



**TC02406**

**Appeal number: TC/2010/07181**

*VALUE ADDED TAX – input tax – section 24 VATA 1994 – regulation 29(2) VAT Regulations 1995 – whether there were taxable supplies by taxable persons – whether the appellant in possession of valid VAT invoices to support its input tax claim – discretion as to alternative evidence of the charge to VAT – appeal substantially dismissed but allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**McANDREW UTILITIES LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JONATHAN CANNAN  
MISS SUSAN STOTT FCA CTA**

**Sitting in public at Manchester on 10-12 September 2012**

**Mr Ross Staniforth of Yeomans & Staniforth accountants for the Appellant**

**Mr James Puzey of counsel instructed by the General Counsel and Solicitor of  
HM Revenue & Customs for the Respondents**

## DECISION

### *Background*

1. The Appellant operates in the construction industry as a sub-contractor providing groundwork services on building sites. It has been registered for VAT since 2002. In the course of its business it uses sub-contractors to provide labour, plant and equipment in order to fulfil contracts. This appeal arises out of input tax credits which the appellant has claimed in its VAT returns on payments it claims to have made to sub-contractors who are taxable persons for the purposes of VAT.

2. HMRC conducted an enquiry into the appellant's VAT returns and on 23 July 2010 it made assessments on the appellant totalling £77,529. These assessments related to VAT periods 05/07 to 02/09. On 26 July 2011 HMRC made further assessments in the sum of £11,978 covering periods 05/09 to 02/10. This appeal relates to all the assessments ("the Assessments"). The total sum in issue on this appeal is therefore £89,507 plus interest.

3. We set out the submissions of the parties in more detail below. Put briefly the appellant contends that HMRC ought to have allowed the input tax credits claimed by the appellant and should not have made the Assessments. HMRC contend that:

(1) There were no taxable supplies by the entities named on the invoices relied on by the appellant.

(2) The invoices relied on by the appellant do not comply with the regulations in relation to VAT invoices.

(3) No satisfactory alternative evidence has been produced by the appellant to support the input tax claim.

4. We consider below the law in relation to input tax credit in so far as it affects the issues on this appeal. We then consider the evidence before us and make findings of fact based on that evidence. We then give reasons for our decision.

### *Consideration of the Law*

5. Section 4(1) of the *Value Added Tax Act 1994* ("VATA 1994") provides:

*"VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him."*

6. For these purposes a "taxable person" is defined by section 3(1) VATA 1994 as a person who is or is required to be registered under the Act.

7. Section 24(1) VATA 1994 defines input tax in the following terms:

*"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) ...

(c) ...,

5            *being (in each case) goods or services used or to be used for the purposes of any business carried on or to be carried on by him.”*

8.    Section 24(6)(a) VATA 1994 makes provision for regulations to determine how input tax is to be evidenced:

*“Regulations may provide –*

10           *(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 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...”*

15    9.    Regulations have been made under this provision concerning the documents which will evidence and quantify input tax. They are found in the *Value Added Tax Regulations 1995 (SI 1995/2518)*. Regulation 29 is the relevant provision:

*“(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 –*

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

...

25           *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.”*

10.   Regulation 13 provides that where a registered person makes a taxable supply to a taxable person he shall provide a VAT invoice to that person.

30    11.   Regulation 14 stipulates what particulars must be stated in a VAT invoice. For present purposes we are concerned with the particulars required by the following subparagraphs of regulation 14(1):

(b) *the time of supply*

(d) *the name, address and registration number of the supplier;*

(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 ...

12. There is an issue as to the extent of the particulars necessary to constitute a valid VAT invoice. This does not appear to be the subject of any direct authority. The detailed requirements for a valid VAT invoice are left to individual member states to determine. In *Reisdorf v Finanzamt Köln-West* [1997] STC 180 the ECJ stated at [27]:

10 “Article 22(2) [of the 6<sup>th</sup> Directive] thus requires every taxable person to keep accounts in sufficient detail to permit application of VAT and inspection by the tax authorities. Article 22(8) adds that Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.”

13. We consider that the requirements of regulation 14 are at least in part directed to ensuring that VAT invoices provide sufficient information and detail to enable a meaningful audit of transactions to take place. In particular the information must be sufficient for HMRC to identify the nature and extent of the goods or services supplied and thus be able to verify that the supply took place as described in the VAT invoice.

14. It can be seen from the above provisions that input tax credit is only available where there has been a taxable supply of goods or services. If a supply has taken place but the purchaser holds an invalid invoice, that is an invoice which does not satisfy the requirements of regulation 14, HMRC has discretion to accept alternative evidence “of the charge to VAT”. The discretion also arises where the purchaser does not hold a VAT invoice of any description.

15. We consider that evidence of the charge to VAT is not limited to evidence that a supply took place. It is, in our view, evidence that a particular supply took place in similar detail to that which ought to have been contained in a valid invoice, had one been available. What evidence it would be reasonable for HMRC to expect will depend on the particular circumstances of the case, including for example all the circumstances in which the supply took place and the reason why a valid invoice is not available.

16. In March 2007 HMRC issued a statement of practice in relation to invalid invoices: “VAT Strategy: Input Tax Deduction Without a Valid VAT Invoice”. The statement of practice was intended to explain HMRC’s policy in respect of claims for input tax supported by invalid invoices against a background of increasing fraud involving invalid invoices. The policy outlined in the statement of practice differs according to the nature of the goods or services being supplied. For certain types of goods which are subject to widespread fraud such as mobile phones and excise goods there is a stricter policy in place. This appeal is not concerned with such goods.

17. In the present case HMRC’s policy requires the appellant to “be able to answer most of the questions at Appendix 2 satisfactorily”. It is clear however that this is a very general guide because in addition to a list of specific questions, Appendix 2

states that the list is not exhaustive and additional questions may be asked in individual circumstances. Appendix 1 to the statement of practice sets out a “*Decision Flowchart*” which summarises HMRC’s usual decision making process.

18. In the present case we are concerned with HMRC’s exercise of discretion. It is well established that in such appeals the tribunal has a supervisory jurisdiction. In *Kohanzad v C & E Comrs [1994] STC 968* Schiemann J considered the discretion of HMRC to allow input tax credit in the absence of any VAT invoices. He described the jurisdiction of the tribunal in the following terms:

10                   *“It is established that the tribunal, when it is considering a case where the commissioners have a discretion, exercises a supervisory jurisdiction over the exercise by the commissioners of that discretion. It is not an original discretion of the tribunal; it is one where it sees whether the commissioners have exercised their discretion in a defensible manner. That is the accepted law in this branch of the court's jurisdiction, and indeed it has recently been decided that the supervisory jurisdiction is to be exercised in relation to materials which were before the commissioners, rather than in relation to later material ...*

15                   *It is, of course, well established that in this type of case, the burden of proof lies on an appellant to satisfy the tribunal that the decision of the commissioners was incorrect.”*

19. The supervisory jurisdiction in cases such as this involves consideration of whether the Commissioners took into account all relevant matters, whether they took into account any irrelevant matter and whether the decision was within the bounds of reasonableness.

20. In *Ellen Garage (Oldham) Ltd v C & E Comrs [1994] VATTR 392* the VAT Tribunal held that where a supplier who had never been registered for VAT made supplies in excess of the registration threshold, the supplier was a taxable person because he was required to be registered. As such the recipient of the supply incurred input tax. However the Tribunal in that case appears to have considered that the trader was therefore entitled to an input tax credit notwithstanding that he did not hold, and indeed could not hold, a valid VAT invoice. It did not consider whether the Commissioners had properly exercised their discretion to require other evidence of the charge to tax in support of the input tax claim.

21. For the reasons given by the tribunal in *Ahmed t/a New Touch v HMRC [2007] UKVAT V20119* we consider that where there is a supply by a taxable person who is unregistered, HMRC still have discretion to require evidence of the charge to VAT as an alternative to a VAT invoice. The factors relevant to the exercise of that discretion will depend on the particular circumstances of the case.

22. Shortly before the hearing of this appeal the CJEU released its judgment in the joined cases of *Mahagében kft (C-80/11) and Péter Dávid (C-142/11)*. In *David*, the taxpayer had contracted to carry out various construction works. There was no doubt

that the works were carried out and the project agent certified completion of those works including the identity of the workers, the location where the works were carried out and the hours worked. Mr David was the subject of a tax inspection and stated that he had used a sub-contractor. However further inspections showed that the sub-  
5 contractor did not have any employees and had produced an invoice from a further sub-contractor which itself did not have any employees. It was not possible to establish which contractor had carried out the work. The Hungarian tax authorities concluded that the invoices relied on by Mr David were fictitious, albeit that they included all the information required of a valid VAT invoice.

10 23. The question referred to the CJEU was whether the *Principal VAT Directive* 2006/112/EC precluded member states from refusing the taxable person a right to deduct input tax on the ground that someone in a chain of suppliers had acted improperly without also establishing that the taxable person was aware of the improper conduct.

15 24. The Court held that in those circumstances the right to deduct could only be refused on the basis of the ECJ case law including *Kittel and Recolta Recycling C-439/04 and C-440/04* pursuant to which it must be established that the person seeking to deduct input tax knew or should have known of the connection with fraud.

20 25. In the present appeal Mr Puzey expressly stated that the respondents did not suggest that the appellant knew or should have known of any connection with fraud in relation to its transactions. However he submitted that the respondents did not need to rely on such an allegation to justify refusal of the input tax in the present case. He distinguished the present case from that of *David* on the basis that:

25 (1) It was not clear in the present case what supplies had been made and where or when they had been made.

(2) In the present case the appellant did not have valid invoices or apparently valid invoices in order to support its claim to input tax credit.

30 26. In *Mehageben* the taxpayer purchased acacia logs and received VAT invoices from its supplier. The supplier accounted for VAT on the supply of the logs to Mehageben which sought to reclaim the VAT it had paid. Following a tax inspection the Hungarian authorities concluded that the supplier had insufficient stock to have supplied all the logs to Mehageben. They concluded that the VAT invoices relied on by Mehageben were not authentic.

35 27. The question for the CJEU in *Mehageben* was whether the *Principal VAT Directive* precluded member states from refusing the taxable person a right to deduct input tax on the ground that he did not have, in addition to an apparently valid VAT invoice, other documents demonstrating that the supply was by a taxable person who had satisfied his own obligations in relation to the declaration and payment of VAT. The Hungarian tax authorities could not require a taxable person seeking to deduct  
40 input tax to satisfy himself that there were no irregularities or fraud on the part of traders earlier in the transaction chain.

28. Mr Puzey distinguished *Mehageben* on the basis that the UK did not impose a requirement on traders to carry out commercial checks. Rather the UK notified traders that if they failed to carry out due diligence checks then they risked being provided with invalid invoices and HMRC not being satisfied with alternative evidence of the charge to VAT. It is not a case of HMRC saying if a trader does not carry out checks then he will not be entitled to input tax credit. In addition, *Mehageben* was also concerned with apparently valid invoices unlike the present appeal.

29. In so far as Mr Puzey distinguished these cases on the facts we address those submissions in our decision below, in the light of our findings of fact.

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### ***Findings of Fact***

30. On behalf of the appellant we heard oral evidence from Mr Sean McAndrew, a director of the appellant, and Mr Lee James. On behalf of the respondents we had witness statements from Ian Blakeley and Emma Robotham which were accepted by the appellant. We heard oral evidence from the following officers of HMRC:

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Linda Davies, Higher Officer  
Malkit Johal Singh, Officer  
Leslie Pitt, Higher Officer  
Barry Bartley, Officer  
Martyn Barnes, Officer

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### ***The Appellant Generally***

31. Mr McAndrew gave evidence. He has been involved in the construction industry since he was 16. He is now 37 years of age. He has been in business as a labour provider since about 1998, firstly as a sole trader and since 2002 through a limited company. The business was managed from his home address until about 2 or 3 years ago when he started using separate office premises. The turnover of the business in 2007 to 2009 was some £4½ to 5 million per annum.

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32. At the time of the supplies we are concerned with the office staff comprised Mr McAndrew's wife and an office junior. Mr McAndrew frankly admitted that the administration was poor. In 2008 an accountant started coming in to the office for 1 or 2 days a week.

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33. The appellant had a large pool of sub-contractors that it used to fulfil contracts. It had no systems in place to reliably measure or record the work done by its sub-contractors. Agreements were verbal and Mr McAndrew kept the details in his head. On occasion where plant was being hired or materials purchased he would obtain a written quote and keep it in a file. Otherwise the appellant would be invoiced and as long as the work was done the supplier would be paid. Sometimes it would be a main contractor who supervised the work and confirmed that it had been done. On other occasions Mr McAndrew would be on site to confirm the work done.

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34. On 21 April 2008 HMRC sent a letter to the appellant warning it that one of its labour providers, Gerrard Diamond, had been de-registered for VAT. The appellant was advised that in order to protect its tax position, and the public revenue, input tax claimed in relation to that trader's VAT number may not be verified. The appellant  
5 was told to ensure that it obtained written verifications of VAT numbers of current and future sub-contractors.

35. Mr Johal of HMRC visited the appellant on 7 August 2008 at the offices of their accountants, Yeomans & Staniforth. Mr McAndrew was present together with his wife Debra McAndrew and Mr Staniforth. At that time the appellant had 5 or 6 full  
10 time employees and operated from Mr and Mrs McAndrew's home. Sub-contractors were sourced by word of mouth or by placing adverts in The Sun newspaper. Mr Johal highlighted the risks of revenue fraud in the sector and advised of the need to keep records. New sub-contractors should be verified through HMRC's national advice service or they could telephone Mr Johal directly in Nottingham. Subsequently  
15 a central number was set up.

36. Mr McAndrew had a basic familiarity with the CIS Scheme for taxation in the construction industry although he said that he was "*a road digger, not an expert*". He claimed that he was not "*100% aware*" of the risk of fraud in the taxation of sub-contractors and labour providers before Mr Johal's visit. He was more concerned with  
20 running the business than in making himself aware of such matters. We were not satisfied with Mr McAndrew's evidence in this regard and we find that Mr McAndrew was deliberately playing down his awareness of the risk of tax fraud in the construction industry.

37. On 22 October 2009 HMRC sent a letter to the appellant outlining the risk of  
25 revenue fraud in the construction industry and enclosing a leaflet on due diligence checks that businesses were encouraged to make. We accept that this leaflet and the need to carry out more formal due diligence checks were not known to Mr McAndrew when the appellant was receiving most of the supplies relevant to this appeal. However we find as a fact that Mr McAndrew must have been aware at all material  
30 times of the need to carry out some degree of commercial checks before dealing with sub-contractors and suppliers of plant and equipment.

38. Mrs Davies of HMRC visited the appellant on 25 February 2010. At this visit Mr McAndrew stated that the appellant had been carrying out verifications of VAT numbers, although he maintained that they had been told they did not need to do so.  
35 At a visit on 1 April 2010 and in response to Mrs Davies' request for documentation, Mr McAndrew produced a folder said to include the due diligence that had been carried out on sub-contractors used by the appellant. In fact it was clear from the contents of the folder that some if not all of the checks had been carried out after the appellant had entered into the transactions.

40 39. The appellant kept no formal records of agreements and pricing for work to be carried out. Mr McAndrew maintained that he kept such details in his head. Given the volume and nature of the work being done we find that hard to believe. Indeed on other occasions in his evidence Mr McAndrew referred to having used a notebook.

We find that he would have maintained some records, however rudimentary, but that he has not retained those records.

5 40. Mrs Davies wrote on 13 April 2010 requesting further evidence to support the input tax claimed, including due diligence material. None was forthcoming and she raised assessments to disallow the input tax claimed on 23 July 2010. The basis of that decision was that there was insufficient evidence that supplies had been made by the persons named on the invoices.

10 41. Mrs Davies told us that at the time she made the decision she did not specifically have regard to the Invalid Invoice statement of practice. Having said that in reaching her decision we are satisfied that she effectively took the same route as that described in the flowchart at Appendix 1 of the statement of practice.

### ***The Input Tax Credits Claimed***

15 42. The invoices in respect of which the appellant claims input tax credit relate to supplies purportedly made by 9 businesses. We deal with each business separately. The tables below, setting out the input tax for which credit is claimed also identify in some cases an invoice date and a payment date. The invoice date refers to the date on the invoices which were provided by the appellant. Where there is no date it signifies that the appellant has not provided an invoice to justify that particular input tax credit. The payment date refers to the date on which the appellant paid the invoices. In some cases the appellant produced at the hearing of the appeal returned cheques and its own bank statements to evidence payment. On the basis of that evidence we are satisfied that payments were made in the amounts and on the dates identified. However we are not satisfied on the evidence that the payments were made for the ultimate benefit of the businesses named on the invoices.

25 43. Where no payment date is recorded, which is the majority of the entries, the only evidence in support of payment comes from an entry in the appellant's Sage accounting system. We accept that the appellant has only sought to establish payment for what appear to be a sample of claims to input tax credit. On the balance of probabilities and in the absence of any allegation of dishonesty against the appellant we find that payments were made in relation to each supply relied upon to support the input tax claims. Again however we are not satisfied that the payments were made for the ultimate benefit of the named businesses.

### ***Midland Staff Exchange ("Midland")***

35 44. The following sums are claimed as input tax in relation to payments said to have been made to Midland:

<b>Invoice Date</b>	<b>Payment Date</b>	<b>Net Invoice Amount £</b>	<b>VAT £</b>
15/03/07		15,050	2,633.75
02/04/07		19,000	3,325.00
30/04/07		33,550	5,871.36
28/05/07		31,450	5,504.00
11/06/07		27,639	4,836.80
08/08/07		28,563	4,998.60
16/09/07		22,511	3,939.57
22/01/08	20/03/08	20,659	3,615.40
			2,594.67
21/12/08		24,214	4,237.61

45. Midland was incorporated on 24 March 2005. It held a certificate for the purposes of the old CIS scheme which had been issued in March 2007 and expired at the end of February 2008. The authorised user was Mr J P Singh. Midland was registered as a sub-contractor for the purposes of the new CIS scheme which came into force on 1 April 2007. Midland was entitled to receive gross payments until 19 March 2008 when its status was changed by HMRC. Thereafter payments to Midland had to be made net of tax.

46. Mrs Davies visited Midland on 27 February 2007 at which time the business premises were boarded up. On 8 March 2007 she took action to deregister Midland for VAT purposes. It was deregistered with effect from 19 December 2005. Mr McAndrew did not check Midland's VAT registration when he employed them in 2007. If he had done so he would have found that they had been de-registered. Midland was dissolved on 17 November 2009.

47. On 8 February 2008 Midland faxed general information about its business to the appellant. It appeared to be, as its name suggested, a labour provider. Mr McAndrew's recollection was that he came into contact with Midland when they answered an advert he had placed in The Sun newspaper. He also said that he dealt with a Mr Singh but could not recall his first name, although he later accepted that it was Mr K Singh. He could not recall what checks he had done on Midland, if any.

48. The appellant did obtain at some stage a photocopy of the CIS certificate referred to above. Mr McAndrew could not recall whether it had been presented in person by Mr K Singh or simply posted to the appellant.

49. The invoices identified above are all photocopies. The invoice dated 21 December 2008 was incorrectly dated. It ought to have been dated 21 December 2007. The description of supplies made on all but one of the invoices was "*Supply of plant labour and materials*" over specific periods of several weeks. The invoice dated 2 April 2007 had a description of "*Services rendered*". Mr McAndrew was unable to say what this invoice related to. He described it as "*a bit of plant and bob mats*". It is not surprising that he could not recall what had been supplied more than 5 years on,

but the appellant produced no records whatsoever to identify what supplies are referred to on the invoices. Mr McAndrew suggested that he may have kept details in a scrap book at the time but he no longer has it. Given the vagueness of his evidence we are unable to accept that any detailed record was maintained.

5 50. The appellant relied on a statement from Mr K Singh dated 31 August 2012. The statement purported to confirm that Midland carried out works for the appellant during 2008 and that it was paid in full by cheque for all works completed. We give that statement little weight. Mr Singh was not available for cross examination. There is no detail of what works were carried out, where or when. There is no information as to when and how payment was made. Indeed most of the invoices refer to work done in 2007 rather than 2008.

15 51. Mr McAndrew said that he had gone to meet Mr Singh to obtain this statement. He had tracked him down with great difficulty and met him to get the statement. Mr McAndrew knew it was Mr Singh because he recognised him as someone he had seen previously. Mr McAndrew said that he did not recall where he had met Mr Singh to obtain the statement. We find that remarkable, given that the statement was dated less than 2 weeks before Mr McAndrew gave his evidence. We do not accept Mr McAndrew's account of the circumstances in which this statement was obtained, indeed the most generous view we can take is that Mr McAndrew was being deliberately evasive in relation to this aspect of his evidence.

***Lakesite Construction Limited ("Lakesite")***

52. The following sums are claimed as input tax in relation to payments said to have been made to Lakesite:

<b>Invoice Date</b>	<b>Payment Date</b>	<b>Net Invoice Amount £</b>	<b>VAT £</b>
08/09/08	30/09/08	10,325	1,806.87
27/10/08		16,324	2,856.70
10/11/08		6,299	1,102.48
22/12/09		21,359	3,737.85

25 53. Lakesite was registered under the CIS scheme to receive net payments with effect from 4 June 2008. It was registered for VAT from at least February 2008 and the appellant produced its VAT return for period 02/08. Lakesite was dissolved on 15 September 2009 and did not exist as a company at the date of the last invoice. However that invoice was incorrectly dated and should have read 22 December 2008.

30 54. Mr Pitt of HMRC visited Lakesite on 18 November 2008 and interviewed Mr Rashpal Singh, a director of Lakesite. Mr Singh said that Lakesite had only four customers and denied making any supplies to the appellant. He said that he had not heard of the appellant. He said that the company only supplied labour and did not

supply plant. Mr Pitt also uplifted invoices issued by Lakesite between December 2007 and October 2008 which did not include any invoices to the appellant.

55. Following the interview Mr Pitt was concerned in relation to some of the invoices Lakesite had used to claim input tax credits and also that it did not appear to have a workforce. He decided to cancel its VAT registration.

56. Lakesite was de-registered in March 2009. Deregistration of Lakesite was backdated to 16 November 2007. Mr Pitt sent the appellant a letter dated 20 March 2009 stating that Lakesite had been de-registered.

57. Mr McAndrew said that he dealt with someone called Ranjit or Rash at Lakesite. He could not recall how he was introduced, it was either by recommendation or through an advert in The Sun. The appellant did seek to verify the sub-contractor status of Lakesite on 30 September 2008. However no other checks were carried out.

58. The invoices produced by the appellant were all photocopies. They all refer to supplies of plant and materials with no supplies of labour. It is not clear whether the plant, such as a JCB and a digger, were supplied with drivers. Mr McAndrew could not recall and had no records. The invoices do show the number of days for which each item of plant was supplied, but without giving dates or hire rates. The location is simply identified as "Rugby" or "Chesterfield". Mr McAndrew said that he would keep the hire rates in his head.

59. The appellant relied on a statement from Mr Rash Pal Singh dated 12 October 2011. The statement purported to confirm simply that Lakesite did work for the appellant without giving any further details. We attach little weight to that statement. Mr Singh was not available for cross examination. There is no detail of what works were carried out, where or when. There is no information as to when and how payment was made.

60. Mr McAndrew was surprised that Rashpal Singh told Mr Pitt that he had never heard of the appellant. He maintained however that the plant had been supplied and he had paid for it.

30 ***Solid Gold Services Limited ("Solid Gold")***

61. The following sum is claimed as input tax in relation to a payment said to have been made to Solid Gold:

<b>Invoice Date</b>	<b>Payment Date</b>	<b>Net Invoice Amount £</b>	<b>VAT £</b>
14/03/09	14/04/09	23,030	3,454.56

62. Mr McAndrew could not recall how he had been introduced to Solid Gold or who he had dealt with at the company.

63. Mr McAndrew phoned the HMRC national advice service on 9 April 2009 seeking to verify the VAT registration number of Solid Gold. This was after the date of the invoice. He gave details of Solid Gold's name and address and the VAT registration number was confirmed to him. This was expressly subject to the caveat that HMRC were not authorising any transaction with Solid Gold and that it may be subject to subsequent verification.

64. Mr Bartley visited Solid Gold on 28 May 2009. Solid Gold was no longer at its registered address. The director, Mr Ranjit Singh was not available on that occasion and a further visit took place on 8 July 2009. Mr Singh stated that Solid Gold had not made supplies to the appellant and had not heard of them. On a subsequent visit Mr Singh described allowing someone called Gurpreet to use Solid Gold's VAT number and bank details to deposit £26,845 into the bank account. Mr Singh withdrew the cash and gave it to Gurpreet. He then raised a VAT invoice to Telecom Collection. That invoice bears the same date and amounts as the invoice to the appellant although the format is different and it included full contact details.

65. The invoice is a photocopy and shows a description of various items of plant and materials being hired or provided. It also shows a charge for removal of "muck". It does not show where the services were provided, nor does the invoice contain any contact details apart from the address. Mr McAndrew recalled that the goods and services were supplied at "Chesterfield SOS".

***Select Engineering Services Limited ("Select")***

66. The following sums are claimed as input tax in relation to payments said to have been made to Select:

<b>Invoice Date</b>	<b>Payment Date</b>	<b>Net Invoice Amount £</b>	<b>VAT £</b>
			210.00
			210.00
			210.00
			210.00
			210.00
			210.00
			210.00
			210.00
			210.00
30/08/09		4,000	600.00
25/09/09		4,000	600.00
29/11/09		800	120.00

67. The appellant relied on a statement signed by Mr Michael Tubman and dated 10 November 2011 to the effect that he performed work for the appellant between

September 2007 and November 2009. Mr Tubman is the uncle of the wife of Mr McAndrew's brother and is currently suffering from a serious illness.

5 68. The invoices produced by the appellant were photocopies and referred to "supply of labour to Chesterfield SOS". They were for round sums and did not show what days were worked or what rates were payable.

69. The appellant's Sage accounting records show a first invoice from Select dated 2 December 2007 with the last invoice being dated 29 November 2009. Only the last three invoices were produced by the appellant. Mr McAndrew insisted that this was an administrative error and that the appellant did have the invoices. They were not  
10 produced in evidence.

70. Select was registered for VAT and made VAT returns for periods 02/09 to 11/09 showing no taxable supplies or inputs, despite the invoices identified above. Mr McAndrew insisted he was not aware of that fact and we have no reason to disbelieve his evidence in this respect.

15 ***LTJ Building & Groundworks ("Mr James")***

71. The following sums are claimed as input tax in relation to payments said to have been made to Mr James:

<b>Invoice Date</b>	<b>Payment Date</b>	<b>Net Invoice Amount £</b>	<b>VAT £</b>
18/12/07		16,500	2,887.50
			3,150.00
29/01/08		18,000	3,150.00
			3,150.00
			2,800.00
			2,800.00

20 72. Mr James was registered for net payments under the CIS scheme. He was also VAT registered. He signed a statement dated 15 December 2011 confirming that he worked for the appellant in 2007 and 2008. He also gave oral evidence during the hearing and was cross-examined.

25 73. Mr James came across as an honest and credible witness and we accept his evidence. He had been working for the appellant in the period from December 2007 to May 2008 when there was a safety issue with Mr James' work and he ceased working for the appellant. Thereafter he was in and out of work and was eventually made bankrupt in August 2009. He has since worked for the appellant.

30 74. Some of the work done by Mr James for the appellant was on a day rate, that is charged by the day. Other work was on "meterage", that is a set price per metre, for example laying pipes.

75. When Mr James invoiced the appellant he did so on a monthly basis. He would fax the invoice and keep the original invoice himself. He retained the original invoices and Mr McAndrew had asked for them about 5 or 6 months before the hearing. Mr James had sent the originals to Mr McAndrew at that time by recorded delivery. Apart from the two invoices identified above, the invoices were not produced in evidence and no good explanation was provided by the appellant.

76. The invoice dated 18 December 2007 simply referred to “*Contract work at Rugby*”. Mr James explained this on the basis that the work itself had involved various different jobs which would have been too much to list on an invoice. His recollection was that this was charged at a day rate but that does not appear on the invoice.

77. The invoice dated 29 January 2008 gave much greater detail and Mr James put the detail into context in his oral evidence. The invoice identified three different types of pipework that Mr James had laid. He had agreed a meterage rate with Mr McAndrew although this does not appear on the invoice, nor does the length of pipework laid. The amount to be invoiced was agreed with Mr McAndrew at the time.

***Cedarcroft Construction Limited (“Cedarcroft”)***

78. The following sum is claimed as input tax in relation to a payment said to have been made to Cedarcroft:

<b>Invoice Date</b>	<b>Payment Date</b>	<b>Net Invoice Amount £</b>	<b>VAT £</b>
06/05/08	03/06/08	16,563	2,898.63

20

79. Cedarcroft held a certificate for the purposes of the old CIS scheme which had been issued in February 2007 and expired at the end of December 2007. The authorised user was Mr Surjit Singh Raj. It was reported stolen in October 2007. Cedarcroft was registered as a sub-contractor for the purposes of the new CIS scheme and was entitled to receive gross payments until 9 July 2008 when its status was changed by HMRC. Thereafter payments to Cedarcroft had to be made net of tax. Cedarcroft was registered for VAT with effect from 26 August 2005. It was deregistered on 20 June 2008 and dissolved on 23 June 2009.

80. Mr Barnes of HMRC visited Cedarcroft on 22 January 2008 and 8 July 2008. On the latter occasion he interviewed Mr Surjit Rai, a director of Cedarcroft. The appellant had recently sought to verify Cedarcroft’s sub-contractor status. Mr Rai did not know the appellant however he stated that he was effectively a director in name only and the business was run by a Mr Khan. He also stated that Cedarcroft’s bank accounts had been inactive since 2 May 2008. Unfortunately Mr Barnes has since lost copies of the bank statements but he did summarise the information contained in them. There is no entry relating to the appellant and the entries cease on 2 May 2008.

81. Mr McAndrew made no attempts to check the financial position of Cedarcroft, although he did obtain a VAT certificate. At first he thought that he had checked its gross payment status but then recalled that there was no need to do so because it was only supplying plant. He could not recall who he dealt with at Cedarcroft. They would either have been recommended or answered an advert in The Sun. The appellant did obtain a photocopy of the gross payment certificate but Mr McAndrew could not recall how this had been obtained. Because the certificate was issued under the old CIS Scheme Mr McAndrew said that they would not have taken much heed of it.

82. The invoice relied on is a photocopy and refers to “Plant hire and Van hire / hire of small tools” over a period of approximately 4 weeks. There is no detail of where or exactly what was supplied. Mr McAndrew at first thought that this was supplied at the Rotunda in Birmingham but then recalled that it was in Leicester. He could not recall any other details of what was supplied.

***Oakdale Projects Limited (“Oakdale”)***

83. The following sums are claimed as input tax in relation to payments said to have been made to Oakdale:

<b>Invoice Date</b>	<b>Payment Date</b>	<b>Net Invoice Amount</b>	<b>VAT</b>
		<b>£</b>	<b>£</b>
31/05/08		360	63.00
31/05/08		54	9.45
04/06/08		4,164	728.70

84. The invoices are all are for plant hire and identify the type of plant, the site to which it was hired, the periods over which they were hired and the weekly rate. They are photocopies and do not identify Oakdale’s name, save in an email address which is shown.

85. The sum alleged to have been paid in respect of these invoices was £5,000, although the total sum due was £5,379.

86. Mr McAndrew could not recall the name of his contact at Oakdale, but thought it was someone called Greg. Sometimes when he was using a sub-contractor he did not see the people. He would ring a firm to do a job, it would be done and invoiced and he would pay the invoice. Oakdale supplied plant and Mr McAndrew made no attempt to verify the company details, other than speaking to them on the phone. He did not always get the surname of the person he was dealing with. He did not always obtain financial background on sub-contractors because in the construction industry he said a lot of people are used on the basis of recommendation.

87. Mr McAndrew did not obtain a company search for Oakdale. A company search document in evidence was obtained after Mrs Davies’ visit.

***Hayes Electrical & Construction Limited (“Hayes”)***

88. The following sums are claimed as input tax in relation to payments said to have been made to Hayes:

<b>Invoice Date</b>	<b>Payment Date</b>	<b>Net Invoice Amount £</b>	<b>VAT £</b>
27/10/09	28/10/09	22,350	3,352.50
12/12/09		25,683	3,852.45

5 89. Hayes was registered for VAT. On 22 October 2009 the appellant’s accountant, Louise, phoned the HMRC national advice service seeking to verify the VAT registration number of Hayes. She gave details of Hayes and the VAT registration number was confirmed to her. This was expressly subject to the caveat that HMRC were not authorising any transaction with Hayes and that it may be subject to  
10 subsequent verification.

90. Both invoices relied on are photocopies. The first invoice shows “*Provide labour on the Swelic/Notts Scheme*” with no details of when, how many people or at what rate. Mr McAndrew had no recollection or record of such details.

15 91. The second invoice shows “*Plant hire and material*” with no further details. Mr McAndrew had no recollection or record of such details. He did recall that it was supplied to a site at Enderby.

20 92. Mr Blakeley of HMRC visited Hayes’ accountant on 21 December 2009. He obtained copies of its business records. These included invoices issued by Hayes between April 2009 and November 2009 but did not include any invoice to the appellant.

***VCL Group UK Limited (“VCL”)***

93. The following sum is claimed as input tax in relation to a payment said to have been made to VCL:

<b>Invoice Date</b>	<b>Payment Date</b>	<b>Net Invoice Amount £</b>	<b>VAT £</b>
07/06/08	04/07/08	16,820	2,943.60

25 94. VCL was registered for VAT under the name VCL Group UK Limited. It was dissolved on 15 September 2009.

95. The VCL invoice is a photocopy and is in the name of “VCL Group UK”. It simply described “*Supply Labour*”. There was a manuscript calculation on the invoice which might or might not have been a day rate together with the number of days

worked. There was no evidence as to who's handwriting this was and there was no description of where or when the labour was supplied.

96. Mr McAndrew could not recall who his contact was at VCL or where the labour was supplied. He had no records. He said that he would have come into contact with VCL either by way of recommendation or in answer to an advert in The Sun.

### *Summary of the Parties' Submissions*

97. Mr Puzey on behalf of the respondents made the following broad submissions:

- (1) The tribunal could not be satisfied that taxable supplies were made by the entities named on the invoices;
- 10 (2) The invoices relied on by the appellant did not comply with regulation 14 and were therefore invalid as VAT invoices;
- (3) No satisfactory alternative evidence of the charge to VAT had been produced by the appellant.

98. At some points Mr Puzey's closing submissions did appear to us to stray into a suggestion that appellant had not satisfied a burden of establishing that any supply at all had taken place. That was not how the respondents' case had been put previously and could be said to imply some dishonesty or knowledge of fraud on the part of the appellant. However Mr Puzey made very clear that he was not making any such allegations and we deal with the appeal on that basis. We start from the premise that something was supplied to the appellant in relation to each of the transactions in issue.

99. Mr Staniforth on behalf of the appellant essentially submitted that the documents produced by the appellant and the oral evidence of Mr McAndrew and Mr James established that taxable supplies did take place and that there was sufficient alternative evidence of the charge to VAT. The only reasonable decision should have been to allow the input tax credits. He relied in particular on the fact that payments were made by the appellant as identified above.

100. We address the more detailed submissions of the parties in our decision below.

### *Decision*

101. The appellant can claim input tax credit where it has been charged VAT on goods and services used by it for the purposes of its business. The charge to VAT arises where a taxable supply is made by a taxable person. Where the appellant can support the charge to VAT by reference to a valid VAT invoice it will be entitled to the input tax credit. Otherwise it must rely on alternative evidence of the charge to VAT.

102. The discretion of HMRC only arises once it is established that a taxable supply by a taxable person has taken place. The respondents did not dispute that supplies had

taken place. What they disputed was that the supplies relied upon by the appellant were made by the persons named on the invoices or by taxable persons at all.

103. In those circumstances there is a burden on the appellant to establish:

5 (1) that the supplies which did take place were taxable supplies made by taxable persons. If we are satisfied that is the case, then the appellant must also establish:

(2) that it held a valid VAT invoice at the time input tax deduction was claimed. In the event that we are not satisfied as to (2), the appellant must establish:

10 (3) that HMRC failed to reasonably exercise its discretion to accept alternative evidence of the charge to VAT, either because it failed to take into account relevant material, took into account irrelevant material or reached a decision which no reasonable body of commissioners could reach.

104. We deal with each of these issues under separate headings.

15 (1) *Were there Taxable Supplies made by Taxable Persons?*

105. We are satisfied that in respect of each entry in the appellant's records tabulated above that some supply of goods or services did take place. In each case, save in relation to Mr James, the evidence before us as to the identity of the supplier is unreliable and contradictory. We have taken into account all our findings of fact set  
20 out above, but in outline Midland had already de-registered for VAT at the time of the supply and Mr Singh's statement that he had traded with the appellant is unreliable. There is evidence that the directors of Lakesite, Solid Gold and Cedarcroft had never heard of or traded with the appellant. Select had not included the supplies on its own VAT returns for the relevant periods. The invoices said to relate to Oakdale are  
25 unreliable photocopies from which it is impossible to decipher Oakdale's name save as a generic email address.

106. On the basis of our findings of fact we are not satisfied that the person supplying goods or services was the company identified in the invoices or in the appellant's records.

30 107. We then need to consider whether the person or persons who did make the supplies were taxable persons at the time they were made. It is only if the supplier was a taxable person that the supply itself will be a taxable supply in respect of which input tax credit may be available. The position is different in relation to each purported supplier.

35 108. Midland was not VAT registered. Whoever was supplying the goods and services ought to have been registered for VAT at least when the supplies reached the threshold for VAT registration. In 2007 the threshold was £62,000 so that on or about  
40 30 April 2007 it ought to have been registered and was therefore a taxable person. For the supplies on and before 30 April 2007 we are not satisfied that the supplier was a taxable person. For supplies after that date it is likely that they were a taxable person.

109. The total value of supplies purportedly made by the following suppliers to the appellant were not above the registration threshold. As such we are not satisfied that they were made by taxable persons:

<b>Purported Supplier</b>	<b>Total Value of Supplies £</b>
Lakesite	54,307
Solid Gold	23,030
Cedarcroft	16,563
Oakdale	4,578
Hayes	48,033
VCL	16,820

5 110. Select was owned by Mr Tubman who was related to Mr McAndrew. Select did not declare any taxable supplies on its VAT return. In all the circumstances we cannot be satisfied that Mr Tubman made these supplies through Select, rather than for example on his own behalf.

10 111. Finally, in relation to Mr James we are satisfied on the basis of the evidence before us that he was a taxable person and that he made supplies giving rise to the input tax credits claimed by the appellant.

15 112. In summary, save in relation to supplies made by Mr James and the supplies purportedly made by Midland after 30 April 2007, we are not satisfied that any taxable supplies were made and the appellant is therefore not entitled to any input tax credit in relation to those supplies. That is sufficient to determine this appeal in relation to most of the input tax claimed, apart from that relating to Mr James. For the sake of completeness we consider the remaining issues as if we were satisfied that all the supplies in question were taxable supplies by taxable persons.

(2) *Validity of the VAT Invoices*

20 113. Save in relation to Mr James, we are not satisfied that the supplies were made by the persons named on those copy invoices which have been produced by the appellant, including those purportedly made by Midland. It follows therefore that save in relation to Mr James we are not satisfied that those invoices are valid VAT invoices because they do not include the name, address and registration number of the supplier  
25 and do not comply with regulation 14(1)(d).

30 114. There are further deficiencies in relation to all the invoices relied on by the appellant. We accept Mr Puzey's submission that the invoices do not have sufficient detail to properly identify the goods and services supplied, the quantity of goods or the extent of the services. The scant information recorded on the invoices would not be sufficient for HMRC to carry out any meaningful audit or verify exactly what transaction took place.

115. In the circumstances for all the supplies, even if we were satisfied that they were taxable supplies made by a taxable person, the ECJ decision in *Mehageben and David* could not be relied upon to support an input tax deduction. The invoices are plainly invalid. The only basis upon which the appellant might then be entitled to succeed on this appeal is if it could establish that HMRC failed to exercise its discretion reasonably to accept alternative evidence of the charge to VAT.

(3) *HMRC's Exercise of Discretion*

116. We have set out the supervisory jurisdiction of the tribunal in cases such as this, in particular that we are testing the reasonableness of the decision to refuse input tax credit by reference to the material which was available to the officer at the time she took that decision. In the week prior to the hearing the appellant produced further documentation upon which he sought to rely but which was not available to HMRC at the time the decision was taken. We also heard evidence from the appellant's witnesses which included material not provided to HMRC at the time the decision was taken. During the course of the hearing Mr Puzey stated that the late material did not change the decision to refuse input tax credit. He was prepared to concede for the purposes of this appeal only that in testing the reasonableness of the decision we could take into account the late material.

117. Mr Staniforth did not challenge the reasonableness of the HMRC policy on invalid invoices, however he did challenge the reasonableness of the decision on the facts of this case.

118. Payments to sub-contractors in the construction industry are well known to be susceptible to fraud. The potential for fraud includes sub-contractors failing to account for income tax on their earnings. Fraud can also involve the use of off-record labour thereby evading liabilities to PAYE and national insurance. It is for that reason that the CIS scheme was introduced and it has undergone various amendments over the years. Most recently in April 2007 when the previous scheme, involving certificates being issued to subcontractors which they were required to produce to ensure gross payment, was replaced with the present registration scheme.

119. Frauds can also involve claims for VAT input tax credit where no supplies have taken place or where the supplier does not intend to account for output tax on his supply. The fact that a payment is made between parties does not mean that there has necessarily been a supply as described in an invoice. Mrs Davies gave evidence that the existence of such fraud is well known in the construction industry and we accept that evidence. We should repeat at this stage that the respondents make no allegation of dishonesty or impropriety against Mr McAndrew or the appellant. However we have found as a fact that Mr McAndrew was aware of the risk of fraud in the construction industry.

120. The respondents say that the appellant's failure to carry out any meaningful due diligence or commercial checks in a market affected by fraud is a factor in the exercise of its discretion to accept alternative evidence of the charge to VAT. We accept that submission. In such a market we would expect the appellant to have made

considerably more effort than it did to satisfy itself as to the identity and legitimacy of persons it was dealing with. The absence of reliable evidence as to the identity and status of the suppliers arises because of the appellant's failure to carry out any meaningful checks.

5 121. We bear in mind that the alternative evidence referred to in regulation 29(2) is of the charge to VAT. The questions in Appendix 2 of the statement of practice must therefore be read in the context that they are seeking to establish that there has been a taxable supply to the appellant by a taxable person for which payment has been made. It is evidence to establish the following matters which will be particularly relevant:

- 10 (1) The identity of the supplier,  
(2) The nature and extent of the goods and services being supplied,  
(3) The use to which the goods and services were put in the appellant's business,  
(4) Payment for the goods and services.

15 122. We also consider that the alternative evidence required is evidence to the same level of detail as that which would be contained in a valid invoice, the absence of which gives rise to the discretion.

123. It is clear to us that Mrs Davies was right to try and establish alternative evidence of these matters. Putting to one side the supplies made by Mr James, it is  
20 equally clear to us that even with the additional material produced at the hearing the appellant has failed to provide sufficient alternative evidence. The question is whether Mrs Davies' decision not to accept the alternative evidence is in any way unreasonable. We are not satisfied that it is. Indeed on the basis of the evidence before us it was eminently reasonable. In particular there was little or no alternative evidence  
25 of the true identity of the suppliers or the nature and extent of the goods and services being supplied.

124. Based on our findings of fact we accept Mr Puzey's submissions in relation to *Mahagében kft (C-80/11)* and *Péter Dávid (C-142/11)* set out above. Those cases were dealing with very different situations to the present. It is well established that  
30 member states may refuse the right to deduct input tax in the absence of a valid VAT invoice, even where the taxable person seeking the right to deduct has no knowledge or means of knowledge of a connection with fraud. See for example *Reisdorf* where the ECJ held that member states have the power to determine rules relating to supervision of the exercise of the right to deduct input tax, in particular the manner in  
35 which taxable persons are to establish that right. Member states are entitled to require production of the original invoice and where the taxable person no longer holds it, other cogent evidence that the particular transaction in respect of which deduction is claimed has actually taken place.

125. It may well be as Mr Staniforth submitted that the appellant is being held  
40 responsible for the misconduct of others. However it is the circumstances in which the

appellant chose to deal with those suppliers and record those dealings that have led to its difficulties in producing alternative evidence of the charge to VAT.

126. The position in relation to Mr James is different. We are still left with a failure to produce invoices of any description for 4 out of the 6 supplies made by Mr James. Even in the light of Mr James' evidence we cannot say that HMRC's decision to refuse input tax credit was unreasonable. It is reasonable for HMRC to expect VAT invoices in the absence of a good reason as to why they are not available. The appellant has had more than two years to produce those invoices and it has failed to do so. It has given no reason, let alone a good reason, as to why the invoices have not been produced.

127. In relation to the 2 invoices from Mr James which were produced, taken together with Mr James' evidence we consider that on any view there is sufficient alternative evidence of the charge to VAT. In saying that we make no criticism of Mrs Davies' original decision. Mr Puzey accepted that we could take into account in the exercise of our supervisory jurisdiction the material and evidence produced during the course of the hearing.

128. For all the reasons given above we dismiss the appeal, save in respect of the input tax evidenced by invoices issued by Mr James on 18 December 2007 and 29 January 2008. The input tax credit in relation to those invoices is £6,037.50.

129. 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.

**JONATHAN CANNAN**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 4 December 2012**