giving favourable consideration to Gemini in the matter of any interest or penalties attaching to the assessment.

46. 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 findings of this decision notice.

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**JOHN WALTERS QC  
TRIBUNAL JUDGE**

**RELEASE DATE: 14 June 2012**

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