[2016] UKFTT 0149 (TC)

TC04935

Appeal number: TC/2014/05356

VAT – input tax credit refused by HMRC following deregistration of supplier with retrospective effect - whether invoices were valid – no – whether HMRC had acted reasonably in refusing to exercise discretion to accept alternative documentation – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRADON CONSTRUCTION LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ZACHARY CITRON
MS ELIZABETH BRIDGE

Sitting in public at Fox Court, London on 3 September 2015

Mr Bryan Reeve of Mountsides Ltd, Accountants, for the Appellant

Mr Mark Ratcliff, Officer of HMRC, for the Respondents

DECISION

1. This case concerned HMRC's refusal to give credit for amounts charged to the appellant as VAT on invoices from a supplier that, after the date of the invoices in question, was deregistered from VAT with retrospective effect from a date prior to the invoices. The questions at issue were whether the supplier's invoices were valid VAT invoices and, if they were not, whether it was reasonable for HMRC to have refused to exercise their discretion to grant input tax credit on the basis of the documentation which the appellant had provided.

The appeal

2. Following a visit to the appellant's accountants, Mountsides Ltd ("Mountsides"), and subsequent correspondence, HMRC on 8 April 2014 raised a notice of assessment in the sum of £21,613 representing denial of input tax deductions in respect of the VAT periods of the appellant ending 30 November 2012 and 28 February 2013. The input tax deductions denied were in respect of amounts charged as VAT in certain invoices to the appellant from Sitetech Services UK Ltd ("Sitetech").

3. The appellant requested a review of the decision by an HMRC officer not previously involved in the matter; by letter of 22 August 2014, the reviewing officer upheld the original decision.

4. The appellant appealed by notice dated 2 October 2014.

Evidence and findings of fact

5. We received a bundle of relevant documents and an authorities bundle.

6. We received witness statements from Mr Bryan Reeve of Mountsides, who also represented the appellant at the hearing and gave oral evidence under oath; and from Mr Graham King, the officer of HMRC who conducted the site visit and subsequent correspondence, who also attended the hearing (by which time he had retired from HMRC) and gave oral evidence under oath.

7. The evidence was largely not in dispute, and so, except where we indicate otherwise, the following can be taken as our findings of fact.

8. The appellant was an owner-managed construction company that mainly dealt with civil engineering projects (for example, roadways). The shareholders and directors of the appellant were Mr James Grady and Mrs Lorraine Grady (neither of whom gave evidence).

9. To do its work, the appellant engaged quantity surveyors and local labour suppliers. Sitetech, one such labour supply company, invoiced the appellant for work done between June 2012 and January 2013.

10. The input tax deductions in dispute relate to the 15 invoices (the "Invoices") issued by Sitetech to the appellant after 1 October 2012, the date from which, on 12 March 2013, Sitetech became retrospectively deregistered from VAT. The Invoices, dated between 2 October 2012 and 29 January 2013, were each in respect of a specified week, for varying amounts (mostly between £5,000 and £10,000), and each stated the following under the heading "Description": "Labour & Trade supplied at the following Sites: Various sites". Each of the Invoices included a sum labelled as "Vat @ 20%". The total amount due under the Invoices was £108,065.67 plus £21,613.13 VAT (the latter sum being the amount in dispute in this appeal). The invoices issued by Sitetech to the appellant prior to 1 October 2012 were identical to the Invoices in terms of their description of the services rendered.

11. Following a visit to Mountsides' offices to check on the appellant's VAT affairs, Mr King wrote to Mr K Sam of Mountsides on 15 July 2013 noting Sitetech's deregistration from 1 October 2012 and asking for the following in respect of supplies received from Sitetech:

(1) copies of contracts for services provided

(2) details of all input tax deducted by the appellant, after 1 October 2012, and the VAT period in which the deduction was made

(3) copies of time sheets for labour said to have been provided by Sitetech, this to be married up with the relevant invoices

(4) details of bank account/s numbers and sort code/s for which the payments into Sitetech were made

(5) copies of the appellant's bank statements showing payments made to Sitetech

12. Mountsides responded on 29 July 2013 providing the information requested in items (2), (4) and (5) above. Regarding item (1), Mountsides provided a copy of a one-page document on the appellant's headed notepaper entitled "subcontract agreement." It was signed by the appellant (on 2 July 2013) and by Sitetech (on 3 July 2013). The sub-heading was "Contract for labour hire from 09/07/2012-09/07/2013". It confirmed Sitetech's appointment as "Sub-contractor to carry out Site Services on Various Projects" at rates set out separately for various categories such as carpenter, steel fixer, groundworkers/pipe layer, etc.

13. Regarding item (3) above, Mountsides' letter stated that no time sheets were available, the reason for this being that the appellant "does not have facility to store time sheets for every week provided by every labour company that he is trading with due to lack of space." They added that their client "checks the time sheets and if happy with the hours reported against the invoice, they are then destroyed."

14. Mr King wrote to Mr Sam on 14 August 2013 stating that the bank statement entries were not sufficient evidence to support the input tax deducted and that he required further evidential information:

> (a) names, addresses, national insurance numbers of subcontract labourers provided by Sitetech
>
> (b) the sites on which the individuals were engaged and the supply being made eg labourer, bricklayer, carpenter etc

15. After some delay, Mr Reeve responded on behalf of Mountsides in a letter of 10 February 2014. As regards the information requested in item (a) above, Mr Reeve stated that the appellant "does not hold, and has never held this information, and nor is he expected to". Regarding the information requested in item (b) above, Mr Reeve responded:

> "We have explained to you that our client does not retain timesheets once he had checked the Invoices, and it is the timesheets that would provide this detail. We have contacted the liquidators of Sitetech, only to be told that they do not hold any of the records of Sitetech. We are therefore unable to provide this detail."

16. The appellant's inability to provide further documentation in relation to the Invoices (apart from the subcontract agreement, bank statements and bank details already provided) gave rise to further exchanges of correspondence in which the parties argued over whether the appellant could have, or should have, been able to provide such further documentation. The following were amongst the issues discussed in that subsequent correspondence:

> (1) whether there was a legal requirement for the appellant to retain time sheets it had received (HMRC contended that there was);
>
> (2) whether the appellant would be expected to hold records relating to the individual "labourers" or "operatives" who actually did the work for which Sitetech was charging (HMRC contended that it would; the appellant disagreed);
>
> (3) whether the appellant could obtain the information requested by HMRC from parties other than Sitetech (for example, from the "main contractor" which was the appellant's customer);
>
> (4) whether six so-called "veto letters" sent to the appellant by HMRC between March 2008 and July 2013 were relevant to the matter (HMRC contended they were; the appellant disagreed). These were letters from HMRC bringing to the appellant's attention that businesses with which it traded had been deregistered from VAT. The letter of 4 February 2009 (for example) advised that any input tax claimed in relation to transactions involving the counterparty that had been deregistered "which purport to have taken place may fail to be verified";
>
> (5) whether the appellant had performed adequate "due diligence" of Sitetech in the light of an HMRC notice entitled "Use of Labour Providers – Advice on

Due Diligence" that had been sent to the appellant in 2009 (HMRC argued that it had not; the appellant argued that it had). The notice stated that HMRC "has identified a continuing incidence of problems with fraud and unpaid taxes through the use of un-vetted or poorly vetted Labour Providers" – across labour intensive industries including construction. It said that business' checks to establish the credibility and legitimacy of their supplies, customers and suppliers "will need to be more extensive in business sectors where there are greater commercial risks or vulnerability to fraud and other criminality".

17. No further documentation or other information relating to Sitetech's supplies to the appellant was provided by the appellant in the course of this subsequent correspondence.

18. At the hearing, Mr Reeve presented further information about some of the issues listed at paragraph 16 above:

(1) Mr Reeve said the reason the appellant had not approached its customer in the construction project, for information about Sitetech being requested by HMRC, was that Mr Grady would not have wanted this to affect the relationship with the customer.

(2) There was inconsistent evidence as to whether Sitetech provided time sheets to the appellant. Mountsides' letter to HMRC of 29 July 2013, as well as Mr Reeve's witness statement and his testimony at the hearing, were to the effect that it had. However, under cross examination, Mr Reeve accepted that an email from Mr Sam to the liquidators of Sitetech dated 25 November 2013 stated that Sitetech "never provided to [the appellant] any time sheets to match the hours that were being recorded on the invoices". Mr Reeve said the source of his statement (that time sheets were provided by Sitetech, but destroyed by the appellant) had been Mr Grady.

(3) Mr Reeve said that when the appellant first engaged Sitetech, it checked the validity of its VAT number. He said that credit searches were typically done but he was unable to find the one that he believed had been done in relation to Sitetech.

19. Mr King said in his witness statement that the lack of detail on the Invoices was a major concern to him and his information requests were made as there were serious concerns regarding Sitetech ever being in a position to actually supply any labour force.

20. Mr King told us at the hearing that he had seen instances where written contracts had been "made up" – he therefore gave little weight to the subcontract agreement supplied by the appellant. Mr King said that the bank statements, providing evidence of actual payment by the appellant, were not sufficient in his view to show there had been a supply of services by Sitetech, as he had seen other cases where the moneys returned to persons associated with the payer. Hence he wanted evidence of who were the people who worked at the site – their names, addresses, national insurance numbers. In his experience, it was unusual for time sheets not to be

available. He wanted to see evidence of individuals who had been paid, so that he could then check those details against information HMRC had about those individuals' receipts.

The law

References to sections are to the Value Added Tax Act 1994; references to regulations are to the Value Added Tax Regulations 1995 (SI 1995/2518)

21. Section 25(2) provides that a taxable person is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

22. Section 24(1)(a) provides that "input" tax in relation to a taxable person is "VAT on the supply to him of any goods or services…". "VAT" means "value added tax charged in accordance with this Act …" (s96)

23. Section 4(1) provides that "VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply by a taxable person in the course or furtherance of any business carried on by him"

24. Under s24(6)(a), "regulations may provide 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."

25. Under Reg 29(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 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. Reg 13 provides that "where a registered person makes a taxable supply in the United Kingdom to a taxable person", he shall provide such person with a VAT invoice. Under Reg 14(1), "a registered person providing a VAT invoice in accordance with Reg 13 shall state thereon" various "particulars" including "(g) a description sufficient to identify the goods or services supplied" and "(h) for each description, the quantity of the goods or the extent of the services …"

27. Under s83(1)(c), the matters within the jurisdiction of this Tribunal include "the amount of any input tax which may credited to any person".

HMRC statement of practice

28. HMRC's statement of practice "VAT Strategy: Input Tax Deduction without a valid VAT invoice" of March 2007 (the "statement of practice") sets out how HMRC will exercise their discretion to allow deduction of input tax in the absence of a valid VAT invoice. Relevant extracts from this are as follows:

> "**Invalid Invoice and HMRC's discretion [paragraph 13]**
>
> A proper exercise of HMRC's discretion can only be undertaken where there is sufficient evidence to satisfy the Commissioners that a supply has taken place.
>
> Where a supply has taken place, but the invoice to support this is invalid, the Commissioners may exercise their discretion and allow a claim for input tax credit."
>
> "**How will HMRC apply their discretion? [paragraphs 17 and 19]**
>
> … claimants will need to be able to answer most of the questions at Appendix 2 satisfactorily. In most cases, this will be little more than providing alternative evidence to show that the supply of goods or services has been made (this has always been HMRC's policy) …
>
> As long as the claimant can provide satisfactory answers to the questions at Appendix 2 and to any additional questions that may be asked, input tax deduction will be permitted."
>
> "**Questions* to determine whether there is a right to deduct in the absence of a valid VAT invoice [Appendix 2]**
>
> 1. Do you have alternative documentary evidence other than an invoice (eg supplier statement)?
> 2. Do you have evidence of receipt of a taxable supply on which VAT has been charged?
> 3. Do you have evidence of payment?
> 4. Do you have evidence of how the goods/services have been consumed within your business or their onward supply?
> 5. How did you know that the supplier existed?
> 6. How was your relationship with the supplier established? For example:
>
> - How was contact made?
> - Do you know where the supplier operates from (have you been there)?
> - How do you contact them?
> - How do you know they can supply the goods or services?
> - If goods, how do you know the goods are not stolen?
> - How do you return faulty supplies?
>
> *This list is not exhaustive and additional questions may be asked individual circumstances"

Appellant's arguments

29. Mr Reeve said that the appellant felt unfairly treated by HMRC: the Sitetech invoices held by the appellant, immediately before and immediately after 1 October 2012 (the date Sitetech was deregistered), were identical in terms of type of information supplied, and its detail. Yet the former was accepted by HMRC (for the purpose of giving input tax credit) and the latter was not accepted. Mr Reeve said that the appellant had no way of knowing that the Invoices would be treated differently by HMRC from the invoices of Sitetech that pre-dated 1 October 2012. Mr Reeve said that the appellant felt that it was being penalised for the actions of a rogue trader, in order to mitigate losses to HMRC.

30. In terms of the adequacy of the evidence provided by the appellant of the supplies made to it by Sitetech, Mr Reeve questioned why the appellant would pay a labour supplier like Sitetech if it failed to supply any labour. The appellant's customer had paid the appellant for a construction project. The results were measured by a quantity surveyor. In Mr Reeve's submission, the labour (provided by Sitetech) must have been supplied in order to get to this outcome.

HMRC's arguments

31. HMRC submitted in their skeleton argument that the Invoices were invalid both because Sitetech was deregistered for VAT on the dates of the Invoices, and because the Invoices did not satisfy the requirements of Reg 14.

32. We note, however, that in their notice of application to the Tribunal for directions of 26 February 2015, HMRC stated that their original statement of case contained a "mistake" in that it stated that the reason for their refusal of the appellant's claim for input tax deductions in respect of the Invoices was that Sitetech's "retrospective deregistration rendered the invoices held by the appellant invalid …" HMRC went on to state:

> "The ECJ has confirmed that a supplier's retrospective deregistration does not render VAT invoices invalid (See *Mecsek-Gabona Kft v Nemzeti Ado-es Vamhivatal Del-dunantuli Regionalis Ado Foigazgatosaga* (Case C-273/11)). Accordingly it is appropriate that [HMRC] inform the Tribunal of the mistake in the statement of case and correct the oversight."

33. As regards the requirements of Reg 14, HMRC submitted that the main deficiency in the Invoices was in relation to Reg 14(1)(g), requiring a description sufficient to identify the goods or services supplied. The Invoices referred to "Labour & Trade supplied at the following Sites: various sites". HMRC contended that this was not sufficient to verify what transactions took place or what the nature of the services was. Furthermore, HMRC submitted that the appellant was unable to provide satisfactory evidence of these matters.

34. At the hearing, Mr Ratcliff questioned whether the amounts charged as VAT in the Invoices were input tax as defined in s24 – were the amounts actually "VAT",

given that the supply took place after the date of Sitetech's deregistration? We note that this point had not been raised in HMRC's statement of case or in correspondence with the appellant prior to the appeal.

35. HMRC submitted that their decision to refuse input tax deduction in respect of the Invoices (which they said were invalid) was reasonable. In response to our questions with regard to the application of the statement of practice in this case, Mr Ratcliff submitted that questions 1 to 5 set out in Appendix 2 had been asked of the appellant, as follows (with HMRC's view of how each question had been answered, in square brackets):

(1) Do you have alternative documentary evidence other than an invoice (eg supplier statement)?

[No]

(2) Do you have evidence of receipt of a taxable supply on which VAT has been charged?

[No]

(3) Do you have evidence of payment?

[Yes]

(4) Do you have evidence of how the goods/services have been consumed within your business or their onward supply?

[Only a general statement; no detailed evidence received]

(5) How did you know that the supplier existed?

[The signed subcontract agreement indicates that Sitetech did exist.]

36. Mr Ratcliff accepted that question 6 in Appendix 2 of the statement of practice ("How was your relationship with the supplier established?" – with examples given) had not been put to the appellant by HMRC. However, other avenues for obtaining relevant information – such as approaching the appellant's customers for their records – had been suggested by HMRC to the appellant (via Mountsides) in correspondence.

37. Mr Ratcliff made clear that HMRC were not arguing that the appellant was involved in a fraudulent arrangement. HMRC did, however, consider it relevant that the appellant had been warned about fraud in the construction industry, having received a copy of HMRC's "Use of Labour Providers – Advice on Due Diligence" notice, as well as the six "veto letters" sent to it by HMRC. Mr Ratcliff submitted that, given these circumstances, the appellant should have been aware of the insufficiency of the invoices it received from Sitetech; and it should have retained any time sheets it received.

38. As to why HMRC allowed VAT charged by Sitetech prior to 1 October 2012 as deductible input tax, despite those invoices being materially identical to the Invoices: HMRC's statement of case described this as an "oversight" but submitted that this did not affect the reasonableness of their decision to refuse input tax deduction for the amounts charged as VAT in the Invoices.

Discussion

39. This case concerns the appellant's right to deduct, as input tax, the amounts charged to (and paid by) it as VAT on the Invoices. The appeal was argued, very largely, on the basis of whether the Invoices were valid VAT invoices (as described in Reg 14) and, if not, whether HMRC had been reasonable in refusing to exercise their powers (granted under s24(6)(a) and Reg 29(2)) to allow input tax deduction by reference to other documents or information.

40. We say it was argued thus "very largely" (rather than entirely) because, at the hearing, Mr Ratcliff raised (for the first time in the proceedings) the question of whether there was a prior issue, namely whether the amounts charged as VAT in the Invoices were "input tax" in relation to the appellant (as defined in s24)? In other words, before we even get to the questions of whether the Invoices were valid or HMRC were unreasonable to have refused to accept alternative documentation or information, do we first have to be satisfied that the amounts charged were "input tax" ie VAT on a supply to the appellant of goods or services?

41. Although we can see the theoretical attraction of starting with this question, such an approach seems to us to run counter to the general scheme of the legislation. Under both s24(6)(a) and the proviso to Reg 29(2), what the VAT invoice (or such other documentation and information as HMRC direct) is intended to evidence and quantify is "the charge to VAT". This means that, in deciding whether the Invoices were valid and, if they were not, whether HMRC were unreasonable not to have exercised their powers under Reg 29(2), we will in effect be deciding whether there is sufficient evidence of "the charge to VAT" on the supplies by Sitetech indicated in the Invoices – and so, whether such amounts are "input tax". Hence, we see no practical merit in considering "was it input tax?" as a prior question to that of the validity of the Invoices and any alternative documentation - which means we can approach the appeal in the manner it was argued by the parties.

Were the Invoices valid VAT invoices?

42. We have noted above (paragraph 32) that HMRC applied to the Tribunal to amend their statement of case to remove the argument that the Invoices were rendered invalid by the deregistration of Sitetech with retrospective effect. Permission was granted and the statement of case was so amended. The argument reappeared, however, in HMRC's skeleton argument. It would seem to us contrary to the overriding objective of the Tribunal's rules, to deal with cases fairly and justly, for us now to entertain arguments which HMRC originally advanced and then decided were mistaken. Hence, we find that the Invoices were not rendered invalid by the retrospective deregistration of Sitetech.

43. We are left, then, with the question of whether the Invoices were invalid by reason of not containing the particulars required by Reg 14. We find that they were: the words "Labour & Trade supplied at the following Sites: Various sites" are not in our view sufficient to identify the goods or services supplied, nor do they provide the

quantity of the goods or the extent of the services. Accordingly, the particulars required by Reg 14(1)(g) and (h) were not contained in the Invoices, such that they did not meet the requirements of a valid VAT invoice.

Was it reasonable for HMRC to have refused to exercise their powers to allow input tax deduction by reference to the documentation provided by the appellant?

44. Under the proviso in Reg 29(2) (made pursuant to s24(6)(a)), HMRC have power to direct, either generally or in relation to particular cases or classes of cases, that a person claiming deduction of input tax hold or provide such evidence of the charge to VAT (other than a valid VAT invoice) as HMRC direct. The jurisdiction of the Tribunal with regard to HMRC's exercise of this power is supervisory: we cannot substitute our own discretion for that of HMRC; we can only decide whether the decision was unreasonable in the sense that the commissioners (of HMRC) (a) have acted in a way in which no reasonable panel of commissioners could have acted; or (b) have taken into account some irrelevant matter or have disregarded something to which they should have given weight. Moreover, if we are persuaded that the decision was flawed but that, had HMRC approached the matter correctly, they would inevitably have arrived at the same conclusion, we should dismiss the appeal.

45. HMRC have, in the statement of practice, published policy with respect to exercise of their power under the proviso in Reg 29(2), couched in terms of their "discretion" to allow claims for input tax deduction without a valid invoice. The approach set out in the statement of practice is in our view reasonable: it quite correctly focuses on whether alternative evidence has been provided to show that the supply of goods or services has been made (paragraph 17); and the (non-exhaustive) list of questions set out in Appendix 2 is well-targeted to the production of such evidence. We shall therefore assess the reasonableness of HMRC's decision not to allow input tax deduction with respect to the Invoices, by considering whether it was in accordance with the statement of practice (although we will revisit this approach later in our discussion when we consider the significance of HMRC's having treated the Invoices differently from Sitetech's invoices prior to the date of its deregistration).

46. The question for HMRC, applying the statement of practice (at paragraph 13), was whether there was sufficient evidence that supplies by Sitetech took place as indicated in the Invoices. Apart from the Invoices themselves, the only additional evidence which the appellant was able to produce to HMRC was (1) bank statements showing payments made to Sitetech, and (2) the subcontract agreement. As noted above (paragraph 43), the Invoices themselves gave scant details of the supplies made by Sitetech: they give no indication of what "Labour & Trade" were provided, nor of the sites at which it was provided. The bank statements contain no further information about the supplies made by Sitetech. As for the subcontract agreement, it set out the charges to be made in relation to certain categories of labourer; but it gave no details of the sites or projects in which those labourers were to be engaged; and since it was, by its nature, an agreement prior to the making of the supplies, it provided no evidence of what supplies were actually made.

47. Mr Reeve, in his submissions, argued that it could be inferred from the circumstances - the fact that the appellant had paid Sitetech, combined with the supposition that the construction project in question had been completed to the customer's satisfaction such that the appellant itself had been paid - that goods and services "must have been" received from Sitetech. The question for us is not whether such inference could be made; but whether it was unreasonable of HMRC not to have made it. Given how little information HMRC were provided about the construction project involving Sitetech – in particular, the appellant provided nothing in response to HMRC's request (letter of 14 August 2013 – see item (b) at paragraph 14 above) for information about the sites on which the Sitetech labourers were engaged and the type of supplies being made – we do not consider it unreasonable of HMRC to have refrained from making the inference advocated by Mr Reeve.

48. We thus find it reasonable of HMRC to have concluded that the information provided by the appellant was not sufficient evidence that supplies by Sitetech took place as indicated in the Invoices. HMRC's decision was therefore in accordance with the statement of practice and so, in our view, they did not act in a way in which no reasonable panel of commissioners could have acted. We now turn to whether, in making this decision, HMRC had regard to irrelevant matters or disregarded relevant ones.

49. As regards relevant matters, the statement of practice sets out at Appendix 2 a list of "questions to determine whether there is a right to deduct in the absence of a valid VAT invoice". Paragraph 17 of the statement of practice states that "claimants will need to be able to answer most of the questions at Appendix 2 satisfactorily. In most cases, this will be little more than providing alternative evidence to show that the supply of goods or services has been made…". Neither the statement of practice, nor the list of questions in Appendix 2, was expressly referred to in correspondence prior to HMRC's decision to refuse input tax deduction in respect of the Invoices. We consider this a flaw in HMRC's conduct of the case, but it does not of itself render their decision unreasonable, provided the substance of the relevant questions from Appendix 2 was conveyed to the appellant in the course of HMRC's enquiries. We assess this as follows:

(1) As regards questions 1, 2 and 3 from Appendix 2, we are satisfied that these were effectively asked of the appellant, albeit not in the precise terms of the statement of practice.

(2) Question 5 – "How did you know that the supplier existed?" – was not asked as such, but it seems to us the subcontract agreement (signed by Sitetech) produced by the appellant effectively gave an answer to that question.

(3) Question 4 – "Do you have evidence of how the goods/services have been consumed within your business or their onward supply?" – was not asked, although arguably hinted at in HMRC's letter of 28 February 2014, which suggests that the appellant contact its own customers for their records, and in its letter of 6 May 2014, which includes "a copy of the contract between [the appellant] and its End User Customer" in a list of possible supporting documentation.

(4) Question 6 – "How was your relationship with the supplier established?" (with several examples given) – was not asked.

50. Given HMRC's failure to ask questions 4 and 6 from Appendix 2 of the statement of practice, the question for us is the relevance of these questions, in this particular case, to the underlying issue of whether the supplies by Sitetech indicated in the Invoices had actually taken place. We find as a fact that it was made sufficiently clear to the appellant over the course of correspondence prior to HMRC's decision, even without these questions being asked, that HMRC wished to see any evidence of the supplies by Sitetech indicated in the Invoices that the appellant could produce. Furthermore, no evidence was produced to us to suggest that asking these two questions would have prompted the disclosure of relevant information in the form of evidence of Sitetech's supplies. We do not therefore consider that this flaw in HMRC's decision-making process comprises a failure by HMRC to give weight to a relevant matter. It does not therefore render their decision unreasonable.

51. Turning now to irrelevant matters to which HMRC may have had regard, we have found that, following Mountsides' letter to HMRC of 10 February 2014 (confirming that the appellant was not in a position to provide further documentation), the parties entered into discussion in correspondence on a number of issues which we have listed in summary at paragraph 16 above (some of which were further discussed at the hearing – see paragraph 18 above). We find that in this correspondence, the parties moved from the question of "what" documentation the appellant could provide, to the question of "why" more could not be provided (and whether the appellant was at fault for failing to provide more). In our view, the "why" question is not relevant. The statement of practice places the burden of proof (to use this term in a non-judicial context) upon the taxpayer to produce sufficient evidence of a supply by (in this case) Sitetech. Where (as here) the taxpayer is unable to do so, HMRC are in no position to exercise their discretion in the taxpayer's favour. It matters not why the evidence is unavailable, nor who is at fault for this state of affairs.

52. It follows that we shall not be making findings with regard to the issues of fact and law in dispute between the parties and listed at paragraphs 16 and 18 above. Insofar as the appellant was arguing that certain items – such as the prior "veto letters" sent to it by HMRC, or whether it had complied with the advice in HMRC's notice on due diligence of labour suppliers in certain industries – were irrelevant, we agree. However, even if HMRC had (properly) given no regard to such irrelevant matters, we are of the view that inevitably, given the paucity of evidence produced by the appellant (see paragraph 46 above), they would have arrived at the same conclusion.

53. The combined result of our findings at paragraphs 48, 50 and 52 above is that, adopting (as we have in paragraph 45) conformity with the statement of practice as the test of the reasonableness of HMRC's decision to refuse input tax credit with regard to the Invoices, we find that the decision was in accordance with the statement of practice and so, reasonable.

54. The appellant was unhappy with the apparent unfairness of HMRC treating the Invoices differently from how they treated Sitetech's invoices prior to 1 October 2012

(see paragraph 29 above). The nature of our jurisdiction is such that the only way we can respond to this complaint is to ask whether HMRC's conduct with regard to Sitetech's invoices prior to 1 October 2012 should be taken into account in assessing the reasonableness of HMRC's decision with regard to the Invoices. To do so would of course be a departure from the approach in the statement of practice, which (unsurprisingly) does not give any weight to prior conduct of HMRC that is non-compliant with the statement of practice itself.

55. The existence of the statement of practice as published HMRC policy, combined with the absence of any evidence of deliberate and informed agreement between HMRC and the appellant to depart from that statement, makes us unable to find that HMRC's decision as regards the Invoices should have given any weight to their pre - 1 October 2012 conduct. It was reasonable of HMRC to have made their decision with regard to the Invoices solely in accordance with the statement of practice.

Conclusion

56. The appeal is dismissed and the notice assessment of 8 March 2014 in the amount of £21,613 is upheld.

57. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 2 MARCH 2016