



**TC05195**

**Appeal number: TC/2015/02796**

*VALUE ADDED TAX – Input tax claim - title to goods passing when 100% of payments made - 70% of payments made when supplier went into administration - whether supply made - no – whether evidence of fraud – no - Sections 24(1)(a), 25(2) and 26(2)(a) Value Added Tax Act 1994 (“VATA”) - Appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**D & J GRANT**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS  
CHARLOTTE BARBOUR CA CTA**

**Sitting in public at George House, 126 George Street, Edinburgh on  
14 June 2016**

**Richard Staunton of Francis Clark LLP Accountants, for the Appellant**

**Elizabeth McIntyre, Officer of HMRC, for the Respondents**

## DECISION

1. This is an appeal by D & J Grant ('D&JG') against a decision by HMRC notified on 28 October 2014, and upheld on review on 20 February 2015, to disallow the VAT incurred in relation to two-part payments made to Free Breeze Energy Systems UK Ltd ("Free Breeze") in connection with the supply of wind turbines, which D&JG claimed as input tax in an amount of £93,800 in their 04/13 VAT period.
2. The wind turbines were not delivered to D&JG and the issue before the Tribunal was whether the VAT of £93,800 could be claimed as input tax.
3. The Tribunal had before them a bundle of documents including a witness statement from Ian Sked, an Officer of HMRC, who was ill and unable to attend the hearing, whose statement was accepted by both parties; and a witness statement by John Grant a partner in the firm of D&JG. Mr Grant's statement was accepted by both parties and he was cross-examined by HMRC. Mr Grant was a credible witness.

### 15 **The Facts**

4. D&JG planned to install two wind turbines on a farm in Angus and sought funding from the Bank of Scotland. In order to obtain the most advantageous type of turbine in terms of maximising D&JG's return from the "feed in tariff" and in order to facilitate the obtaining of planning permission these turbines were of a particular construction being RRB V29 225 kW models, with a single grid connection and an output capacity of 450kW. There were only limited suppliers of such turbines.
5. The Bank of Scotland made it conditional on providing finance that a "due diligence" report be carried out by the firm of Fisher German to address the environmental and planning issues as well as the status and suitability of the turbine manufacturer, RRB Energy Limited ("RB") and their sole UK agent, Free Breeze.
6. The due diligence report was a "desk-based" exercise only, and relied upon information provided by the Bank of Scotland, the customer, the turbine supplier and Fisher German's further research. The Tribunal noted that it contained limited, if any, financial due diligence on the assets, liabilities profitability and financial well-being of Free Breeze. It reported that RB was headquartered in India and that it had been awarded certificates from internationally accredited bodies. Free Breeze, the report stated, was founded in 1999 as a sole proprietorship and incorporated in 2004 entering the UK market in December 2010. The report stated that Free Breeze had a number of orders for turbines and that they had formed partnerships in the UK with various subcontractors.
7. D&JG entered into a contract with Free Breeze for the supply of two wind turbines with a total value of £670,000 plus VAT. The purchase and sale agreement was signed on 5 and 14 December 2012. This written agreement provided at clause 11 B for payment of: "a) deposit of Thirty percent (30)% plus VAT due and payable within five (5) business days of the execution of this Agreement. b) Fourty (sic) 40% plus VAT, due and payable within five (5) business days upon manufacture,

testing and final inspection of the Equipment. Payment must be made prior to release (*sic*) of Equipment (*sic*) from supplier (*sic*) factory for transporting to Port”. The remaining 30% was payable in a further two instalments on inspection after delivery and after successful commissioning and acceptance testing.

5 8. The agreement, at clause 16, stated “Unless otherwise specified in the Agreement, the Equipment shall remain the property of the Seller until payment of 100% of the Contract Price has been received by the Seller”.

9. On 3 December 2012, D&JG was issued with an invoice by Free Breeze for an amount of £201,000 and VAT of £40,200, making a total of £241,200, representing a  
10 30% deposit “per PSA dated December 3, 2012”, which was paid on 21 December 2012.

10. On 23 April 2013, Tony Knowles of Aska Energy Ltd, an intermediary for D&JG who was involved in obtaining the planning permission for D&JG, forwarded an email from Ralph Brunskill of Free Breeze showing images of serial numbers “1800  
15 and 1801”. Within this chain of emails was an email dated 14 February 2013 enclosing photographs with these serial numbers and two emails dated 13 February 2013 between Mr Brunskill and Mr Nagarajan who also worked for Free Breeze.

11. The email from Mr Brunskill of 13 February 2013 stated “I was told earlier this  
20 week that the nacelles (a cover housing that houses all of the generating components of a wind turbine) would be shipped around Feb. 20. I advise the customer this so they could send payment. They requested the serial #'s on the nacelles. Now the ship date has changed. How do we get dates from RRB (RB) that we can rely on? I don't want the customer to think we are trying to fool them with ship dates that are moving  
25 around.” The email to Mr Brunskill dated 13 February 2013 stated “The problem is that RRB is unable to keep their commitment on the shipping dates, anyway I will recheck with RRB once again tomorrow with regard to the shipping date and will adv  
u (*sic*) accordingly”.

12. On 12 February 2013, Tony Knowles had sent an email to Mr Grant enclosing an  
30 email from Ralph Brunskill which said “We have been advised by RB that 2 turbines for Reddie Farm will be shipped on around February 20.... We require payment of £321,600 (40% of the contract price plus VAT) prior to shipping from India.... Please see attached invoice relating to this payment”.

13. The photographs purporting to show the serial numbers were indistinguishable  
35 pieces of machinery with serial numbers written in what looked like a large felt pen.

14. This was the first turbine that D&JG had ordered and they were not familiar with the process. These turbines were never delivered.

15. On 11 February 2013, D&JG were issued with an invoice by Free Breeze for an amount of £268,000, plus VAT of £53,600, totalling £321,600, being “40%  
40 instalment (*sic*) per PSA dated October 3, 2012”, which was paid on 20 February 2013 (“the 40% payment”).

16. On 19 March 2013 Free Breeze entered administration and on 27 March 2014 entered Creditors Voluntary Liquidation.

17. On 11 June 2013, Mr Grant sent an email to the police at CID Central asking for documentary evidence that might prove useful in the Free Breeze investigation. The email explained that Mr Grant held emails from Ralph Brunskill about the order for turbines and mentioned that it now transpired that no order had been placed and that “the 2 payments were obtained fraudulently by Free Breeze UK”. The email asked that Police Scotland pursue this fraud. The email was acknowledged on 13 June 2013 stating that Police Scotland had passed on the details of which they were aware of to the administrators of Free Breeze but had not yet received any reply. This email referred to an extract from an email received from RB’s legal team in India which stated that although an order was placed on 8 March 2013, no payment was made to RB within the required five business days and so the order had not been executed. The email from Police Scotland reiterated that the order was not placed until March 2013 by Free Breeze and continued “The evidence that I have so far tends to suggest that a fraud has taken place, however once I receive an update from (the administrator) I will be a far better position to have this progressed”.

18. An email from CID Central, dated 4 August 2013, stated “I fully understand your concerns with regards to the manpower and time being spent investigating this crime but I would like to assure you that I am progressing this as quickly as I am able to. Fraud, by its very nature, is not an easy or quick crime to investigate”.

19. Thereafter, it would appear that the investigation into whether there was a fraud or whether any charges might be made was left in abeyance and D&JG believe this may have been caused as a result of the different jurisdictions with Free Breeze being based in England and D&JG being based in Scotland.

20. On 14 August 2014, HMRC visited D&JG, sometime after D&JG’s concerns had been raised with the Police, in relation to their VAT affairs and on 18 August 2014 wrote advising of matters where there were queries regarding, amongst other things, VAT recovered in relation to payments made to Free Breeze.

21. On 28 October 2014, HMRC wrote to Mr and Mrs Grant and Herdhill Farms in relation to this issue stating, “Taking account of the fact that Free Breeze did not have the turbines at that time, did not even place purchase order until 8 March, I must conclude that the information supplied by Free Breeze at that time was fraudulent. The serial numbers in this case do not evidence a supply”.

22. On 4 and 11 November 2014, correspondence took place between D&JG’s agents and HMRC clarifying that the assessment should be addressed to D&JG and not Mr and Mrs Grant and Herdhill Farms personally. On 28 November 2014, a review was requested which was produced on 20 February 2015. The review letter of 20 February 2015 stated that the decision to disallow the input tax was correct on the basis that a supply never, in fact, took place. D&JG had entered into a contract with Free Breeze to supply wind turbines by means of a contract which were to be delivered by or before 31 March 2013 and would remain the property of Free Breeze

until 100% on the contract price was received by Free Breeze from D&JG. The turbines were never delivered.

23. The review letter acknowledged that the email correspondence from Police Scotland dated 13 June 2013 explained that Free Breeze did not place a purchase order for the turbines with their Indian supplier RB until March 2013 but that, as no payment was made the order lapsed, HMRC did not accept that the supply took place by virtue of a fraud in the supply chain which D&JG was not aware of and, consequently, that D&JG should not be entitled to deduct the VAT charged in relation to the supply as input tax.

24. Reference was made to a Joint Liquidators progress report into Free Breeze dated 19 May 2015 which noted that customer deposits were received in the sum of £953,333 in respect of orders placed on turbines. A thorough reconciliation of Free Breeze's bank account on payments made in the year prior to administration showed numerous large sums were paid in foreign currency overseas accounts from D&JG's Lloyds Bank account. The joint liquidators were, however, unable to obtain detailed information from Lloyds Bank without payment of £1,000 which it was suggested no customers were willing to pay in order to obtain the information.

#### **D&JG's Submissions**

25. D&JG say that this was the first turbine ordered by D&JG and that they were unaware of the process. In addition, D&JG, as a farming operation, was used to paying for machinery for large sums of money on the basis that no ownership of the machinery or implements would take place until 100% of the purchase price had been paid. It was explained, however, that this was normally in relation to well known dealerships or companies where D&JG assumed financial strength.

26. D&JG say that they were defrauded of the sums of money paid for the turbines and refer to the evidence of HMRC in Officer Sked's letter of 20 October 2014 and the emails from the Police as evidence that there was fraud. In addition, they say that the demand for money when the order had not been successfully, and knowingly placed, was fraudulent.

27. D&JG say that as the order was placed, even although it was cancelled when no deposit was paid, there is an argument that the goods did "exist" and at some point there was a genuine intention by Free Breeze to order the goods and supply them to D&JG.

28. They say that no credit note has been received by D&JG from either Free Breeze or the liquidator and that HMRC accept the D&JG was the subject of a fraud.

29. Accordingly, D&JG referred to the cases of *Kittel v Belgian State* [2008] STC 1537 and *Bonik EOD* [2013] STC 773 as authorities for the proposition that where a taxpayer is a victim of fraud, the burden of the tax should not fall upon the taxpayer. In the case of *Kittel* a taxpayer was not denied credit for input tax where there had been a fraudulent evasion of VAT by an immediate supplier in circumstances where

the taxpayer did not know and should not have known that the transaction was fraudulent.

### HMRC's Submissions

5 30. HMRC say that D&JG are not eligible to recover the VAT because, notwithstanding that D&JG may have considered at the time the VAT invoices were issued, it was believed the wind turbines would be supplied, the fact was that the title would not pass until the full amount had been paid.

31. Consequently, D&JG were unable to recover the amount shown as VAT at the point where Free Breeze became insolvent as at the point no supply had been made.

10 32. HMRC referred to Section 24(1)(a) VATA 94 as supporting the position that a taxable person may treat as "input tax" VAT on the supply to him of any goods or services but that, in this case, there was no supply of goods and, therefore, D&JG are unable to treat the amounts shown on the sale invoices from Free Breeze as input tax.

15 33. HMRC referred to a number of cases. Such cases state that where there is no supply no input tax can be obtained and cite *Theotruie Holdings Ltd v CC&E* [1983] VATTR88; *Northern Counties Co-operative Enterprises Ltd* BEL/862/2, *Mary Sibbald Munn* LON/88/607, *Monks & Son* LON/99/2630A and *Pennystar Limited* a Queens Bench decision [1996] STC 163, in support. HMRC distinguish *David Peters Limited* [2012] UKFTT 124 TC, as the taxpayer had actually seen the goods which  
20 were subject to the appeal and there was no contract in place setting out the vendor's and purchaser's obligations which was not the case with D&JG. This case involved the purchase of plant and machinery where the taxpayer had proof that the goods existed but which were to be sourced from a number of different depots. They had received a tax invoice but what happened was that the goods were sold multiple times.  
25 The taxpayer had visited the site and believed that the goods were *bona fide* (see paragraphs 31 and 53).

34. HMRC say that the circumstances relating to the lack of delivery are unfortunate but D&JG were in the familiar position of "buyer beware" and that there is no evidence of fraud and that the comment on this by Officer Sked in his letter of  
30 28 October 2014 was using the term loosely and which, in any event, there was no evidence. There was no supply and, therefore, in terms of the legislation, no input tax can be claimed.

35. HMRC referred to sections 4(2), 24(1) (a), 25(2), and 26(2)(a) of VATA and say that D&JG cannot meet the definition of supply so cannot claim input tax; they have  
35 no entitlement to a credit and that this arose at the point when no supply of the goods became apparent which was when Free Breeze went into administration.

36. HMRC say that they have used their best judgement in terms of section 73(1) in making an assessment of £93,800 and that they have done so within the requisite time limits. They say that Article 168 is not relevant because there was no supply.

## Decision

37. The Tribunal found that the wind turbines were not supplied to D&JG, had not been ordered by Free Breeze to the extent of the order for their manufacture being confirmed, and were not delivered. It was not clear to the Tribunal that the  
5 photographs of the components of the turbines with the serial numbers actually existed but, even if they did exist, they were not delivered in terms of the contract which would have required not only physical delivery but also payment of 100% of the purchase price.

38. Only 70% of the purchase price had been paid and, accordingly, legal title to the  
10 wind turbines had not passed, let alone delivery. Accordingly, the wind turbines did not come within the scope of VATA as there was not a taxable supply in terms of section 4, and, consequently, they could not come in within the definition in section 24 of “input tax” and, consequently, could not come within the terms of section 26.

15 39. Accordingly, although it is a harsh burden for D&JG to accept, they could not reclaim the input tax as they do not qualify under the legislation; this being an additional burden to the lost payments on which their claim for input tax was based.

40. The Tribunal considered whether the circumstances of D&JG’s contract and attempted purchase, and therefore supply, came within the rulings set down by the  
20 Court of Justice of the European Communities/Union in *Kittel* and *Bonik*. These allow a taxable person, who was the recipient of a supply of goods, who did not and could not have known that the transaction concerned was connected with a fraud committed by the seller, to deduct input tax, in terms of the principal VAT Directive and the principles of proportionality, equal treatment and legal certainty.

25 41. An assessment requires to be made to show that the supplies of goods at issue had actually been carried out and this was clearly not the case with the wind turbines ordered by D&JG. The Tribunal considered that D&JG clearly did not know that their order of wind turbines might be connected to a fraud and there was no evidence that they should have so known.

30 42. The Tribunal accepted that this was D&JG’s first order of wind turbines and that they relied on the Bank of Scotland and Fisher German’s due diligence which, for whatever reasons, did not analyse the financial standing of Free Breeze. The contract D&JG signed, was quite clear about the delivery and transfer of title being dependent  
35 on 100% of the payments being made and, as HMRC said, this was an unfortunate case of “buyer beware”.

43. The Tribunal could not, however, find any evidence that there was in fact fraud. The letter of 28 October 2014 from HMRC had a statement from Officer Sked of HMRC saying that he thought there was a fraud but there was no evidence as to why he had reached that decision; the emails from Police Scotland again provided only an  
40 indication that there might be fraud and the fact remained that no case of fraud had been brought against Free Breeze or its directors nor was there any evidence that any

action had been taken against the directors of Free Breeze as a result of their behaviour.

5 44. The report by the joint liquidators indicating that monies had been paid from Free Breeze's Lloyds Bank account in foreign currency to overseas bank accounts was not in itself proof of fraud. It might, in the circumstances, be supposed that these transfers could be fraudulent but, again, no further investigation appears to have taken place and no evidence of where and why these payments were made was before the Tribunal.

10 45. The information that came to light, referred to in Officer Sked's letter of 20 October 2014, that the emails of 20 February 2013 showed photographs of turbine parts with handwritten serial numbers which had not been ordered until 8 March 2013 (an order subsequently cancelled through non-payment to RB) was again suspicious but not conclusive evidence of fraud and the preceding emails in that chain referred to shipping dates which kept changing.

15 46. Accordingly, the Tribunal could not establish that there was fraud and, therefore, could see no basis on which the judgement of *Kittel* and *Bonik* could apply in circumstances where there was no supply.

47. The Appeal is dismissed.

20 48. 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)"  
25 which accompanies and forms part of this decision notice.

30 **W RUTHVEN GEMMELL W S**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 21 June 2016**