



**TC02362**

**Appeal number: TC/2009/09754**

*VAT – Input Tax – validity of VAT invoices – exercise of discretion by HMRC to allow claim for input tax – whether taxable supply has taken place – whether supplier is taxable person.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SPECIAL METALS AND ENGINEERING LIMITED      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE W D F COVERDALE  
MR M ATKINSON**

**Sitting in public at Leeds on 1<sup>st</sup> August 2011**

**Mr R Barlow, Counsel, for the Appellant**

**Mr B Haley of the Solicitor's office of HM Revenue and Customs, for the Respondents**

## DECISION

5 1. The Appellants Special Metals and Engineering Limited appeal a Value Added Tax Notice of Assessments dated 03.04.2009 in the sum of £66422. The Notice covered those quarterly tax periods referenced 12/06 to 03/08 inclusive and was issued pursuant to S73(2) Value Added Tax Act 1994.

2. The grounds upon which the disputed Assessments were made by HMRC were as follows:

10 1.) The Appellant carries on a business as a dealer in metals from premises in Rotherham and has been registered for Value Added Tax with effect from 01.09.1998 and the registration remains extant.

15 2.) The Appellant was visited on 22.10.2008 by an officer of HMRC in order to verify the return for the period 03/08 which showed a repayment due to the Appellant; it was also wished to verify the accuracy of a recently submitted voluntary disclosure. A further visit was made on 13.11.2008 in order to check the details of the Appellant's suppliers; three of those suppliers gave HMRC cause for concern:

(a) Dowgate Contractors Limited (Dowgate) – (£12941 input tax).

20 It became apparent that this trader was deregistered for VAT with effect from 01.08.2006. Purchase invoices detailing supplies to the Appellant are dated between 21.09.2006 and 26.02.2007. The address on the invoices is shown as Glebe Farm but the trader moved to 17 Palatine Road, Rochdale on 18.11.2005. The appellant did not visit this supplier's premises and dealt with a Steve Burke who apparently now resides in Cyprus. The goods were delivered by the supplier but the appellant is unsure of the method used.

(b) Fiadem Limited (Fiadem) – (£25502 input tax).

30 This trader was deregistered for VAT with effect from 25.06.2008. Purchase invoices detailing supplies to the Appellant are dated between 12.12.2007 and 20.03.2008. The Appellant did not visit this supplier's premises and dealt with a Neil Butcher by telephone. The Appellant could not recall the transport arrangements.

(c) Tachman UK Limited (Tachman) – (£27933 input tax).

35 This trader was deregistered for VAT with effect from 14.02.2008 (as a missing trader) Purchase invoices detailing supplies to the Appellant are dated between 16.03.2007 and 26.02.2008. The Appellant could not recall whether they had visited this supplier's premises and all transactions had been made through a Johnny Tach.

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3.) On 15.01.2009 HMRC wrote to the Appellant advising that attempts to contact the suppliers at (a) to (c) above proved fruitless and no evidence of trading could be found. HMRC further advised that, despite the Appellant holding copy VAT certificates for these suppliers and details of payments, they considered the claims to input tax to be invalid. On 06.05.2009 HMRC requested an explanation as to why, in the case of the Tachman and Dowgate supplies, the payments were split between cash for the net amount on the invoices and cheque for the VAT amount and enquired if there were any delivery notes for the goods and stock records for the goods. Cheques made out to Dowgate and Tachman were cashed through third parties. Initially no reply to these enquiries was received.

3. Essentially the Appellant's grounds of appeal are that the tax was incurred in respect of a legitimate business purpose and the invoices were valid.

4. The law relating to credit for input tax is contained in S24, 25 and 26 Value Added Tax Act 1994. S24(1) provides the definition of input tax:

"S24(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; 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."

S24(6) provides: "Regulations may provide:-

(a) for VAT on the supply of goods or services to a taxable person ... to be treated as his input tax only if and to the extent that the charge for 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."

S25(2) provides: "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 as is due from him."

S26(1) provides: "The amount of input tax 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;

(2)(a) taxable supplies:"

5. Regulation 29(2)(a) of the Value Added Tax Regulations 1995 provides: "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) supply from another taxable person, hold the document which is required to be provided under regulation 13:

(b) to (f) ...

5 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.”

6. Mr Haley, on behalf of HMRC submits that there are two issues before the Tribunal:

1.) Did supplies take place? If they did not there can be no input tax.

10 2.) If there were supplies, are the invoices valid VAT invoices.

7. With regard to the matter of whether supplies took place the Tribunal has heard much evidence about the nature of the Appellant’s business. This is well outlined in the Witness Statement of Martin Barber, the Managing Director of the Appellants who has also given oral evidence today. He presents as a respectable businessman  
15 who has much experience in the scrap metal trade, having spent all his working life in the business. He describes his practices in agreeing to buy metals from vendors, taking delivery, booking the goods into his records, quoting a price and receiving an invoice from the vendor. Most vendors were known to him so he did not routinely check VAT numbers on invoices.

20 8. Some vendors were simply paid by cheque but others preferred to call at the Appellants’ premises and collect a cheque for the VAT and cash for the net amount. These vendors would be dealers and may or may not need cash on the day in order to do further business with other parties.

25 9. Mr Barber goes on to explain that since 2006 he has been requiring sight of copy VAT registration certificates from all suppliers. He was told by another dealer that an officer of HMRC had indicated that the VAT element of invoices should always be paid by cheque so thereafter this is what he did. He gives convincing evidence that this practice is now customary in the trade and this is his explanation for paying his customers part in cash and part by cheque. The Tribunal accepts this  
30 evidence and does not find the need to make further enquiry about that aspect of HMRC’s concerns.

10. Mr Barber says that he paid all three suppliers, Dowgate, Tachman and Fiadem in this way.

35 11. Mr Barber did not visit the stated business of Dowgate because he assumed that nobody would be there during the working day. His efforts to trace their Mr Burke have proved fruitless; the gentleman is now believed to be living in Cyprus. He has known of the Tachman business for many years and knew their Mr John Myers, also known as Mr Tach, as someone well known in the trade. Mr Barber obtained a copy of his VAT Registration certificate but did not visit his premises for the same reason

as stated above. Likewise he obtained a copy of Fiadem's VAT Registration certificate.

12. Mr Barber's case is that he did everything that could reasonably have been expected of him to ensure that these suppliers were bona fide traders and properly registered for VAT. All of his purchases from these dealers were recorded on a contemporary basis in his Inwards Notebook, a copy of which is produced to the Tribunal.

13. HMRC's position has previously been that it is acknowledged that there has been a supply of goods to the Appellants but not necessarily the supply of all the goods that purport to be the subject of the VAT invoices given to the Appellants. That position has not really changed during the hearing of this appeal: Mr Robert Payne, an officer of HMRC, who has given oral evidence to the Tribunal, says that there is still some doubt about whether the transactions took place and he does not accept that the transactions necessarily took place. He evidently remains unsatisfied, beyond reasonable doubt, that the transactions took place. The Tribunal does not accept that is the correct threshold for assessing the evidence in this case: on the balance of probabilities all of the transactions that are the subject of the various invoices in this case did take place. The Tribunal has been assisted in drawing this conclusion by the credible evidence – given on oath – of Mr Barber and the comprehensive Schedule of Transactions that he has produced from his business records.

14. The Tribunal, therefore now focuses upon the validity of the invoices.

15. The Tribunal's attention has been drawn to a document issued by HMRC namely 'Statement of Practice: VAT Strategy – Input tax deduction without a valid VAT invoice.' This addresses the difficulties that can arise (both for business traders and HMRC) from the use of invalid VAT invoices and refers to the initial remedy of returning to the supplier and asking for a valid VAT invoice. If, for some reason, this cannot be done the trader may still be entitled to input tax recovery: in most cases, provided businesses continue to undertake normal commercial checks to ensure their supplier and the supplies they receive are *bona fide* prior to doing any trade, it is likely that they will be able to satisfy HMRC that the input tax is deductible.

16. Paragraph 5 of the Statement of Practice refers to certain conditions:

“5. A business has incurred input tax if the following conditions are met:

- there has actually been a supply of goods or services;
- ...
- the supplier is a taxable person, ie someone either registered for VAT in the UK, or required to be registered;
- the supply is made to the person making the deduction;
- the recipient is a taxable person at the time the tax was incurred; and
- the recipient intends to use the goods or services for his business purposes.

17. Paragraph 6 refers to a discretion that can be exercised by HMRC:

“6. If you are a taxable person, in order to exercise your basic right to deduct input tax, you must hold a **valid VAT invoice**. Without a valid VAT invoice, there is no right to deduct input tax. However, in the absence of such an invoice, you may still be able to make claims for input tax, but these claims are subject to HMRC’s discretion.  
5 This of course assumes that a taxable supply has taken place. Where HMRC question the fact that an underlying supply has taken place, these provisions do not apply.”

18. Paragraph 7 refers to evidence and confirms that HMRC may “consider evidence other than that contained in documents when exercising their discretion.”

10 19. Paragraph 8 refers to the required contents of a valid VAT invoice and will not be recited here.

20. It has already been stated that the Tribunal finds that the taxable supply has been made. The Tribunal now addresses the question of whether, in case the invoices are invalid, HMRC should properly have exercised their discretion and allowed claims for input tax credits. The Tribunal has power to do this pursuant to a  
15 supervisory jurisdiction over the exercise of HMRC discretion.

21. It is HMRC’s case that the three suppliers were de-registered for VAT “with effect from” various dates. The Tribunal needs to ascertain not only the dates when de-registration was effected but also whether the suppliers were ‘required to be registered’ (paragraph 5 of the Statement of Practice).

20 22. Dowgate was evidently deregistered with effect from 01.08.2006 (and indeed apparently in liquidation). The Tribunal will accept that it was deregistered at all material times for present purposes ie in particular it was deregistered at the dates of the supplies to the Appellant. However the level of the transactions with the Appellant clearly indicates that Dowgate was **registrable**, the turnover clearly being above the  
25 VAT threshold for registration (£59,000); the value of the supplies made by Dowgate to the Appellant was £88,942.71 in five months; Dowgate was a taxable person. The Appellants had always dealt with the same person (although there now appears to be some doubt as to identities and there may have been some other person purporting to represent Dowgate); It would not be reasonable to expect the Appellant to travel to  
30 visit Dowgate’s premises; it is concluded that there was no onus on the Appellant to enquire further as to Dowgate’s VAT status.

23. Fiadem was registered for VAT at all material times: the relevant supplies were between 12.12.2007 and 20.03.2008; the company was not deregistered until (with effect from) 25.06.2008; all the supplies were made by it as a registered taxable  
35 person. They were a new customer to the Appellant but known to Mr Barber and referred to him by someone in the trade.

24. Tachman was evidently deregistered for VAT with effect from 14.02.2008; relevant supplies were between 16.03.2007 and 26.02.2008; the only supply that falls outside this period is a supply valued at £7,979.83 – one of the smaller Tachman  
40 invoices – on 26.02.2008 (twelve days after deregistration), all others being within the period of registration.

25. The Tribunal has concluded that in all cases the volume of transactions were such as to entitle the Appellant to assume that the three suppliers were registered because the transactions would have made them registrable. Normal commercial checks were made by the Appellants: VAT Registration certificates were checked at the outset of dealings with their suppliers; they had no reason to believe that there had been deregistrations; there was no onus on the Appellants to enquire further into the status of the suppliers.

26. Furthermore it is apparent that normal commercial arrangements were in place: there has been a satisfactory explanation of the mixed payments of cash and cheques as stated in paragraph 9 above.

27. The position of HMRC has no doubt been influenced by the fact that the three suppliers have not accounted for output tax. There has been a loss to HMRC. This was not to be known to the Appellant and is not the issue before the Tribunal today. The Tribunal accepts that, realistically, the Appellant had no means of knowing that the suppliers had been deregistered at material times.

28. Up to the date of deregistration the VAT invoices from Fiadem and Tachman were valid. The other VAT invoices were invalid but the Tribunal concludes that discretion has not properly been exercised by HMRC on the basis of information available at the date of the decision that has been appealed. An invalid VAT invoice can never truly be validated but this can be done, and is endorsed by the Tribunal, for the purpose of allowing a claim for input tax.

29. This appeal is therefore allowed.

30. As the Tribunal's jurisdiction is supervisory HMRC is directed to review again all of the invoices in question in order to implement the Tribunal's decision.

31. Mr Barlow for the Appellants made no application for costs and no order is made.

32. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**W D F COVERDALE  
TRIBUNAL JUDGE**

**RELEASE DATE: 23 October 2012**

