[2015] UKFTT 0489 (TC)

TC04651

Appeal number: TC/2014/03185

VAT – input tax –Value Added Tax Act 1994, section 24 – Value Added Tax Regulations 1995, regulations 13, 14 and 29(2) – discretion to accept alternative evidence of input tax – output tax - disbursements – whether or not in the name of the appellant's customer – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES EDWIN BOYCE **Appellant**
(trading as GLENWOOD)

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MR DEREK ROBERTSON

Sitting in public at 4th Floor, City Exchange, 11 Albion Street, Leeds, LS1 5ES on 3 August 2015.

Mr James Boyce appeared in person.

Mr David Wilson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

Introduction

1. This is an appeal by Mr Boyce against a review decision upholding an assessment for output tax and for the repayment of disallowed input tax, originally in the sum of £124,980 plus interest ("the Assessment").

2. The factual background is not in dispute. Mr Boyce traded as Glenwood during the material time. He has since ceased trading. His business was involved in the purchase, supply and export of new and used motor vehicles. These were mostly prestige vehicles, including Porsches, Mercedes and Range Rovers. Most of the vehicles which are the subject of these proceedings were exported by Mr Boyce's customer, Great Harvest Limited ("Great Harvest") to Singapore. However, the manufacturers of the vehicles and the owners of the dealership franchises would not, it appears, have approved of Great Harvest purchasing them in the United Kingdom for the purposes of export in this way. Great Harvest's solution to this was to disguise its involvement by Mr Boyce purchasing the vehicles and then selling them on to Great Harvest. In turn, Mr Boyce's involvement was disguised by individuals purchasing the vehicles from the dealership franchises for him ("the Named Purchasers"). The managers of the dealerships where the vehicles were purchased ("the Dealerships") were not only well aware of what is happening but in fact actively sought Mr Boyce out to sell the vehicles to him. Indeed, some of the Named Purchasers were themselves employees or contacts of the Dealerships.

3. The very nature of this process meant that the Dealerships' invoices refer to the Named Purchasers, rather than Mr Boyce, as the purchasers of the vehicles.

4. Mr Boyce was the subject of a series of routine VAT assurance visits between 24 June 2013 and 1 October 2013. This resulted in the Assessment, notice of which was given in a letter dated 18 December 2013, in the sum of £124,983 plus interest. No penalties were imposed.

5. The Assessment related to the periods from 08/11 to 11/12 and was divided into the following categories by HMRC (although we have added the descriptions for ease of reference within this decision):

(1) £8,014 representing output tax not declared on the profit of margin scheme sales ("the Margin Scheme Output Tax").

(2) £2,654 representing output tax due on road fund licences and first registration fees (together "the Road Fund Licence Output Tax").

(3) £100,663 representing the repayment of input tax disallowed in the absence of satisfactory purchase invoices ("the Vehicle Purchase Input Tax").

(4) £9,364 representing the repayment of input tax disallowed in relation to a cancelled purchase ("the Cancelled Purchase Input Tax").

(5) £857 representing output tax in relation to various miscellaneous matters which had not been declared ("the Miscellaneous Output Tax").

(6) £3,431 representing input tax in relation to various miscellaneous matters which were disallowed for want of evidence ("the Miscellaneous Input Tax").

6. The Assessment decision was reviewed and upheld by a decision dated 15 May 2014. Mr Boyce duly appealed to this Tribunal (although expressly excluded from his appeal the sum of £7,791 representing part of the Margin Scheme Output Tax). His grounds of appeal include the following:

> "I, James Edwin Boyce, was acting on the behalf of an export company to purchase new and used motor cars for export.
>
> All the cars which I exported myself have been accounted for. All export evidence such as Bills of Lading has been supplied and accepted by HMRC.
>
> The amount of £117,192.00 was for cars and disbursements to purchase cars on the export companies' behalf. I had been inspected by HMRC numerous times in the past. I have also obtained VAT advice from KPMG VAT experts before I started trading.
>
> All cars sold to the export company then were sold at cost plus an admin fee. Any VAT collected on the sale to the export company has been accounted for.
>
> I do not have the money. The goods (cars) were purchased with one hand with VAT reclaimed and sold on another hand to export companies. Any VAT on profit was paid to HMRC upon the sale. I did not retain any VAT monies."

7. By a letter dated 23 March 2015, HMRC withdrew the sum of £7,791 from the sum assessed for Margin Scheme Output Tax (presumably, given Mr Boyce's stance in his Grounds for Appeal, because it had by then been paid) and withdrew the sum of £202 from the sum assessed for the Road Fund Licences Output Tax.

8. Mr Boyce provided a helpful and realistic statement of case, which included concessions as to the remaining Margin Scheme Output Tax, the Cancelled Purchase Input Tax and the Miscellaneous Output Tax.

9. In the course of the hearing, the parties sensibly agreed that Mr Boyce would provide HMRC with further documents to substantiate the Miscellaneous Input Tax. If HMRC accept Mr Boyce's position in the light of those documents, the assessment will be reduced accordingly. If HMRC do not accept those documents, then Mr Boyce said that he would accept the position. We make the point that Mr Boyce did not present any oral or documentary evidence to us about the Miscellaneous Input Tax and so we would have had to dismiss that part of his appeal if it had been pursued. However, given the parties' stance, we will not make any findings in this decision as to the Miscellaneous Input Tax.

10. It follows that the parties only require a determination upon the Vehicle Purchase Input Tax assessed in the sum of £100,663 and the Road Fund Licence Output Tax in the sum of £2,452 (after the withdrawal of the £202 referred to above).

11. Before leaving our introductory remarks, we note that HMRC made it very clear that it was no part of their case that Mr Boyce was acting dishonestly, whether as regards his VAT position or as regards his involvement in disguising Great Harvest's involvement.

The Evidence

12. We heard evidence from Mr Boyce. He began by explaining the background to his business. He had been an employee of a motor sales company, Pinnacle International Pte Ltd ("Pinnacle"), in Singapore. In 2010, he moved to the United Kingdom with a view to sourcing and exporting vehicles to the Far East. He retained his links with Pinnacle. Indeed, as Mr Boyce put it, he, "was the front and the face for the Singapore Company in the United Kingdom."

13. Pinnacle and Mr Boyce arranged for Great Harvest to be incorporated to carry out the actual exporting. Mr Boyce would then be responsible for overseeing the process of purchasing the vehicles from dealers, selling them to Great Harvest, and then Great Harvest exporting them on. Pinnacle would pay all Mr Boyce's expenses by way of a management fee invoiced every month.

14. Mr Boyce said that he took advice from KPMG as to setting up business in the United Kingdom in this way, who told him what was needed in order to comply with all legal requirements.

15. We were told that 90% of Mr Boyce's work was for Great Harvest and Pinnacle. The remaining 10% comprised sales to other customers who would similarly export them, although not necessarily to Singapore. As set out above, Mr Boyce would arrange for Named Purchasers to purchase vehicles from main dealers who would then transfer them to him. He would then transfer them to his customers (mainly Great Harvest), who would then export them (in Great Harvest's case, to Pinnacle).

16. Some of the Named Purchasers were people connected to the Dealerships and others were employees of Great Harvest. We were told that it was in the Dealerships' interest to sell as many vehicles as possible in order to increase their sales numbers. They would often contact Mr Boyce with potential deals and would provide discounts. Mr Boyce said that the whole process was, to use his words, "dealer led". However, the Dealerships could not record the sales as being to Mr Boyce or Great Harvest, as they had to disguise the fact that these were purchases for the purpose of export for fear of jeopardising their relationship with the manufacturers.

17. The Named Purchasers entered into a written agreement entitled, "Buying Agent Agreement" ("the Agency Agreement"). We were told that there would be an Agency Agreement in respect of each transaction. We were provided with one example of an Agency Agreement which included the following terms:

> "1. This agreement is of [sic] the purpose of purchasing new motor vehicles for and on behalf of James Boyce and any associated companies/business, herein known as "the Company". This is not an employment contract.
>
> We [agent's name] (known as "the Buyer") have purchased the following car on behalf of "the company" [invoice details].
>
> We have no legal title to the motor vehicles, even though vehicles may be invoiced to us directly, or taxed (registered keeper) in our name.
>
> We will not claim the Value Added Tax (VAT) from the purchase of this said motor vehicle. In doing so I will be committing a breach of the agreement and will be liable for any amounts that "the company" is unable to claim, by our actions.
>
> 2. Payment of services. The company has paid via [recipient's name] a commission for the services supplied.
>
> 3. Property. Any documents or information supplied to "the buyer" is the property of "the company" and will remain so.

18. We were also provided with various other documents for each of the transactions in dispute in respect of the Vehicle Purchase Input Tax. These included at least: a purchase invoice from the Dealership in the name of the Named Purchaser; an invoice from Mr Boyce to his customer; and bank statements showing debits from Mr Boyce to the Named Purchaser and credits from Mr Boyce's customers to Mr Boyce.

19. New cars were purchased from the Dealerships with road fund licences and first registration fees. These are itemised on the invoices from the Dealerships without a charge for VAT as they were properly treated by the Dealerships at that stage as disbursements.

20. Mr Boyce said that he had been the subject of a series of VAT inspections in 2010 and 2011. He told us that he explained to HMRC how the business was run and there was no suggestion that anything that he had done was wrong until Mrs Brierley's visit which led to the Assessment.

21. Mr Boyce said that, since the Assessment, he has tried to obtain evidence from the Named Purchasers. However, none of them have co-operated. He said that he had not tried to get replacement invoices from the Dealerships but the Dealerships (presumably as distinct from the managers he was dealing with) would be unlikely to know who he was.

22. Mr Wilson's only significant question in cross-examination was as to why Mr Boyce had not tried to have the names on the purchase invoices changed. Mr Boyce said that the invoice could not be changed once the transaction had been closed.

23. HMRC did not adduce any oral or written witness evidence

The Legal Framework

Evidence of input tax

24. Section 24 of the Value Added Tax Act 1994 ("VATA 1994") relates to input tax and output tax. Section 24(6) provides for regulations as to evidence of input tax as follows:

> "(6) Regulations may provide –
>
> (a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member states to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;"

25. The relevant regulations of the Value Added Tax Regulations 1995 ("VATR 1995") provide as follows:

> "13. Obligation to provide a VAT invoice
>
> (1) Save as otherwise provided in these Regulations, where a registered person
>
> (a) makes a taxable supply in the United Kingdom to a taxable person, or
>
> (b) makes a supply of goods or services to a person in another member State for the purpose of any business activity carried on by that person, or
>
> (c) receives a payment on account in respect of a supply he has made or intends to make from a person in another member State,
>
> he shall provide such persons as are mentioned above with a VAT invoice (unless, in the case of that supply, he is entitled to issue and issues a VAT invoice pursuant to section 18C(1)(e) of the Act and regulation 1145D(1) below in relation to the supply by him of specified services performed on or in relation to goods while those goods are subject to a fiscal or other warehousing regime.
>
> … …
>
> (5) The documents specified in paragraphs (1), (2), (3) and (4) above shall be provided within 30 days of the time when the supply is treated as taking place under section 6 of the Act, or within such longer period as the Commissioners may allow in general or special directions."

"14.

(1) Subject to paragraph (2) below and regulation 16 and save as the Commissioners otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars –

(a) a sequential number based on one or more series which uniquely identifies the document,

(b) the time of the supply,

(c) the date of the issue of the document,

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

(e) the name and address of the person to whom the goods or services are supplied,

(f) …

(g) a description sufficient to identify the goods or services supplied,

(h) for each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in any currency,

(i) the gross amount payable, excluding VAT, expressed in any currency,

(j) the rate of any cash discount offered,

(k) …

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

(m) the unit price,

(n) where a margin scheme is applied under section 50A or section 53 of the Act, a relevant reference or any indication that a margin scheme has been applied,

(o) where a VAT invoice relates in whole or part to a supply where the person supplied is liable to pay the tax, a relevant reference or any indication that the supply is one where the customer is liable to pay the tax.

… …"

"29.

(1) Subject to paragraph (1A) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim on the

return for the first prescribed accounting period in which he holds that document or invoice.

… …

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

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

… …

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

… …"

26. The focus of the present claim is upon the proviso to regulation 29(2) and HMRC's discretion to accept alternative evidence of the charge to VAT. It was common ground between the parties that we have a supervisory jurisdiction in this regard. We agree with this approach (see *Kohanzad v Customs and Excise Comrs* [1994] STC 967 *per* Schiemann J at 969). As such, Mr Boyce has the burden of proof of satisfying us that HMRC did not take into account all relevant matters or took into account any irrelevant matter or that no reasonable body of Commissioners would have reached the decision that HMRC made. It follows that we are restricted to considering the information available to HMRC at the time of the decision. However, Mr Wilson has helpfully conceded for the purposes of this appeal that HMRC has since reconsidered the decision in the light of the evidence provided within these proceedings and effectively upheld the review decision. As such, HMRC's position was that we should take into account all information presently available to this Tribunal when considering the reasonableness of HMRC's decision, treating it as available at the time of the decision. In any event, we were not given any evidence as to how much less information – if any less at all – HMRC in fact had at the time of the decision.

27. From a Community law perspective, Article 178(a) of the Principal VAT Directive 2006/112/EEC provides as follows:

"Article 178:

In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a) in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Section 3 to 6 of Chapter 3 of Title XI.

… …"

28. HMRC drew heavily upon the First-Tier Tribunal case of *Everycar Contracts Limited and Sabrina Hammon trading as SJM Group v HMRC* [2013] UKFTT 405 (TC) (Judge John Walters QC and Mr George Bardwell) in respect of both the application of the domestic law and the Community law. On the face of it, this was a similar case to the present. The appellants carried on business as car exporters and also purchased vehicles from main dealers through nominees. The appellants relied upon invoices made out to the nominees as evidence of their own input tax claims. Although not binding on us, the decision gives a helpful explanation of the legal framework. Given the extent of HMRC's reliance on this case, we recite the main part of the Tribunal's conclusions as follows:

> "[63] In our view this appeal raises two related but distinct issues. The first is whether HMRC's decision to refuse to exercise its discretion to accept alternative evidence (other than regular tax invoices) to support the appellants' claims to deduct input tax is one which no reasonable body of Commissioners in the circumstances could have made – this is a domestic public law issue. The second is whether Community law (especially the principles of neutrality and effectiveness) requires HMRC in all the circumstances of this case to exercise its discretion to accept alternative evidence in the appellants' favour.
>
> [64] We have no difficulty in deciding the first (domestic public law) issue in HMRC's favour. We note that Officer Jones did consider exercising his discretion to accept alternative evidence in relation to Sabrina Hammon trading as SJM Group and decided not to do so. We also note that although Officer Wootten did not consider exercising his discretion to accept alternative evidence in relation to Everycar, Officer Mrs Ford considered exercising her similar discretion as part of her review of Officer Wootten's decision and decided not to do so.
>
> [65] Also, it was not the basis of Officer Mrs Ford's decision that the third parties had purchased the cars as agents of the appellants. Her decision not to accept alternative evidence in relation to Everycar was taken purely on policy grounds that (1) the appellants had obtained the irregular tax invoices in question for business reasons; (2) that they could have obtained regular tax invoices from the dealer-suppliers if they had chosen to do so; (3) that acceptance of alternative evidence in these circumstances posed a risk of enabling fraud to be committed; and (4) that acceptance of alternative evidence in this case might involve HMRC acting inequitably towards compliant taxpayers. Officer Jones's decision was based on this view that the appellants could have obtained regular tax invoices from the dealer-suppliers if they had chosen to do so (the second reason given for Officer Mrs Ford's decision).
>
> [66] While we have some sympathy with Mr Ahmed's case that the reasons for obtaining the irregular invoices should not have carried much (or any) weight as grounds for the decision on whether or not to exercise the discretion to accept alternative evidence, and we have difficulty in seeing how a decision to accept alternative evidence in the appellants' case would have been unfair to other taxpayers (particularly taxpayers holding invoices from insolvent or liquidated suppliers), we regard the concern to prevent or limit the risk of enabling fraud to be committed by the use of irregular invoices and, in particular, the view,

honestly held by the decision makers at the time they made their decisions, that the appellants could have obtained regular tax invoices from the dealer-suppliers if they had chosen to do so, as rational grounds for HMRC's decisions not to accept alternative evidence and to insist on the appellants' production of regular tax invoices.

[67] The evidence produced by the appellants (the letters referred to at paragraphs 22 and 23 above), some 12 months after HMRC's decisions had been made, do not go anywhere near to establishing that HMRC's view that the appellants could have obtained regular tax invoices from the dealer-suppliers was wrong or based on some fundamental misapprehension. Those letters are from three, not necessarily representative, dealer-suppliers, and although they state that their accounting system makes it impossible for them to issue amended invoices, they do not say why, and, of course, the originators of the letters were not presented for cross-examination by Mr Shea on the point. There is also the point that the letter from Marsh Wall Limited (BMW Service) indicates that the invoices were made out to 'the end user' (which we take to mean the appellants' customers) rather than unconnected private individuals, which we understand to have been the case in most, if not all, purchases.

[68] Further, there was not, in our view, any procedural irregularity in this case which would cause HMRC's decisions to be regarded as irrational on general public law principles.

[69] We, therefore, hold that the appellants have not surmounted the 'notoriously high' threshold of public law irrationality, referred to by Sir Thomas Bingham MR in *ex p Unilever plc*.

[70] We turn, therefore, to second, Community law, issue of whether the principles of neutrality and effectiveness require HMRC in all the circumstances of this case to exercise its discretion to accept alternative evidence in the appellants' favour.

[71] Here, the point is whether the conditions laid down by HMRC as an emanation of the state, *viz:* that the appellants must obtain regular tax invoices from the dealer-suppliers and hold them to support their claims to input tax deduction, renders 'virtually impossible' (*cf Reemtsma* [37]) the exercise by the appellants of their Community law rights to deduction of the input tax. We understand the alternative 'or excessively difficult' to be included in the reference to 'virtually impossible' (*cf Reemtsma* [41]) It is worthy of note that the Court of Justice made reference in *Reemtsma* [41] to the case of the insolvency of the supplier being an example of a case where reimbursement of VAT from a supplier had become impossible or excessively difficult. We do not understand therefore that the insolvency or disappearance of a supplier are the only circumstances which would require (pursuant to the principle of effectiveness) direct reimbursement by the tax authorities.

…

[77] We consider that it would be sufficient for the appellants to show that it would be virtually impossible or excessively difficulty for them

to obtain regular tax invoices (by analogy with *Reemtsma*, referred to above).

…

[80] Our decision is that the appellants have failed to satisfy us of this: letters referred to at paragraphs 22 and 23 do not persuade us that it will be virtually impossible or excessively difficult for the appellants to obtain regular tax invoices from the dealer-suppliers. We bear in mind the dealer-suppliers' legal obligation under regulation 13 of the VAT Regulations to supply a regular tax invoice to the appellants (an obligation with which, since 2010, we understand they have complied). The letters referred to in terms explain why the original invoices issued to third parties cannot be re-issued or changed. They do not provide evidence meeting HMRC's point that they would expect that a credit note could and should be issued to the third party involved and a new invoice could and should be issued to whichever of the appellants had provided the funds for the purchase of the car in any particular case.

[81] For these reasons we dismiss the current appeals."

29. The Tribunal in *Everycar* referred to the First-Tier Tribunal decision of *McAndrew Utilities Limited v HMRC* [2012] UKFTT 749 (TC) (Judge Jonathan Cannan and Miss Susan Stott). The Tribunal in *McAndrew* made the point that the alternative evidence required in the absence of a VAT invoice is context specific and not limited to evidence of the supply having taken place, stating as follows at [13] to [15]:

"[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."

30. The Tribunal in *Everycar* also placed considerable emphasis upon *Reemstma Cigarettenfabriken GmbH v Ministero delle Finanze* (Case 35/05) STC [2008] STC

3448. In that case, the Court of Justice considered the question of reimbursement of input tax (albeit in the different situation where the recipient of the invoice mistakenly paid the VAT) as follows at [37] to [42]:

> "[37] It must be pointed out in that regard that, in the absence of Community rules on applications for the repayment of taxes, it is for the domestic legal system of each member state to lay down the conditions under which such applications may be made; those conditions must observe the principles of equivalence and effectiveness, that is to say, they must not be less favourable than those relating to similar claims founded on provisions of domestic law or framed so as to render virtually impossible the exercise of rights conferred by the Community legal order (see, inter alia, *Recheio Cash & Carry SA v Fezenda Pública/Registo Nacional de Pessoas Collectivas* (Case C-30/03) [2004] ECR I-6051, para 17, and *My Travel plc v Customs and Excise Comrs* (Case C-291/03) [2005] STC 1617, [2005] ECR I-8477, para 17).
>
> [38] Also, the Sixth Directive does not contain any provisions relating to the adjustment by the issuer of the invoice of VAT which has been improperly invoiced. The Sixth Directive merely defines, in art 20, the conditions which must be complied with in order that deduction of input taxes may be adjusted at the level of the person to whom goods or services have been provided. In those circumstances, it is for the member states to lay down the conditions in which improperly invoiced VAT may be adjusted (*Schmeink & Cofreth and Strobel* [2000] STC 810, [2000] ECR I-6973, paras 48 and 49).
>
> [39] In the light of the case law cited in the two preceding paragraphs, it must be conceded that, in principle, a system such as the one at issue in the main proceedings in which, first, the supplier who has paid the VAT to the tax authorities in error may seek to be reimbursed and, second, the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due observes the principles of neutrality and effectiveness. Such a system enables the recipient who bore the tax invoiced in error to obtain reimbursement of the sums unduly paid.
>
> [40] It must also be borne in mind that, according to settled case law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each member state, under the principle of the procedural autonomy of the member states (see, inter alia, *Preston v Wolverhampton Healthcare NHS Trust* (Case C-78/98) [2001] 2 AC 415, [2000] ECR I-3201, para 31, and *i-21 Germany GmbH v Bundesrepublik Deutschland* (Joined Cases C-392/04 and C-422/04) [2007] 1 CMLR 305, para 57).
>
> [41] In that regard, as rightly submitted by the Commission, if reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, those principles may require that the recipient of the services to be able to address his application for reimbursement to the tax authorities directly. Thus, the member states must provide for the instruments and the

> detailed procedural rules necessary to enable the recipient of the services to recover the unduly invoiced tax in order to respect the principle of effectiveness.
>
> [42] The answer to the second part of the second question must therefore be that the principles of neutrality, effectiveness and non-discrimination do not preclude national legislation, such as that at issue in the main proceedings, according to which only the supplier may seek reimbursement of the sums unduly paid as VAT to the tax authorities and the recipient of the services may being a civil law action against that supplier for recover of the sums paid but not due. However, where reimbursement of the VAT would become impossible or excessively difficult, the member states must provide for the instruments necessary to enable that recipient to recover the unduly invoiced tax in order to respect the principle of effectiveness.

31. In the present context, the availability to HMRC of a discretion pursuant to the proviso to regulation 29(2) provides the instrument to allow recovery notwithstanding the absence of a valid VAT invoice where appropriate to do so. Having regard to *Everycar* and *Reemstma*, the relevance of Community law is that the principles of neutrality and effectiveness must be observed when considering HMRC's discretion to accept alternative evidence of the charge to VAT.

Disbursements

32. Section 1(1)(a) of VATA 1994 provides for VAT to be charged on the supply of goods or services in the United Kingdom, including anything treated as such a supply.

33. Section 5(2)(a) of VATA 1994 states that:

> "'supply' in this Act includes all forms of supply, but not anything done otherwise than for a consideration;"

34. Article 79(c) of the Principal VAT Directive 2006/112/EEC provides as follows:

> "the taxable amount shall not include the following factors:
>
> …
>
> (c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered into his books in a suspense account.
>
> The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged."

35. HMRC have set out its practice in paragraph 25.1.1 of Notice 700:

> "You may treat a payment to a third party as a disbursement for VAT purposes if all the following conditions are met:
>
> - you acted as the agent of your client when you paid the third party

- your client actually received and used the goods or services provided by the third party (this condition usually prevents the agent's own travelling and subsistence expenses, phone bills, postage, and other costs being treated as disbursements for VAT purposes)
- your client was responsible for paying the third party (examples include estate duty and stamp duty payable by your client on a contract to be made by the client)
- your client authorised you to make the payment on their behalf
- your client knew that the goods or services you paid for would be provided by a third party
- your outlay will be separately itemised when you invoice your client
- you recover only the exact amount which you paid to the third party
- the goods or services, which you paid for, are clearly additional to the supplies which you make to your client on your own account

All these conditions must be satisfied before you can treat a payment as a disbursement for VAT purposes."

Mr Boyce's Case

36. The essence of Mr Boyce's case was that HMRC had previously investigated his business and were perfectly happy with his evidence of input tax and approach to disbursements.

37. As regards the Vehicle Purchase Input Tax, Mr Boyce submitted that it was clear that he had incurred the supplies and that he could not get any replacement invoices.

38. As regards the Road Fund Licence Output Tax, Mr Boyce submitted that he had complied with Public Notice 700.

HMRC's Case

39. As regards the Vehicle Purchase Input Tax, Mr Wilson submitted on behalf of HMRC that Mr Boyce had failed to provide a VAT invoice made out to him and had not shown that it was virtually impossible or excessively difficult to obtain a valid VAT invoice. His position was that Mr Boyce had effectively chosen not to do so. The present case, Mr Wilson maintained, was no different to the *Everycar* case.

40. As regards the Road Fund Licence Output Tax, Mr Wilson relied upon HMRC's initial reasons for rejecting the claim; namely, that these were single supplies of taxed vehicles rather than the road fund licence and tax being disbursements.

Discussion

Findings of fact

41. We found Mr Boyce to be an honest, credible and helpful witness and have no reason to doubt the truth of what he said. We accept his evidence as set out in paragraphs 12 to 22 above.

42. The following findings of fact are particularly relevant to our decision:

(1) Mr Boyce was acting honestly in entering into the transactions. As far as Mr Boyce was concerned, the Dealerships' employees and managers had authority to bind the Dealerships and did so.

(2) The Named Purchasers were acting as Mr Boyce's agents and nominees.

(3) It is clear from the Agency Agreements that the supplies of the vehicles were made to Mr Boyce. It is also clear that Mr Boyce was acting as agent for his customers.

(4) The bank statements evidence the flow of funds from Mr Boyce to the Named Purchasers and from Mr Boyce's customers to Mr Boyce.

(5) The Agency Agreements precluded the Named Purchasers from reclaiming input tax themselves.

(6) Although employees (and even managers) of the Dealerships were complicit in the transactions, Mr Boyce and his customers were hidden from view from the owners of the Dealerships and the manufacturers.

(7) The Dealerships would be extremely unlikely to supply Mr Boyce with a replacement VAT invoice or to credit the Named Purchasers and reissue an invoice to Mr Boyce. We infer this from the overall context of the transactions, the fact that neither the owners of the Dealerships or the manufacturers would have known or would have approved of the transactions and the fact that the Named Purchasers have not co-operated in Mr Boyce's attempts to regularise the position. We infer from Mr Boyce's evidence that the people he dealt with would not be prepared to jeopardise the Dealerships' position with the manufacturers by doing this. Our reason for this inference is that if the employees were not prepared to disclose Mr Boyce's involvement at the time of the transactions (and we find as a matter of fact that they were not so prepared) it is difficult to see why they would be prepared to do so now.

(8) HMRC's reason for disallowing the Vehicle Purchase Input Tax was limited to the absence of evidence of supplies to Mr Boyce. In her review decision dated 15 May 2014, Officer Hanrahan states as follows:

> "Section D is made up of input tax disallowed on purchases not addressed to Mr Boyce. In order to claim back input tax the requirement at Section 24(1) VAT Act 1994 has to be met. HMRC Guidance (VIT20500) outlines the conditions before you are entitled to claim

> input tax. One of these is that the supply must be made to the person claiming the deduction. The majority of the assessment relates to purchases of vehicles with invoices addressed to various individuals not the business. The officer has given you the opportunity to provide evidence to support the supply being made to you but this has not been submitted. Based on the information I have available to me I am supporting the decision to disallow this input tax."

(9) The fact that Officer Hanrahan considered the possibility of Mr Boyce providing evidence to support the supply makes it clear that she considered her discretion to allow alternative evidence but declined to exercise it in Mr Boyce's favour.

(10) There is no suggestion that the discretion ought to have been refused for any reason other than the failure to provide invoices addressed to Mr Boyce (it being HMRC's case that it was not virtually impossible or excessively difficult to obtain regular VAT invoices) or to provide what HMRC considered to be satisfactory alternative evidence.

(11) The road fund licences and first registration fees were separately itemised on the Dealerships' invoices to the Named Purchasers and Mr Boyce's invoices to his customers.

(12) The road fund licences and first registration fees were incurred by the Dealerships as disbursements in the name of the Named Purchasers rather than in the name of Mr Boyce or his customers.

(13) There was no evidence as to Mr Boyce's customers' knowledge, understanding or intention as regards the road fund licences or first registration fees.

(14) There was no evidence to suggest that Mr Boyce's customers had any liability of their own to any third party in respect of the road fund licences or first registration fees.

The Vehicle Purchase Input Tax

43. We do not accept HMRC's central premise that it was not virtually impossible or excessively difficult for Mr Boyce to obtain regular VAT invoices. In reaching this conclusion, HMRC failed to take into account the fact that the whole point of the arrangements as described by Mr Boyce was that he and his customers were being hidden from view from the manufacturers or the owners of the Dealerships. It was virtually impossible or excessively difficult for Mr Boyce to obtain a regular VAT invoice because the Dealerships were not prepared to give him them at the time of the transactions (as signified by the need to involve the Named Purchasers). There was no basis presented to us for suggesting that they would have been any more prepared to do so at any later date.

44. Further we take the view that HMRC acted unreasonably in reaching the decision that Mr Boyce had not provided sufficient evidence to support the supply being made to him. We remind ourselves of Mr Wilson's concession that we can

consider all the information which was available to us in the hearing for this purpose (although, again, we note that we would normally be restricted to the evidence available to the decision maker but in the present case HMRC have reconsidered the review decision upon the basis of the information now available and invite us to test the reasonableness of the review decision against that information).

45. We reach this conclusion because HMRC either failed to take into account the following matters or, if they did take them into account, reached a decision which no reasonable body of Commissioners would have reached:

(1) The inability to obtain VAT invoices in Mr Boyce's name as set out in paragraph 43 above.

(2) The Agency Agreements clearly evidenced the true relationship between the Dealerships, the Named Purchasers and Mr Boyce.

(3) Mr Boyce's bank statements evidenced the payments to the Named Purchasers and tallied with the Dealerships' invoices.

(4) HMRC had previously investigated Mr Boyce's affairs and were presumably satisfied that these arrangements constituted supplies to Mr Boyce.

46. We note that the evidence required is not just that of a supply taking place but also the detail which ought to have been contained in a valid invoice if one had been available. However, HMRC have not suggested that any evidence was missing other than that of the supply to Mr Boyce taking place.

47. We are conscious that we are reaching a different conclusion to the *Everycar* case despite *apparently* similar facts. However, we make the following points. First, *Everycar* is not binding upon us. Secondly, these matters are context specific and so turn upon the individual facts of any particular case. Thirdly, the similarities between *Everycar* and the present case are in fact more apparent than real: in *Everycar,* HMRC's decision did not focus upon requiring evidence of the supply having taken place, whereas in the present case this was the focus of the review decision; in *Everycar* the decision was made in order to prevent the risk of fraud, whereas in the present case this did not form part of the decision; in *Everycar* the dealer-suppliers later changed their arrangements so as to provide regular VAT invoices in the name of the appellant, whereas this was not so in the present case; and in *Everycar* the Tribunal was not persuaded that it was virtually impossible or excessively difficult for the appellants to obtain regular VAT invoices, whereas we are so persuaded in the present case.

The Road Fund Licence Output Tax

48. We find that the road fund licences and first registration fees were not disbursements as between Mr Boyce and his customers.

49. Crucially, the road fund licences and first registration fees were not incurred in the name of Mr Boyce's customers. They were obtained in the name of the Named

Purchasers as Mr Boyce's sub-agents. Indeed, they were not even incurred by Mr Boyce but were instead incurred by the Dealerships.

50. It is also of note that Mr Boyce paid the Named Purchasers the full amount of the Dealerships' invoices, therefore including the road fund licences and first registration fees rather than separating them out.

51. In any event, despite the burden of proof being upon him, Mr Boyce did not provide us with any evidence of Mr Boyce's customers' knowledge, understanding or intention as regards the road fund licences or first registration fees, or any evidence that Mr Boyce's customers had any liability of their own to any third party in respect of the same.

Decision

52. It follows that we allow the part of the appeal which relates to the Vehicle Purchase Input Tax (being £100,663) but dismiss the part of the appeal which relates to the Road Fund Licence Output Tax (being £2,452).

53. In closing, we note that Mr Boyce was concerned that this matter might be seen as bringing his integrity into question. We wish to make it clear that Mr Boyce's integrity was not in doubt within these proceedings; a point also underlined by Mr Wilson on behalf of HMRC.

54. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 09 OCTOBER 2015