



TC02603

Appeal number: LON/2008/1575

*VAT - Input Tax – Invalid invoices – Supplier de-registered –
Commissioners’ discretion - VATA 1994 s.26 - VAT reg 1995, reg 13(1),
29(2) – Appeal on discretion dismissed - Double counting – Appeal allowed
in part*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ARKELEY LTD (IN LIQUIDATION)

Appellant

- and -

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

**TRIBUNAL: JUDGE THEODORE WALLACE
MRS RUTH WATTS-DAVIES, MHCIMA, FCIPD**

Sitting in public in London on 2 December 2011 and 19 and 20 February 2013

**Lawrence Onwufuju, former director, instructed by D.M. Patel, CCA,
Liquidator, for the Appellant**

**Sabindar Singh, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

- 5 1. This appeal concerns an assessment disallowing £39,598 input tax for the monthly periods 09/05, 07/06, 08/06 and 12/06 on supplies shown on six invoices from Narslan Ltd and one from an unidentified supplier.
2. The original decision was contained in a letter dated 28 March 2007. Following the appeal, the assessment was varied on review dated 7 May 2009 by Mrs Michelle Hall. The Appellant was wound up on 12 September 2009.
- 10 3. The Statement of Case for HMRC was dated 8 May 2009. In paragraph 24 (iv) it was pleaded that Narslan had de-registered for VAT in October 2005 and had ceased to trade some considerable time before then. Alternatively, in paragraph 25 (iii) it was contended that under section 26A of the VAT Act 1994 the Appellant was not entitled to input tax credit because the consideration for the supplies remained
15 unpaid at the end of six months.
4. The appeal was listed to be heard immediately after another appeal by the Appellant under reference LON/2009/562 and 563 covering periods 01/07 and 03/07; the latter period concerned invoices from other suppliers which were disallowed under section 26A. The time estimate of 3 days for the first appeal proved inadequate
20 for that appeal, let alone for this appeal also.
5. Witness Statements and both parties' bundles of documents covered both the first appeal and this appeal. The first appeal started on 14 November 2010 and was adjourned on 16 November; it was resumed on 30 November 2011 and concluded on 2 December 2011. There was no time for a substantive hearing in this appeal but
25 directions were given with a view to early re-listing before the same tribunal. Both parties were dilatory in complying with those and further directions for witness statements and a joint bundle confined to this appeal and in providing dates to avoid. In the event it was not possible to relist the appeal before February 2013. The evidence was thus very stale.
- 30 6. Meanwhile the Respondents have been given leave to appeal inter alia against part of the decision in the first appeal allowing one of the invoices which had been disallowed under section 26A. That appeal has not yet been heard by the Upper Tribunal.
- 35 7. Findings of fact in the decision in the first appeal are not determinative for this appeal; however there was background material which was not in dispute and of which we were able to take account in this appeal thus saving hearing time.

8. The invoices in issue were as follows:

Period	Date	Supplier	VAT	No in bundle
09/05	16/09/05	Narslan	£4,116	[54]
07/06	5/07/06	Narslan	£9,734	[55]
	12/7/06	Narslan	£3,373	[56]
	21/7/06	Narslan	£6,583	[57]
08/06	8/8/06	Narslan	£5,497	[58]
	8/8/06	Unknown	£4,116	[59]
12/06	3/12/06	Narslan	£6,179	[64]

These total £39,598.

9. The Narslan invoices had a logo, the address Unit 22, Such Close, Letchworth Garden City, Hertfordshire, the telephone number, 0870 240 8012, and Narslan's VAT number before its de-registration with effect from 6 October 2005.

Skeleton argument by Appellant

10. Mr Onwufuju contended that, apart from the invoice on 3/12/06 [64], the invoices had been paid in full when matched on a first in first out ("FIFO") basis, giving dates all of which were within six months of the invoice. There was no record of the invoice on 3/12/06 in the Sage print-outs of Narslan's supplier account [151-4] or the VAT printout for any period; it should not have been included in the assessment.

11. He stated that the Appellant could not recover input tax on other invoices which were unpaid in Narslan's accounts at the time of Arkeley's liquidation.

12. He referred to *Teleos plc v Customs & Excise* [2008] STC 706 stating that the Appellant had acted in good faith and took reasonable measures. He referred to regulation 29(2) of the VAT Regulations 1995, in relation to provision of such evidence other than invoices as the Commissioners may direct, and to paragraph 3.9 of Notice 48 covering extra-statutory concessions.

13. He said that the bank had confirmed that the duplicate statements issued matched the bank's records.

14. He submitted that the invoices were legitimate supplier invoices issued as part of normal trading activities; the Commissioners had allowed invoices from Narslan for later periods than those in dispute.

15. He said that the Appellant had no knowledge of the regulatory compliance of Narslan.

Skeleton for HMRC

16. On 6 July 2012 Mr Singh provided a skeleton argument pursuant to a direction.

17. He contended (Para 8) that the invoice from an unknown supplier has no relevance to the appeal because, apart from the supplier being unknown, the supply had already been cancelled by Arkeley's own accounting system.

18. He contended that on 11 October 2005 Narslan applied to cancel its VAT registration, giving its principal place of business as 483 Green Lanes and stating that it had ceased to trade on 30 September 2005; it was deregistered with effect from 1 October 2005. On 7 October 2004 Narslan had notified Companies House that its new registered address was 483 Green Lanes, N13, which it confirmed to HMRC as its principal place of business on 17 March 2005. Correspondence to Unit 22, Such Close, Letchworth Garden City, the address on the Narslan invoices, had been returned marked "gone away" in March 2005. The invoices headed Unit 22 carried the telephone number of 483 Green Lanes. He contended that "in view of the above, it is highly unlikely that the invoices the Appellant relies on were issued by Narslan".

19. Mr Singh stated that since none of the invoices gave Narslan's correct address the Appellant could not rely on them under regulation 14(1)(d) of the VAT Regulations 1995.

20. He contended that the logo on the Narslan invoices relied on by the Appellant is different from that on headed paper produced by Narslan to HMRC in 2003.

21. Mr Singh stated that, having deregistered, Narslan was not a registered person or a taxable person at the time of the issue of the last five invoices. The documents held from 1 October 2005 were incapable of constituting VAT invoices.

22. In the alternative, Mr Singh contended that the Appellant could not show that it had paid for the alleged supplies within six months. There were real doubts about the authenticity of the bank statements relied on and they showed only limited payments to Narslan which could not be reconciled to specific suppliers by Narslan.

Evidence for Appellant

23. Mr Onwufuju, formerly a director of the Appellant, confirmed two witness statements dated 11 February 2013 replacing an earlier statement of April 2012. These contained a considerable amount of argument as opposed to evidence.

24. He produced copies of six invoices from Narslan and one from another supplier, See paragraph 8 above. The first [54] was dated 16/09/2005 from Narslan Ltd, Unit 22, for 200 Mepitel SIL Wound Dnsg 20 x 30 CM and 1,000 Lipitor 20 mg x 28 for a total of £23,520 plus £4,116 VAT, making £27,636; the invoice number was 1052; it carried Narslan's VAT and company registration numbers. The invoice not from Narslan [59] was from Transaco Ltd for pharmaceuticals also costing £23,520 plus VAT.

25. He exhibited a spreadsheet from Arkeley's accounting records in relation to supplies from Narslan, showing the amounts invoiced inclusive of VAT, payments by Arkeley and the running balance owed by Arkeley to Narslan from 25 October 2005 to 14 October 2006; this did not of course show the invoice of 03.12.06 [64]. The spreadsheet showed purchase day book ("pdb") reference numbers. A further spreadsheet showed payments matching the invoices being made within six months.

26. Mr Onwufuju stated that the payments had been matched with invoices on a first in first out basis. None of the payments exactly matched any of the invoices in dispute. One of the payments matched on a FIFO basis was for the exact sum shown on an invoice not in issue. He produced copies of 17 cheque counterfoils for payments to Narslan, all of which appeared in the spreadsheet.

27. He stated that the payments were cleared by the Appellant's bank, referring to various bank statements.

28. He stated that there is no record in the Appellant's accounting system showing the value of the invoice dated 8/8/06 for £4,116 [59] from an unknown supplier.

29. He produced correspondence with Lloyds TSB Commercial at Walthamstow in relation to duplicate statements 74 and 79 in which the relationship manager stated that the duplicate statements were printed from bank records.

30. He stated that Arkeley had no knowledge and would not have been privy to any information at the time of trading with Narslan as to whether Narslan was trading as a de-registered company, a change of registered address or any other internal activities. He stated that Arkeley had always acted in good faith.

31. Mr Onwufuju's witness statement of 13 February 2013 related the goods on the Narslan invoices to sales invoices by the Appellant to its customers and related the latter to payments from the Appellant's customers.

32. Cross-examined, he said that the invoice for £6,179 dated 3/12/06 [64] had never been claimed as VAT. He referred to a Sage VAT Report showing the build-up of the VAT return for 12/06 [484] which did not include that invoice.

33. He said that he would never have known that Narslan's principal place of business had changed to Green Lanes or that the Narslan invoices gave the old address but the Green Lanes telephone number. He said that as far as he was aware the invoices were genuine and for genuine transactions.

34. He said that he wrote the cheques to Narslan but he did not write the cheque stubs. He said that the stubs were left behind after the visit by Mrs Hall and Mr Kent in January 2007; they were not mentioned before his statement in 2012 because he never knew they were there, believing that everything the Appellant had was taken away by the officers on 17 January 2007. He told Mr Singh that the officers examined them at the visit and he said that he actually saw them do so; he denied that he was lying.

35. Mr Onwufuju told Mr Singh that Arkeley did not have any terms of payment with customers or suppliers. There was no need to be satisfied that suppliers were legitimate: payment by Arkeley depended on supplies being made.

5 36. He said that he had no evidence of orders; the Appellant was now in liquidation. He had only been involved if there was a problem. He did not personally make payments. He did not know of any due diligence on suppliers. There was no letter from Narslan giving its bank details. He said that he thought the Customs officers would have seen the customer invoices at the visit. He thought the officers had them. The visit took 3-4 hours. He denied that no records were taken after the visit.

10 37. He said that the Appellant operated on a goods in/goods out basis with goods being dispatched within 3 to 4 days of receipt; there was not much storage space.

15 38. Asked about an invoice on 18 October 2005 to Medcor Pharmaceuticals NV, he said that Stephen Sun had produced it six months before the goods were received; he was being naughty and wanting his commission. Narslan was not the only supplier of those goods. He remembered the matter very clearly because the customer paid in October 2005 and became agitated: that was why he was involved. He said that was the only invoice with an anomaly.

20 39. He was then asked about the differences between two copies of sheet 105 of bank statements from Lloyds Bank provided by him to HMRC covering the 15-25 January 2007. He said that he could not explain the differences. He produced a letter from the bank saying that duplicate statements were provided to him printed from bank records and that the entries matched the copy statements provided by him. He said the bank told him that no explanation would be given unless there was a financial loss. He said that the bank had made an error but did not want to admit it
25 except on the telephone.

40. He said that he did not know to which address the cheques for Narslan were sent. The sort code was presumably on the computer; he did not have it.

30 41. He told the Tribunal that he tried to get Stephen Sun to give evidence but it was very difficult because of the liquidation: it was not a happy position when the company closed down.

Evidence for HMRC

35 42. Christopher Ian Kent, who at the relevant time was seconded to Customs' Regional Referral Team ("RRT") provided a statement dated 16 January 2012. He stated that he visited the Appellant's place of business with Mrs Hall on 17 January 2007. At the visit he saw apparent purchases from Narslan in the Appellant's accounting books.

43. He stated that he had attended Unit 22, Such Close, Letchworth, a motorcycle servicing and retail accessories establishment. The owner told him that he had not heard of Narslan and that a motorcycle business had been there for many months.

44. Mr Kent stated that he had examined the records at Companies House for Narslan and also the HMRC database. Narslan was registered for VAT with effect from 25 May 2002. The application for registration gave the principal place of business as Unit 22, Such Close, and the telephone number as 01462 674545; the business activity was given as “wholesale pharmaceutical.” The place of business was confirmed in April 2003 and headed paper with address and logo was provided.
45. He stated that a communication to Narslan at Letchworth was returned by Royal Mail on 12 March 2005 with the box “addressee gone away” ticked. A change of address of place of business was returned on 17 March 2005, giving the new address as 483, Green Lanes, N13 4BS and the telephone number as 0870 240 8012.
46. Mr Kent stated that an application by Narslan to cancel the VAT registration [219-223] was received by HMRC at Newry on 11 November 2005 giving the address 483, Green Lanes, and the telephone number as 0870 240 8012; it was dated 11/10/05 and stated that trading ceased on 30 September with no stock on hand. An advice of cancellation of registration and a final VAT return sent to 483 Green Lanes were returned unopened by Royal Mail on 21 November 2005 “addressee gone away”.
47. He stated that Narslan’s annual return to Companies House up to 7 March 2003 was received on 2 August 2003. Narslan which had been struck off the Companies register was restored by the High Court on 18 August 2003. The following annual return was scanned on 11 June 2004. The returns to Companies House showed the registered office as Unit 22, Such Close. The change of registered office to Green Lanes was notified on 7 October 2004.
48. He stated that Narslan was struck off the Companies Register on 6 June 2006 and dissolved on 13 June 2006.
49. Mr Kent stated that the logo on the headed paper provided by Narslan in April 2003 had no similarity to that on the invoices in dispute.
50. He said that he had seen the invoices at the visit; they contained the information required by the regulations provided that such information was correct; there was a distinctive device on the top left of the invoices. No original documents were uplifted at the visit that he could recall. He did not see cheque stubs.
51. He said that they tried to reconcile sales and purchases over a three month period but were unable to do so.
52. Mr Kent said that at the Appellant’s premises there was a very small storage area, like a cupboard.
53. He said that, based on the Appellant’s spreadsheet which showed sales of £1.1 million to Narslan, the Appellant owed over £1/3 million to Narslan at its liquidation; Narslan never chased this before being dissolved.
54. Cross-examined, he said that Mrs Hall was in charge of the visit, he was there to give support. She took notes. They only spoke to Mr Onwufuju. They asked him

about matters on which they needed more information but did raise specific concerns, although he himself finished with grave concerns.

55. He said the premises was about 30 feet x 12-15 feet with the office at the back. There was a computer in the front and also a cupboard. He said that he did not know
5 the minimum storage area for a trader with a pharmaceutical licence. If there was another area he was not shown it. It was some years ago and his recollection might not be correct.

56. He had visited Unit 22 at Letchworth. There was an entirely different trader who told him that he had been there for some months and that there had been no mail
10 for Narslan.

57. He told the Tribunal that he had not looked at Mrs Hall's notes other than the first page. Any visit report on the voluntary disclosure would have been her responsibility.

58. Mrs Michelle Patricia Hall confirmed a composite statement dated 25 January
15 2012.

59. She stated that she first visited the Appellant at Basildon on 25 October 2005 to verify a repayment claim for period 09/06. She identified a number of anomalies but those but those were eventually resolved within acceptable tolerance by presentation of re-run Sage reports and export evidence; the claim was subsequently released for
20 payment.

60. She stated that on 17 January 2007 accompanied by Mr Kent she visited the Appellant at Basildon by appointment with Mr Onwufuju to verify repayment claims totalling £46,257 for 13 monthly periods between 05/05 and 07/06; those included input tax claims for supplies by Narslan. She stated that in view of the volume of
25 anomalies identified "records were uplifted and the contents were further considered at [her] office".

61. Mrs Hall produced notebook entries for the visit. Most of the notes did not concern the Narslan invoices. The notes recorded the five disallowed Narslan invoices. They were not signed by Mr Kent.

30 62. She stated that when she made her decision on 28 March 2007 disallowing the Narslan invoices she had seen two Narslan invoices one of which was that of 16/09/05 [54]. The records for Narslan showed that it was deregistered for VAT on 1 October 2005 and dissolved in June 2006. The 09/05 invoice was technically invalid because the correct address was not given.

35 63. She stated that she had examined all the Appellant's bank statements which had been provided to her. Only four transactions referring to Narslan were present indicating payments by "F/Flow" totalling £234,449. None could be reconciled to specific supplies by Narslan.

64. She stated that further review showed two bank statements headed sheet 105 with different information of payments and receipts. She wrote to the Appellant on 12 December 2007 asking for an explanation, Mr Onwufuju replied that it was a banking error and that he was awaiting further clarification. On 29 February 2008 he wrote that he had been constantly pursuing the duplicate statements with the bank which had not been able to provide any reasonable explanation.

65. Mrs Hall stated that an invoice with a purchase day book reference 793 described as Transaco for £4,114 had been reversed from the build-up of input tax as a purchase credit. It was impossible to disallow input tax on a supply already cancelled by the Appellant's accounting system.

66. She stated that a Sage "VAT Report (Summary)" for period 12/06 showed a net tax reclaim of £22,050.65. A Sage "VAT Return" [482] for the same period printed on 12 January 2007 declared the same net claim; this however had been manually altered to increase the net claim by £22,607.83. The papers contained no explanation for this increase.

67. Mrs Hall said that her note made on 17 January 2007 included the Narslan invoices. Mr Kent looked through the invoices and read out the details which she wrote down. The invoices were not taken away: no original documents were taken; if any had been taken she would have given a receipt. By the reference to "uplifted" (see paragraph 60 above) she meant that the information was extracted. After the visit she received invoices from the Appellant which were not the originals, apart from one with a coloured logo.

68. She said that the return for 12/06 was not due at the date of the visit. She did not see the cheque stubs at the visit, there had been no cause to look for them. The onward invoices issued by the Appellant were not taken away, she could not say whether they were there at the visit.

69. She produced a print-out of Narslan's VAT returns for 2005 from HMRC's database, showing £560 output tax declared in 09/05 and no output tax in the final return on de-registration.

70. Cross-examined, Mrs Hall said that she could not confirm that the invoice for £6,179.25 had been claimed on a return without looking at the Sage report containing the Appellant's VAT account. She agreed that £6,179.25 did not appear on the Arkeley VAT Report dated 12.1.2007 showing the build-up of £37,934.28 input tax for period 12/07, the figure shown on Box 4 in the print-out headed "VAT Return". She agreed that those reports must have been there at the visit. She disallowed that invoice because Narslan was de-registered. She said that the invoice may have been claimed in a later return. The Appellant had not queried it when the assessment was raised.

71. Mr Onwufuju said that the appeal included an invoice for £4,116 in 09/06. Mrs Hall said that the decision of 28 March 2007 stood, apart from an adjustment on 7 May 2009.

72. Asked whether any checks had been made to see whether there was any evidence of payments to Narslan, Mrs Hall said that it was up to the Appellant to produce such evidence but there could not have been such evidence because Narslan was de-registered.

5 73. Mrs Hall's evidence concluded at lunch on the second day. After lunch, during Mr Singh's closing speech she produced a vision print-out showing that the Appellant had claimed £61,113 input tax for 12/06. Mr Singh pointed out that on the Appellant's VAT Return print-out referred to at paragraph 70 above there was a manuscript addition opposite Box 4 "+ 23,178 = 61,112"; the pence were cut-off in
10 the exhibit.

Submissions for HMRC

74. Mr Singh said that the logos and telephone and fax numbers on the Narslan invoices differed from those on the notepaper given by Narslan to HMRC in April 2003. Narslan had notified Companies House of the change of address to Green
15 Lanes in October 2004; mail sent to Unit 22 had been returned in March 2005 and Narslan had confirmed Green Lanes as its address. Narslan had informed HMRC that it had engaged in no trade from 30 September 2005 and its VAT registration was cancelled. Narslan was dissolved on 13 June 2006. He said that it was highly unlikely that the invoices were issued by Narslan: the invoice of 16 September 2005
20 and the others had the wrong address, the remainder were after Narslan was dissolved.

75. At the outset of the present hearing Mr Singh had stated that HMRC did not allege that the Appellant had falsified the invoices or the bank statements.

76. Mr Singh said that since the invoices did not comply with the requirements of regulation 14 the Appellant was not entitled to deduct input tax unless HMRC
25 exercised their discretion under the proviso to regulation 29(2).

77. He said that Narslan had not declared output tax on any of the disputed invoices. There was little evidence of the Appellant trading with Narslan or of Narslan chasing the debt said to be owed by the Appellant; there was no evidence of due diligence by the Appellant on Narslan; there was no evidence as to the sort code of Narslan's bank
30 and no evidence as to where the Appellant sent Narslan cheques.

78. Mr Singh said that the evidence as to onward supplies of goods on the Narslan invoices had only been produced on 13 February 2013. It was not possible to reconcile the payments with the Appellant's invoices to customers.

79. He said that, even if the Appellant succeeded on the issue of the
35 Commissioners' discretion under regulation 29(2), the Appellant had not established that the consideration had been paid by the Appellant within six months as required by section 26A. The payments by F/Flow only came to £216,714; little weight should be attached to the cheque stubs with "Narslan" which had not been taken at the visit and were produced for the first time in Mr Onwufuju's statement in 2012.

80. He said that the Appellant had not established that the input tax of £6,179 had not been claimed.

Submissions for Appellant

5 81. Mr Onwufuju said that the invoice for £4,116 on 8/08/06 may have been duplicated in the assessment.

82. He submitted that it was clear that the invoice for £6,179 had not been claimed in 12/06.

10 83. He said that, apart from the address, the Narslan invoices would have been accepted, the information on them being correct. There was evidence of legitimate transactions with the goods coming in and going out. Hr referred to the print-outs from the Appellant's records of supplier activity. He said that the Appellant was never aware that Narslan had de-registered and was subsequently dissolved. Narslan had not defaulted with the Appellant's knowledge.

15 84. Mr Onwufuju produced an article in De Voil Indirect Tax Intelligence February 2009 on the decision of the High Court in *Revenue and Customs Commissioners v. Livewire Telecom Ltd* [2009] STC 643. He submitted that the Appellant had acted in good faith and had done everything reasonable in its power to meet the requirements of HMRC and was never privy to any default by Narslan or to any fraud on HMRC and that the appeal should accordingly be allowed.

20 Conclusions

85. We have set out a summary of the skeleton arguments as well as the closing submissions because, Mr Onwufuju not being a lawyer, his closing submissions were very brief and because some points originally raised were not pursued or covered in closing and new points arose.

25 86. Section 26 of the VAT 1994 provides that a taxable person is entitled to credit for so much of the input tax as is allowable under regulations as being attributable to supplies.

87. Regulation 29(2) of the VAT Regulations 1995 provides, as far as is relevant, as follows:

30 “(2) At the time of claiming deduction of input tax ... a person shall, if the claim is in respect of –

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

...

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

5 88. Regulation 13 requires a registered person making a taxable supply to provide a VAT invoice. Regulation 14 specifies the contents of a VAT invoice. It provides, as far as is relevant,

“(1) ... [S]ave as the Commissioners may otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars –

- 10 (a) a sequential number ...;
- (b) the time of the supply
- (c) the date of issue of the document;
- (d) the name, address and registration number of the supplier
- 15 (e) the name and address of the person to whom the goods or services are supplied;
- (f) ...
- (g) a description sufficient to identify the goods or services supplied;
- (h) ... the quantity of the goods ..., and the rate of VAT and the amount payable, excluding VAT ...;
- 20 (i) ... the gross total amount payable excluding VAT ...;
- (j) ...
- (k) ...
- (l) the total amount of VAT chargeable ...;
- (m) the unit price
- 25 (n) ...
- (o) ...”

30 89. We find as a fact that at the time of all the Narslan invoices the address of Narslan was at Green Lanes, N3 and not Unit 22, Such Close, Letchworth Garden City, and that at the time of all invoices apart from that on 16/9/05 Narslan was not only not registered for VAT but had been dissolved and therefore did not exist as a company.

35 90. It follows as a matter of law that the Appellant did not hold the documents required under regulation 29(2)(a) and could only succeed by relying on the proviso of regulation 29(2). There was no suggestion that the Commissioners had given a direction under the proviso.

91. In *Kohanzad v. Customs and Excise Commissioners* [1994] STC 967, Schiemann J. considered a case where the Commissioners refused a claim for input tax in the absence of tax invoices although conceding that they had a discretion to do so. The relevant legislation at that time was regulation 62(1) and (1A) of the Value Added Tax (General) Regulations 1985. At page 969b, Schiemann J said that,

“... [T]he second effect of that provision is that the Commissioners have a discretion to allow credit for input tax, notwithstanding that the registered taxable person does not hold such an invoice.”

At d on the same page he said

“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, it is one where it sees whether the Commissioners have exercised their discretion in a defensible manner.”

Again on the same page he said,

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

In the context the reference to “incorrect” means “indefensible” or, as more normally expressed, unreasonable in the sense of *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223, C.A. Although the wording of regulation 29(2) differs from the 1985 Regulations we do not consider that the change is one of substance.

92. An appellant faces a considerable hurdle in establishing that the refusal to allow credit in the absence of valid invoices is unreasonable. An example where an appellant would succeed is where there is clear evidence that invoices which the trader had held were stolen or destroyed in a fire. Another example might be misspelling of an address or an inadequate description of the goods, where there is clear evidence of what the goods comprised.

93. The requirement to hold an invoice when exercising the right to deduct is a basic requirement of VAT. Article 18.1(a) of the Sixth Directive which was in force at the time expressly required the trader to hold an invoice drawn up in accordance with Article 22.3 which specified the contents of an invoice. The details required in an invoice are there to enable the tax authorities to police claims for input tax.

94. Article 18.3a permitted Member States to authorise a deduction without an invoice and obliged Member States to determine the conditions and arrangements for applying that provision.

95. In the present case five of the six invoices purportedly issued by Narslan were dated after Narslan was dissolved and were therefore issued by a non-existent

company. There was no suggestion that Narslan had been restored to the Company Register. Furthermore those five invoices were dated after Narslan had deregistered for VAT. There was no evidence of any due diligence by the Appellant on Narslan nor even of the address to which the Appellant sent cheques to Narslan.

5 96. We are satisfied on the balance of probabilities that the last five Narslan invoices were produced fraudulently. There was no allegation by HMRC that the Appellant acted fraudulently and it may be that the Appellant was itself defrauded.

97. We are however wholly unable to accept that the Appellant did everything reasonable in its power to meet the requirements to obtain input tax.

10 98. This is a totally different case to those in MTIC fraud cases such as were considered in *Livewire*. There is no need for HMRC to rely on the principle established in *Kittel v. Belgium* (Case C-439/04 [2008] STC 1537 in a case where there is no valid invoice. *Kittel* concerned the circumstances in which a trader otherwise entitled to input tax credit loses the right because he knew or ought to have
15 known of the connection with fraud. *Kittel* was not a case where the actual invoices relied on were defective. *Teleos* on which Mr Onwufuju relied in his skeleton does not assist him for the same reason.

99. Although the first Narslan invoice was dated at a time when Narslan was still in existence and registered for VAT, the Appellant has not satisfied us that the refusal to
20 allow that invoice was unreasonable. The address was wrong, the logo differed from the letterhead in April 2003 and mail addressed to Unit 22 had been returned by Royal Mail. There was a complete lack of evidence as to due diligence by the Appellant on Narslan.

100. In the circumstances we see no need to consider section 26A beyond saying that
25 we cannot see how the Appellant could show that it paid for the Narslan invoices when Narslan was dissolved and thus non-existent.

101. There remain the invoices dated 8.8.06 for £4,116 and 3.12.06 for £6,179 which involve different issues altogether.

30 102. Mr Onwufuju's skeleton argument did not address the £4,116 invoice but he submitted in closing that it may have been double counted.

103. We found the decision letters and schedules of assessment most confusing; they were not explained during the hearing. The only references to sums of £4,116 were as follows (pages [37] and [38] of Bundle):

35 and "09/05 16/9/2005 £4,116 £23,520 Inv available Such Close"
and "09/06 £4,116 Inv #1052/Listed at visit 17/1/07".

Invoice 1052 was for £23,520 plus £4,116 VAT and was dated 16/09/2005 [54] in the bundle. A copy invoice from Transaco dated 18/08/06 for £23,520 plus £4,116 VAT was in the bundle at [59]; no original of that invoice was produced at the hearing. We

accept Mr Singh's submission in closing that the invoice of 18/08/06 had been cancelled; the Appellant's VAT Report for period 08/06 [471] showed the Transaco invoice in the Box 4 build-up but also showed it as reversed. We have however concluded that, although the Transaco invoice was not assessed, invoice 1052 on 5 16.09.05 was double counted in Mrs Hall's assessment at [37] and [38] being also included under period 09/06. Section 26A is not relevant to this.

104. The other invoice was £6,179 on 3/12/06. If the Appellant had satisfied us that the input tax was never claimed, he would have succeeded on this. It is clear that it was not included in the initial calculation, see paragraph 70 above. However, as Mr 10 Singh pointed out in closing at paragraph 73, there was a manuscript addition in the margin of the print-out [482] and the additional £23,178 made up the Box 4 figure to £61,112 with some pence cut off in photocopying. The vision print-out of returns shows £61,113 input tax as claimed in period 12/06. The Appellant has not satisfied us that the additional sum did not include the invoice in question.

15 105. The result is that the assessment of £4,116 for 09/06 is discharged; otherwise the assessment stands.

106. 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 20 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.

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**THEODORE WALLACE
TRIBUNAL JUDGE**

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RELEASE DATE: 14 March 2013