TC05643

Tribunal refs: TC/2015/04995
TC/2015/05000
TC/2015/05004
TC/2015/05071
TC/2015/05073

VALUE ADDED TAX — input tax — VAT (Input Tax) (Reimbursement by Employers of Employees' Business Use of Road Fuel) Regulations 2005 — whether Regulations validly made — no — VATA s 24(4), (6)(a), s 26(1)(b) — whether purchases by employees of fuel for use in their own vehicles in part for purposes of employer's business supplies to employers — no — failure by employer to retain fuel receipts in compliance with mandatory requirement of Regulations — input tax claims disallowed — whether exclusion of discretion to allow alternative evidence permissible — yes — whether discretion, if it existed, reasonably exercised to reject claim — yes — no legitimate expectation on facts — appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARSH (BOLTON) LIMITED
PATHVALLEY LIMITED
ASSAN PHARMACY SOUTHWEST LIMITED
ASSAN PHARMACY LIMITED
GORGEMEAD LIMITED **Appellants**

- and -

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

Tribunal: Judge Colin Bishopp

Sitting in public in Manchester on 14 and 15 November 2016

Mr Michael Firth, counsel, instructed by Brian White Ltd, for the appellants

Mr Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

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DECISION

Introduction

1. The five appellants are associated companies, carrying on business as retail pharmacies, using the trading name "Cohens Chemist". One of the services they offer to their customers is the delivery to their homes of prescription medicines and some other items. The delivery service is undertaken by the appellants' employees, using their own vehicles. The employees buy the fuel which is to be used in their vehicles, with their own money, and later submit claims to the appellants for the payment of a mileage allowance related to the distance covered in the course of undertaking deliveries; the allowance includes an element of reimbursement for the fuel used. The claims, once approved, are paid to the employees by means of the appellants' payroll system. The appellants then claim credit, in their respective VAT returns, for the input tax included in the cost of the fuel which they have reimbursed in this way.

2. The appellants had been claiming input tax credit in the manner I have described since a date which is unclear but must have been at least as early as 2007. In that year an officer of the respondents, "HMRC" or "the Commissioners", conducted a control visit, remarking in his visit report that the amount the appellants were recovering was unduly low. He advised them to use a different method of calculation which would lead to a greater recovery rate. An important feature of these appeals is that there was no direct evidence, from either the appellants or HMRC, about the extent to which that officer (who I was told has since left HMRC) examined the appellants' records. It is, however, clear that the advice was given and that the appellants followed it and revised the recovery rate, and no issue is taken with their having done so.

3. Further visits by HMRC officers took place over the following years. There is some disagreement between the parties, to which I shall return, about the extent to which the manner in which the appellants were recovering input tax in respect of their employees' fuel purchases came under further scrutiny by HMRC during those visits, but it is undisputed that the matter came to a head at a visit undertaken by Mrs Andrea Rose-Love on 2 December 2014. On that occasion Mrs Rose-Love learnt that the appellants were not obtaining and keeping the fuel receipts handed to the employees when they bought fuel. As it was a requirement of what Mrs Rose-Love understood to be the relevant legislation, the Value Added Tax (Input Tax) (Reimbursement by Employers of Employees' Business Use of Road Fuel) Regulations 2005, SI 2005/3290 ("the Reimbursement Regulations") (to which I come shortly) that the receipts should be retained and produced to HMRC on request, and no other evidence of purchase which she considered to be acceptable was available, Mrs Rose-Love decided to raise assessments to recover the input tax on fuel purchases for which the appellants had claimed credit over the preceding four years. She wrote to Mrs Leona Kelly, the member of the appellants' accounting team whom she had seen at her visit, to obtain details of the amounts so claimed and in May 2015 raised assessments, totalling in all about £67,000; separate assessments were made because although the appellants are associated and, I understand, share an accounts team they are not in a VAT group. The arithmetic of the assessments is not challenged.

4. In the meantime the appellants, through their then representatives, had been engaged in correspondence with HMRC. They accepted that, with a few exceptions, they did not obtain receipts from their employees, but argued that HMRC should instead

accept, as alternative evidence, their own internal records. Those records consisted of the claim forms completed by the employees, giving details of the journeys undertaken, together with annotations by which the process of checking, authorisation and payment was recorded. Mrs Kelly explained as she gave evidence that the claims were carefully checked by the employees' line managers, to ensure that the journeys to which they related were properly undertaken on the appellants' business, that the distances said to have been covered fairly represented reasonable routes, and that the claims were arithmetically correct. They were checked again in the accounts department, and assuming all was well they were than passed for payment. That evidence was not disputed; and HMRC do not argue that the claims were excessive or in any other way unjustified. Their case, in essence, is, first, that the appellants' failure to comply with the requirement of the Reimbursement Regulations that fuel receipts be retained is fatal to their ability to claim credit for the disputed input tax; second, that alternative evidence is not permissible; and, third, even if it is permissible internally generated records are not acceptable. The appellants dispute all of those propositions and, in addition, argue that the refusal of input tax credit offends principles of European Union law.

5. As the five appellants are associated companies and their appeals all turn on the same facts and raise the same questions of law it was directed that they should be heard together. The appellants were represented before me by Mr Michael Firth, and HMRC by Mr Michael Jones.

The legislation

6. The starting point in European Union law is art 168 of the Principal VAT Directive (2006/112/EC) ("the PVD"). So far as material to these appeals it is as follows:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person; …"

7. That provision is implemented in domestic law by s 25(2) of the Value Added Tax Act 1994 ("VATA"), as follows:

> "Subject to the provisions of this section, [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."

8. No further provisions of that section are relevant in this case, but s 26(1) is material:

> "(1) Subject to the following provisions of this section, 'input tax', in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services …

being … goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

9. It will be observed that both the European and the domestic provisions refer to the deduction of input tax incurred on supplies to the taxable person himself. One of the issues in the appeals is whether, as a matter of law, the relevant fuel was, or is deemed to have been, supplied to the appellants or to the employees; I shall need to examine this issue in some detail later. Whatever the correct answer may be, it has been recognised for many years that it would be unfair to deprive a taxable person of credit for the input tax incurred on supplies, such as those of the fuel in this case, which, whether or not made to others, are nevertheless supplies of goods used by a taxable person for the purposes of his business and for which he has paid, either directly or indirectly. Provision for such credit was made by the predecessor of the Reimbursement Regulations, namely the Value Added Tax (Input Tax) (Person Supplied) Order 1991 (SI 1991/2306) ("the 1991 Order"), in the following terms:

"2 Article 3 below shall apply where road fuel is supplied to a person who is not a taxable person and a taxable person pays to him:

(a) the actual cost to him of the fuel; or

(b) an amount, the whole or part of which approximates to and is paid in order to reimburse him for the cost of the fuel, determined by reference to:

(i) the total distances travelled by the vehicle in which the fuel is used (whether or not including distances travelled otherwise than for the purposes of the business of the taxable person), and

(ii) the cylinder capacity of the vehicle, whether or not the taxable person makes any payment in order to reimburse him for any other cost.

3 Where this article applies, the fuel shall be treated for the purpose of section 14(3) of the Value Added Tax Act 1983 as having been supplied to the taxable person for the purpose of a business carried on by him and for a consideration equal to the amount paid by him under article 2(a) or (b) above, as the case may be (excluding any reimbursement of any cost other than the cost of the fuel)."

10. Section 14 was the forerunner of what is now s 25 of VATA; both deal with accounting periods and the setting of allowable input tax against output tax.

11. The European Commission challenged the provisions of the 1991 Order in infraction proceedings (see Case C-33/03 *Commission v United Kingdom* [2005] STC 582) ("the infraction proceedings"), not (as Mr Firth emphasised) because they extended the scope of the right of recovery to supplies not made directly to the taxable person himself, but because they did not expressly restrict the right of recovery to supplies used for the purposes of the taxable person's business. It was not enough, the court concluded, that in practice the UK did so restrict the right of recovery, and the 1991 Order was found therefore to offend European law. Accordingly it was repealed and replaced by the Reimbursement Regulations. I shall have more to say about the reasoning of the court, and of the Advocate General, later.

12. The Reimbursement Regulations begin with the statement that they were made pursuant to the enabling power found in s 24(6)(a) of VATA. That provision is as follows:

> "Regulations may provide—
>
> (a) for VAT on the supply of goods or services to a taxable person … to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases …."

13. The material parts of the Reimbursement Regulations are in these terms:

> "2 Regulation 5 shall apply where—
>
> (a) road fuel is supplied to a taxable person (employer) in circumstances where it is delivered to and paid for by his employee acting in his name and on his behalf for use by him (the employee) either in whole or in part for the purposes of the taxable person's business; and
>
> (b) the taxable person has agreed to reimburse and does so reimburse his employee for the cost of the road fuel so used in one of the ways specified in regulations 3 and 4.
>
> 3 Where all the road fuel is used for the purposes of the taxable person's business, by payment of the actual cost of the road fuel.
>
> 4 Where only part of the road fuel is used for the purposes of the taxable person's business, by payment of either—
>
> (a) an amount which represents the actual cost of the road fuel so used determined by—
>
> (i) the total distances travelled by the vehicle in which the road fuel is used for the purposes of the taxable person's business; and
>
> (ii) the cylinder capacity of that vehicle; or
>
> (b) the actual cost of the road fuel in circumstances where the taxable person will account for output tax on any private use under section 57 of the Value Added Tax Act 1994.
>
> 5 Where this regulation applies, subject to regulation 6, the amount of input tax to be deducted by the taxable person under section 24(1) of the Value Added Tax Act 1994 in relation to the supply of road fuel referred to in regulation 2 shall be quantified by reference to the amount paid by him to his employee as reimbursement under regulation 3 or 4, as the case may be.
>
> 6 These regulations only apply where the taxable person holds a VAT invoice which contains the details prescribed by regulation 14(1), regulation 14(2) or regulation 16(1) of the Value Added Tax Regulations 1995 as may be applicable and, where so required, is made out to him as the recipient of the supply.
>
> 7 In these regulations, 'use for the purposes of the taxable person's business' means use for those purposes by the taxable person (employer) in making onward taxable supplies."

14. As I shall explain later, there are some underlying issues about the Reimbursement Regulations but, taking them at face value, it is not seriously disputed that regs 2 and 4 are engaged in this case, that (with one reservation) the credit claimed by the appellants has been correctly calculated in accordance with reg 5, and that reg 7 is not offended. The sole issue identified by the parties lies in the appellants' admitted failure, save in a very small number of instances, to comply with reg 6. That failure, HMRC say, has the effect, as reg 6 itself provides, of excluding the application of the Reimbursement Regulations and correspondingly the only mechanism by which the appellants might make a claim for credit. The reservation too stems from the appellants' failure to comply with reg 6; the absence of the VAT invoices makes it impossible to be certain that the fuel purchased by the employees had borne VAT. Therefore, although the arithmetic of the appellants' claims is not challenged, HMRC do not accept that the starting point is necessarily right.

15. Initially, as the narrative above indicates, HMRC considered that they could accept alternative evidence in place of VAT invoices although they would not accept what the appellants were able to produce because it was internally generated, rather than derived from a third party source. HMRC's willingness to accept other (third party) evidence was based upon the assumption that reg 29(2) of the Value Added Tax Regulations 1995 (SI 1995/2518) ("the VAT Regulations"), or at least some analogous discretionary provision, applied in a situation such as this. That regulation, so far as relevant, is as follows:

> "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."

The "document which is required to be provided under regulation 13" is a VAT invoice.

16. Shortly before the hearing was due to begin, HMRC sought permission to amend their statement of case in order to advance the argument that reg 29(2) does not apply in a case of this kind, but is displaced by reg 6 of the Reimbursement Regulations. That regulation, they say, is put in mandatory terms which do not allow them any discretion to accept alternative evidence. In essence, their argument is that by its own terms reg 29(2) applies only to a claim made in accordance with reg 29(1), that is a claim in respect of a supply within s 26(1) of VATA, and therefore one made to the taxable person himself. Where, instead, the taxable person seeks to rely on a different right of recovery, such as that afforded by the Reimbursement Regulations, reg 29(2) cannot apply. Mr Firth complained, and in my view with some justification, that the change of case had come very late, and that the appellants had been put to expense in advancing what HMRC now argued, contrary to their previous position, was a false case, but he recognised that the new argument was one of pure law and that I could not exclude it. I therefore gave HMRC formal permission to amend. I add, for clarity, that HMRC nevertheless maintain the alternative argument that if they do have a discretion, whether in accordance with reg 29(2) or for some other reason, they have exercised it reasonably.

The evidence

17. I had the written statements and oral evidence of three witnesses: Mrs Kelly, Mrs Rose-Love and Mr Stacey Watts, the officer who undertook a review of Mrs Rose-Love's assessments when the appellants challenged them. The facts of which they all spoke were not materially disputed, and I have already set out some of what they said; the focus at the hearing, so far as the evidence is concerned, was on the reasonableness or otherwise of the officers' approach to the making of the assessments, and the acceptance or rejection of the alternative evidence proposed by the appellants.

18. Mrs Kelly explained how the appellants took great care to ensure that the mileage claims made by the relevant employees were both justified and accurate, not merely because they wished to account correctly for VAT but because they did not want to pay inflated or false claims. She agreed that the employees were told, by wording on the claim forms they were required to complete, that they should provide receipts for the fuel they had purchased but, she said, many were reluctant to provide them although she could not explain, at least to my satisfaction, why that was so. Before Mrs Rose-Love's visit the appellants had not insisted on the receipts because they were under the impression, from what Mrs Kelly understood had been said by HMRC officers on at least one previous visit (she had not been present herself), that it was not essential to keep them, despite the terms of the Reimbursement Regulations. Even now, she said, some employees were unwilling to hand them over but the appellants had to meet the claims as the employees had undertaken the journeys, on the appellants' business. It was not possible to refuse to pay. Mrs Kelly also described the exchanges between the appellants and their accountants on the one hand and HMRC on the other in which the appellants attempted, to no avail, to persuade HMRC to accept, as alternative evidence, the appellants' own records which, she said, were reliable, even if they were internal documents, because of the extensive checking to which they were subject.

19. Mrs Rose-Love said that the primary purpose of her visit was to examine the appellants' input tax claims because (for unrelated reasons) the amount of credit sought by the appellants had increased in their recent returns. The mileage claims were considered in the context of that exercise. Mrs Rose-Love was aware of HMRC's own published guidance which reflected the Reimbursement Regulations in making it clear that VAT invoices must be retained, and she asked to see the working papers which, Mrs Kelly told her, included the receipts handed to the appellants by the employees. However when the papers were produced it was apparent that, in fact, very few receipts had been obtained. Mrs Rose-Love agreed that any receipts the appellants could obtain would almost always be simplified invoices (that is, invoices not identifying the purchaser) and that it would be impossible to relate them exactly to any particular supply of fuel; they could do no more than show that a purchase of fuel from a VAT-registered trader in reasonable geographical proximity had been made at or about the relevant time. For that reason, she said, she would have to accept them at face value as long as they were produced and were reasonably contemporaneous with the journeys to which the claims related.

20. Mrs Rose-Love agreed that she had not initially offered Mrs Kelly the opportunity of producing alternative evidence, and that she had decided to make the assessments as soon as the visit was concluded—she wrote, only two days later, to Mrs Kelly, asking for details of the amounts claimed over the preceding four years in order that she could

do so. She agreed too that she not changed her mind despite protests from the appellants' accountants, in which they made the point that the appellants had previously been assured that it was not necessary to retain receipts. She had asked another officer, Mr David Bennett, who had undertaken an inspection about 12 months before her own visit, about the records he had seen and had ascertained that he had not examined the fuel receipts. She was taken by Mr Firth to reports of visits in 2007 and 2010, in which the appellants' payments to the relevant employees were mentioned, but said that she had attached little weight to them as they did not record what the visiting officers had seen, and did not indicate that any assurance had been given to the appellants that fuel receipts were not required.

21. When the accountants produced some documents, in the shape of an example of a completed travel claim, and arguments about why that should be treated as acceptable alternative evidence, Mrs Rose-Love sought advice but was told that internally-generated documents such as the claim forms, carefully checked though they may have been, were not enough; there had to be some third-party evidence of supply, which the appellants could not produce. Therefore, once she had received the necessary figures, she proceeded to make the assessments.

22. Mr Watts undertook his review following a request made by the appellants pursuant to s 83C of VATA. As his witness statement explained, the relevant factors, in his view, were the appellants' awareness of the need to obtain and retain the fuel receipts, evidenced by the note on the claim forms completed by the employees to the effect that they should attach the relevant receipts to the form, the fact that very few receipts had been retained, and the fact that reg 6 of the Reimbursement Regulations precluded a claim for credit in such circumstances. He also took into account HMRC's internal guidance and the clear statement in HMRC's Public Notice 700/64 that "you must retain invoices issued to your employees when the fuel is delivered to them". He then went on to consider, on the assumption which he also made that HMRC had a discretion to accept alternative evidence, whether the internally-generated records were sufficient but, like Mrs Rose-Love, he was unwilling to accept that they were, again because they were not from a third-party source and there was no evident reason, or satisfactory explanation, why the appellants had not complied with reg 6. He agreed with Mr Firth that the possibility that the fuel might have been obtained from a supplier other than a VAT-registered trader was negligible, but saw no reason why the appellants should be excused compliance with the regulation when others in a similar position were able to do so. Mr Watts also made it clear that it was not the risk that credit might be claimed for input tax which had not actually been incurred but the fact of non-compliance with reg 6 which had weighed most heavily with him.

The appellants' arguments

23. Mr Firth's first argument was that HMRC's approach confused the substantive and formal conditions attaching to the right to deduct. There could, he said, be no doubt that the appellants satisfied the substantive requirements—they had received a taxable supply of goods for use in their own business of making taxable supplies, and had as a matter of fact used the supplies for that purpose—and there was ample authority of the Court of Justice of the European Union and its predecessor (together, "the CJEU") to the effect that if the substantive conditions were satisfied the taxable person's right to deduct could not be defeated by a failure to comply with conditions of form. HMRC's

reliance on the supposedly mandatory requirements of reg 6 of the Reimbursement Regulations was in any event misplaced because the right to deduct which the appellants wished to exercise was not conferred, as they thought, by those regulations, but by European Union law and VATA.

24. It was not correct to say, Mr Firth argued, that the appellants were deemed to have received the supplies, but that was the underlying basis of HMRC's position. Neither art 168 nor any other article of the PVD permitted a Member State to deem a supply received by one person to have been made to another, and s 24(6)(a) of VATA, pursuant to which the Reimbursement Regulations were made, also did not confer on HMRC any power to make regulations deeming a supply to have been made to an employer in the appellants' position, and consistently with that subsection no deeming provision was to be found in the Reimbursement Regulations. Article 3 of the 1991 Order, by contrast, had been a deeming provision: it provided that fuel supplied to an employee but used for the business of the employer was to be "treated" as supplied to the employer. The Reimbursement Regulations did not use the same or any equivalent term. Rather, reg 2 referred to fuel *supplied* to the employer, but *delivered* to the employee. That change of approach reflected what the Advocate General and the Court said in the infraction proceedings which led to the replacement of the 1991 Order. At para 21 of her opinion, Advocate General Stix-Hackl said that:

> "The issue in the present case is whether art 17 of the Sixth Directive [now art 168 of the PVD] gives a right to deduct input tax in situations in which an employee makes a purchase for or on behalf of the employer's business and the employee is then reimbursed the cost by the business. Where goods or services are used in the context of a taxable transaction, it cannot make any difference whether the actual (or contractual) recipient of the goods or services is the employer himself or his employee or agent."

25. At para 32 she recorded the acceptance by the Commission that "that employees frequently act on behalf of their employers, and in such a case the goods and services received by the employees are in reality to be regarded as supplied to the employer". At para 35 she set out her conclusion on the identity of the recipient in the case of a supply such as that in issue in that case:

> "… a person receives goods as a taxable person, rather than as a private individual or final consumer, precisely if and in so far as he acquires them for the purposes of his taxable transactions. Further, where an employee uses goods or services for purposes of his employer, those goods or services are cost elements of the goods or services which the taxable employer eventually supplies. In that case the employee does not act as a final consumer, and the chain of supplies is not broken in relation to those goods or services."

26. Once it was accepted that, as a matter of law, the supplies were made to the appellants it followed, without more, that they acquired the right to deduct the input tax they incurred: see art 168 of the PVD, implemented in domestic law by s 25(2) of VATA. That was made clear by the CJEU in its judgment in the infraction proceedings, at [16]:

> "It must first be recalled in this connection that the provisions of art [168] specify the conditions giving rise to the right to deduct and the extent of the right to deduct. They do not leave the member states any discretion as regards their implementation

(*BP Supergas Anonimos Etairia Geniki Emporiki-Viomichaniki kai* [2005] STC 582 at 595 …)."

27. That a failure to comply with a formal requirement cannot override the right to deduct is apparent from judgments such as that in Case C-280/10 *Kopalnia Odkrywkowa Polski Trawertyn P Granatowicz, M Wąsiewicz, spółka jawna v Dyrektor Izby Skarbowej w Poznaniu* [2012] STC 1082. In that case the question was whether a partnership could recover the input tax stated in an invoice issued, before the partnership was registered, in the names of the future partners. At [43] the court said:

> "… the court has held that the principle of VAT neutrality requires that deduction of input tax be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. Where the tax authority has the information necessary to establish that the taxable person is, as the recipient of the supplies in question, liable to VAT, it cannot impose, in relation to the taxable person's right to deduct that tax, additional conditions which may have the effect of rendering that right ineffective …."

28. Similarly, in Case C-590/13 *Idexx Laboratories Italia Srl v Agenzia delle Entrate* [2015] STC 735 the court said:

> "30. According to the court's settled case law, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by EU legislation (judgment in *Tóth v Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága* (Case C-324/11) [2013] STC 185, para 23 and the case law cited).
>
> 31. As the court has repeatedly held, that right is an integral part of the VAT scheme and in principle may not be limited. In particular, it is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, to that effect, judgment in *Tóth*, para 24 and the case law cited) …
>
> 40. Consequently, where the tax authority has the information necessary to establish that the substantive requirements have been satisfied, it cannot, in relation to the right of that taxable person to deduct that tax, impose additional conditions which may have the effect of rendering that right ineffective for practical purposes (see, to that effect, judgment in *EMS-Bulgaria Transport* [*OOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' Plovdiv* (Case C-284/11) [2012] STC 2229], para 62 and the case law cited).
>
> 41. In that regard, it must be stated that the substantive requirements for the right to deduct are those which govern the actual substance and scope of that right, as provided for in [art 168 of the PVD] …
>
> 42. The formal requirements for that right, by contrast, regulate the rules governing its exercise and monitoring thereof and the smooth functioning of the VAT system, such as the obligations relating to accounts, invoicing and filing returns. Those requirements are set out in arts 18 and 22 of the Sixth Directive …."

29. In Case C-272/13 *Equoland Soc coop arl v Agenzia delle Dogane—Ufficio delle Dogane di Livorno* [2014] STC 2487 the court added, at [41], that

> "… the court has repeatedly held that, in view of the preponderant position which the right to deduct has in the common system of VAT, which seeks to ensure complete neutrality of taxation of all economic activities, that neutrality presupposes that a taxable person may deduct the VAT paid or payable in the

course of all his economic activities, a penalty consisting of a refusal of the right to deduct is not compatible with the Sixth Directive where no evasion or detriment to the budget of the state is ascertained …."

30. Mr Firth took me to a number of other cases in which similar comments have been made, but I think it necessary to deal with only one more, Case C-24/15 *Plöckl v Finanzamt Schrobenhausen* [2016] All ER (D) 156 (Oct) in which the question was whether the German government could tax the transfer by Mr Plöckl of a motor car, an asset of his business, to Spain for resale on the grounds that he had not provided the Spanish dealer's VAT registration number. Ordinarily a transaction of that kind would be exempt (in UK law terms zero-rated) in the Member State from which the goods were dispatched. The material observations of the court were as follows:

"34. In its written observations, the European Commission submits that the aim of that requirement to communicate the VAT identification number issued by the Member State of destination is, in the case of an intra-Community transfer, to demonstrate that the taxable person has transferred the goods in question in that Member State 'for the purposes of his undertaking', which … is a condition for the exemption of such a transfer from VAT. At the hearing, the Tax Office and the German Government confirmed that objective of the requirement. The question referred for a preliminary ruling thus concerns the rules of evidence liable to be imposed, and the circumstances in which they may be so imposed, in order to demonstrate that that condition of exemption is satisfied.

35. In that connection, the Court has held that, in the absence of any provision on that subject in the Sixth Directive, which provides only, in the first sentence of Article 28c(A), that Member States are to lay down the conditions subject to which they may exempt intra-Community supplies of goods, the question of the evidence which may be adduced by taxable persons in order to be exempted from VAT falls within the competence of the Member States …

36. In addition, Article 22(8) of the Sixth Directive, in the version resulting from Article 28h thereof, gives Member States the option of adopting measures to ensure the correct collection of VAT and the prevention of tax evasion, provided that they do not go further than is necessary to attain those objectives. Such measures may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT …

37. Such a national measure goes further than is necessary to ensure the correct collection of the tax if, in essence, it makes the right of exemption from VAT subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied. …

39. Accordingly, the principle of fiscal neutrality requires that an exemption from VAT be allowed if the substantive conditions are satisfied, even if the taxable person has failed to comply with some of the formal requirements …

40. In that regard, the Court has held, in connection with an intra-Community supply, that an obligation to communicate the VAT identification number of the person acquiring the goods constitutes a formal requirement …

42. It follows from the foregoing that an authority of a Member State cannot, in principle, refuse to grant an exemption from VAT in respect of an intra-

> Community transfer on the sole ground that the taxable person has not provided the VAT identification number issued to him by the Member State of destination."

31. There could, Mr Firth said, be no real doubt that VAT had been borne on the fuel in issue in this case; it was a fanciful proposition that the employees might have acquired it from unregistered suppliers, and even HMRC's own witnesses agreed that it was highly unlikely that they had done so. It followed that the substantive right to deduct was established, and it was plain from the jurisprudence of the CJEU that it could not be denied merely because the appellants had not been able to produce the receipts which, again, HMRC's witnesses agreed would demonstrate very little.

32. I should add for completeness that Mr Firth addressed me in addition on the decision of the Upper Tribunal in *R (Hammonds of Knutsford) v Revenue and Customs Commissioners* [2016] UKUT 195 (TCC), [2106] All ER (D) 167 (May). However, as the Upper Tribunal pointed out at [62], that was an excise duty case, governed by a different directive and with different rules. Just as the tribunal in that case concluded that little was to be drawn from cases about VAT, so too do I consider there is little to be drawn relevant to this case from a judgment about excise duty.

33. Mr Firth began his attack on HMRC's exercise of their discretion about the acceptance of alternative evidence with the proposition that, by its own wording, the effect of a failure to comply with reg 6 was to disapply the Reimbursement Regulations. Nothing in the enabling provision, s 24(6) of VATA, provided that the Reimbursement Regulations represented an exclusive regime for the recovery by an employer of the input tax incurred on the purchase by an employee of fuel used for the purposes of the employer's business, and if it was correct that the relevant fuel was supplied to the employer it followed that the regulation which was engaged, when VAT invoices could not be produced, was reg 29(2) of the VAT Regulations.

34. Where HMRC went wrong, Mr Firth said, was to exclude self-generated documents, as a matter of policy, when there was nothing in reg 29(2) to support such an exclusion. HMRC had therefore inappropriately fettered their discretion. It was in any event irrational to do so: self-generated documents were, for example, routinely accepted in the case of traders who had self-billing arrangements. HMRC also failed to take into account the fact, as they now accept, that the risk that the fuel had not borne VAT was minimal and the further fact, as they also accepted, that the receipts if produced would prove very little. All the evidence showed that the appellants checked the claims carefully and that they would not have been paid had the appellants not been satisfied that the journeys had been legitimately undertaken for the purposes of their businesses.

35. Mr Firth's last argument was that HMRC, by their earlier conduct, had led the appellants to believe, and reasonably so, that they need not retain fuel receipts, and that correspondingly they had a legitimate expectation that their claims for credit would be met despite their failure to comply with reg 6. He recognised that there are limits on the extent to which this tribunal can give effect to a taxpayer's legitimate expectations: see *Oxfam v Revenue and Customs Commissioners* [2009] EWHC 3078 Ch, [2010] STC 686 and the discussion of it in *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC), [2013] STC 998. His argument was that this is one of those cases in which this tribunal does have the jurisdiction to do so. I do not need to deal with the

question whether this part of his argument is correct since, as I shall explain, I consider this ground of appeal must fail for other reasons.

36. I should, however, record the evidence on which Mr Firth relied for his argument, which consisted of one paragraph of Mrs Kelly's witness statement, on which she could not materially expand as she gave oral evidence, and a passage in HMRC's visit report made following the 2007 inspection. The former is as follows:

> "We have always followed the guidance issued to us by HMRC officers and have been using the current system since 2007 when it was suggested by a HMRC VAT inspector, as referred to in the official HMRC VAT visit notes."

37. The relevant passage in the notes is as follows:

> "Examined basis of i/t claims relating to employees mileage claims re business use – trader is only currently claiming i/t at rate of 3.5p per mile. Discussed at length at [sic] this appears very low – trader to consider submitting VD on more accurate basis (ie region of 10p/12p per mile)."

38. I shall return to this evidence in my discussion below.

HMRC's submissions

39. Mr Jones' central point was that, contrary to the appellants' case, any supplies of fuel placed into the employees' vehicles, and made in exchange for payment by the employees, must have been made to the employees. At the time of that supply it could not be known whether any part of the fuel would be used for the appellants' purposes, or wholly for the employee's own purposes, and it was accordingly impossible to say that there was a supply to any one of the appellants. There was also no relevant onward supply by the employee to his employer, as the employees were not taxable persons acting independently. Absent a supply of the fuel to the appellants, the only means by which they could seek credit for the input tax was by means of the Reimbursement Regulations.

40. Although Mr Jones agreed that the court's primary finding, in the infraction proceedings to which I have referred, was that the 1991 Order did not correctly implement the Sixth Directive because it did not expressly exclude the right of recovery in respect of fuel used for non-business purposes, he did not agree that its findings were confined to that point. It made, he said, two other significant findings. The first was that, contrary to Mr Firth's argument, the supplies of fuel were made to the employees. At para 18 of her opinion the Advocate General referred to "supplies to non-taxable persons, namely employees", a phrase repeated by the court at [22], and it put its conclusion, at [26], in this way:

> "It follows from the foregoing that, by granting taxable persons the right to deduct VAT on certain supplies of fuel to non-taxable persons in conditions that do not ensure that the VAT deducted attaches solely to fuel used for the purposes of the taxable person's taxable transactions, arts 2 and 3 of the UK Order are incompatible with art 17(2)(a) of the Sixth Directive."

41. It is, said Mr Jones, impossible to reconcile that conclusion with the proposition that the fuel, or any part of it, was supplied to the employer. It is also clear that the court saw no difficulty in principle in the fact that the employer was able to recover input tax incurred by its employee in the purchase of fuel supplied to the employee; the primary

and, as that paragraph makes clear, critical defect of the 1991 Order lay in the absence of an express restriction of the right of recovery to that part of the fuel used in the employer's business.

42. The second additional finding on which Mr Jones relied was put by the court in this way:

> "28. The Commission maintains that the deduction provided for by arts 2 and 3 of the UK Order is allowed without it being required that an invoice should be produced, contrary to art 18(1)(a) of the Sixth Directive.
>
> 29. The United Kingdom government challenges this claim only if the first claim should be held to be unfounded.
>
> 30. In those circumstances, it has to be considered that the allegation of infringement of art 18(1)(a) of the Sixth Directive is also well founded."

43. Article 18(1)(a) of the Sixth Directive, now art 178 of the PVD, imposes the requirement that a taxable person seeking credit for the input tax he had incurred must hold a valid VAT invoice, and that requirement is not a matter of mere form. The current provision, art 178(a) of the PVD, is in mandatory terms:

> "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 Articles 220 to 236 and Articles 238, 239 and 240."

44. Those articles prescribe the particulars which must appear in VAT invoices. Articles 180 and 181 permit but do not require Member States to allow claims for deduction which do not comply with the requirements of art 178, and art 182 delegates the making of the detailed rules to the Member States. Sections 24, 25 and 26 of VATA and reg 29 of the VAT Regulations represent the UK's implementation of those articles, including the provision, by reg 29(2), that as a general rule HMRC have a discretion to accept alternative evidence if a VAT invoice cannot be produced. But it was clear from the manner in which s 24(6)(a) of VATA was written, that is by permitting HMRC to make regulations of general or particular application, that the UK has exercised the right to exclude the general rule in certain cases.

45. The Reimbursement Regulations were an example of such a case: it was a condition of the granting of credit pursuant to those regulations that evidence of the supply, in the form of VAT invoices, must be produced. The regulations do not admit of any exception. There is, said Mr Jones, good reason for that approach, since the right of recovery conferred by the regulations is itself exceptional as it relates to input tax which the employer has not himself incurred; it is, in effect, deemed to have been incurred by him. It is correspondingly reasonable for HMRC to insist upon evidence that the input tax has in fact been incurred. It is true that the VAT invoices would not be directly referable to the relevant supplies, but they do represent some evidence that the supplies have actually been made. If the only mechanism by which the appellants could claim credit for input tax is provided by the Reimbursement Regulations, and the appellants have failed to comply with their requirements, their claims must fail.

46. It is not possible, Mr Jones continued, for the appellants to argue that their supposed European law rights prevail over the domestic legislation, since European law,

by virtue of art 178(a), also requires the production of a VAT invoice as a condition of the right of deduction. An explanation of the requirement was provided by the CJEU in its judgment in Case C-85/95 *Reisdorf v Finanzamt Köln-West* [1997] STC 180:

> "22. It is apparent from art 18(1)(a), read in conjunction with art 22(3), that exercise of the right to deduct input tax is normally dependent on possession of the original of the invoice or of the document which, under the criteria determined by the member state in question, may be considered to serve as an invoice …
>
> 23. The power conferred on the member states by art 22(3)(c) to lay down the criteria determining whether documents other than the original invoice may serve as an invoice includes the power to decide that a document cannot serve as an invoice if an original has been drawn up and is in the possession of the recipient.
>
> 24. That power of the member states is consistent with one of the aims of the Sixth Directive, that of ensuring that VAT is levied and collected, under the supervision of the tax authorities … In that regard, the court held in *Jeunehomme and Société anonyme d'étude et de gestion immobilière EGI v Belgium* (Joined cases 123/87 and 330/87) [1988] ECR 4517 at 4544, at paras 16 and 17, that the member states may require invoices to contain additional information to ensure the correct levying of VAT and permit supervision by the authorities, in so far as such particulars do not, by reason of their number or technical nature, render the exercise of the right to deduct input tax practically impossible or excessively difficult."

47. Similar observations had been made in other cases, such as Case C-152/02 *Terra Baubedarf-Handel GmbH v Finanzamt Osterholz-Scharmbeck* [2005] STC 525 at [38]:

> "The answer to the national court's question must therefore be that for the deduction referred to in art 17(2)(a) of the Sixth Directive the first sub-paragraph of art 18(2) of the Sixth Directive must be interpreted as meaning that the right to deduct must be exercised in respect of the tax period in which the two conditions required by that provision are satisfied, namely that the goods have been delivered or the services performed and that the taxable person holds the invoice or the document which, under the criteria determined by the member state in question, may be considered to serve as an invoice."

48. The cases on which the appellants relied, Mr Jones added, do not undermine that principle. All they show is that that, where the tax authority has the information necessary to establish that the substantive requirements attaching to a claim to input tax deduction have been satisfied, it cannot impose additional procedural conditions. Here, however, HMRC were not imposing additional conditions: they required no more than what the PVD provided for.

49. If it was assumed, contrary to his primary submissions, that HMRC did have a discretion to accept alternative evidence, it was plain, said Mr Jones, that it had been exercised reasonably. There was no evidence, independent of the appellants themselves, that the fuel had been purchased and used for the purposes of their business. It was possible, even if unlikely, that the employees had bought fuel on which VAT had not been charged, or had failed to hand over the receipts because they were to be used to support other claims. It was, moreover, apparent from the fact that that the need to hand over their receipts was spelt out on the claim forms completed by the employees that the appellants were aware of the requirements of the Reimbursement Regulations, yet there was no real explanation of their failure to do so. When it was within a taxpayer's power

to produce original receipts but he had failed to do so there was less reason for HMRC to accept alternative evidence but the correspondence showed, notwithstanding reg 6 and the appellants' inadequately explained failure to comply with it, that Mrs Rose-Love and Mr Watts would have considered alternative independent evidence; but none was produced. It could not be said in those circumstances that they exercised their discretion (assuming they had any) in an unreasonable manner.

50. Mr Jones argued, in respect of legitimate expectation, that it was not sufficient for a taxpayer to assert that he had such an expectation; he must demonstrate, in clear terms, what he had been led to expect (see *R (Davies and Gaines-Cooper) v Revenue and Customs Commissioners* [2011] UKSC 47, [2011] STC 2249 at [28]), and the evidence did not do so. Even if that were not the case the appellants still had to overcome the limitations described in *Oxfam* and *Noor*. Moreover, the appellants faced the difficulty that any such expectation as they might be able to establish related only to the evidence supporting their claims; it had nothing to say about the substantive right to deduct.

Discussion and conclusions

51. It seems to me clear, if any applicable deeming provisions are left to one side, that Mr Jones was correct to argue that the supplies of fuel were made to the employees and not to the appellants. Article 14(1) of the PVD provides that "'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner"; and para 1(1) of Sch 4 to VATA reflects that provision by stating that "Any transfer of the whole property in goods is a supply of goods". I do not see how it could realistically be said that the appellants acquired ownership of, or any similar right in, the fuel as it was placed in the tanks of the employees' vehicles. They could not have demanded that any part of it be handed over, nor could they have sold it. It was not known at that moment which part of the fuel, and in some cases if any of it, would be used for the appellants' purposes. It is not even a realistic proposition that the employees bought some part of the fuel as the employer's agent since, while they could have used some of it in order to undertake journeys in the course of their employment, they could as easily have used all of it for their own purposes.

52. That conclusion seems to me to be entirely consistent with what was said in the infraction proceedings. At para 21 of her opinion (quoted above) the Advocate General referred to "the actual (or contractual) recipient of the goods". In its context that phrase can refer only to the employee; and, as I have said, both she and the court referred to the supplies of fuel for which the 1991 Order catered as "supplies to non-taxable persons, namely employees". It is true that at para 35 the Advocate General expressed herself in more ambiguous terms, but at para 40 she said that in a case of this kind "there is no supply of goods between taxable persons". In addition, at [18] the court said:

> "Now, in the instant case, arts 2 and 3 of the UK Order enable a taxable person, viz, the employer, to deduct VAT on the fuel supplied to non-taxable persons, viz, employees, when the employer reimburses them the cost of the fuel."

53. That view of the identity of the recipient of the supply of fuel was carried forward to the court's conclusion, at [26] (also quoted above), which is in turn consistent only with the proposition that the fuel was supplied to the employee, for subsequent use for the employer's business purposes. It is for those reasons that I am satisfied Mr Jones is

right about the recipient of the supply, and I reject Mr Firth's argument that the supply was made, and was accepted by the court in the infraction proceedings, to have been made to the employer. It follows that there is no directly enforceable European law right by which the appellants can secure credit for the input tax on that part of the fuel for which they pay. They can succeed in these appeals only if they can show that the Reimbursement Regulations (since there is no other possible provision) deem the relevant supply to have been made to the employer, that they provide (so far as this is truly a different basis) that a supply to the employee is to be treated as if it had been made to the employer or, alternatively, that without changing the nature of the supply they allow the employer to take credit for input tax incurred by the employee.

54. The first point to be made in that context is that I agree with Mr Firth that there is no provision of the PVD, nor was there any provision of the Sixth Directive, which permits or permitted a Member State to deem a supply to A to have been made to B, nor to treat a supply to A as if it had been made to B. Similarly, there is no power in the PVD by which a Member State may permit B to claim credit for input tax incurred by A. The absence of such a power was touched upon in the infraction proceedings, as the Advocate General's opinion shows, but the point does not seem to have troubled her or the court, and for that reason I shall not allow it to trouble me, but shall instead focus on the domestic legislation which does allow for certain supplies to A to be treated as if they had been made to B. The material provision is s 24(4) of VATA:

> "The Treasury may by order provide with respect to any description of goods or services that, where goods or services of that description are supplied to a person who is not a taxable person, they shall, in such circumstances as may be specified in the order, be treated for the purposes of subsections (1) and (2) above as supplied to such other person as may be determined in accordance with the order."

55. The 1991 Order was made pursuant to the almost identically-worded predecessor provision of s 24(4), that is s 14(3B) of the Value Added Tax Act 1983. However, as I have said, the Reimbursement Regulations themselves state, and in clear terms, that they were made pursuant to s 24(6)(a) of VATA which, for convenience, I repeat:

> "Regulations may provide—
>
> (a) for VAT on the supply of goods or services to a taxable person … to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases …."

56. As Mr Firth pointed out, it is apparent from a perusal of that provision that it does not authorise the making of regulations which deem a supply to A to have been made to B or which cause it to be treated as if it had been so made nor, indeed, does it allow for regulations which provide that A may claim credit for input tax incurred on supplies to B. The scope of the subsection is confined to evidence supporting the charge to VAT, on a supply to the taxable person himself, and the quantification of the charge; it is the means by which the UK has implemented art 178(a) of the PVD, with the discretionary relaxation for which arts 180 to 182 provide, and it is the enabling power for, among others, reg 29(2) of the VAT Regulations. But if I am right that the supply of the fuel in cases of this kind is to the employee, s 24(6)(a) is not a suitable enabling power for the

making of the Reimbursement Regulations, and they appear to have been made in excess of authority.

57. It is surprising that s 24(6)(a) should have been considered an appropriate provision, and particularly so when a suitable power appears, as I have indicated, in the same section and is the re-enactment of the provision pursuant to which the predecessor regulations were made. Since it was plainly intended, subject to satisfaction of the relevant conditions, that the Reimbursement Regulations would allow employers in the position of the appellants to recover some of the input tax incurred in the purchase of fuel by their employees, and the invalidity of the regulations would affect not only the present appellants but no doubt many others in their position, I have considered whether, notwithstanding the error in the making of the regulations, I might nevertheless treat them as valid since, for the reasons I have given, there is no other mechanism by which the appellants might be able to make any recovery. I have examined, therefore, the possibility that the identification in the Reimbursement Regulations of the enabling power as s 24(6)(a) is a simple mistake, in that the draftsman intended s 24(4) but wrote 24(6)(a), and that the error should be disregarded.

58. I do not, however, think the error was of such a simple kind. First, the reference to a specific paragraph of sub-s (6), when sub-s (4) is not broken down into paragraphs, suggests a deliberate choice and not a mere typographical error. The second, and in my judgment insuperable, hurdle lies in what is revealed by a comparison of sub-ss (4) and (6). Subsection (6) does not specify by whom regulations within its contemplation may be made, although once one reaches sub-s (6A) it becomes apparent that the draftsman assumed that the Commissioners would make them. Subsection (4), by contrast, states in clear terms that any order made pursuant to it must be made by the Treasury. It must be assumed to have been Parliament's intention, when VATA was enacted, that a deeming provision within the contemplation of sub-s (4), that is a provision altering what would otherwise be the incidence of tax, must be made by the Treasury, whereas administrative measures, such as those within the contemplation of s 24(6), could be made by the Commissioners. Whether one regards the Reimbursement Regulations as a deeming provision or one enabling A to claim credit for input tax incurred by B their intended effect is to alter what would otherwise be the incidence of tax, and they should therefore have been made by the Treasury in accordance with sub-s (4). They were made, however, by the Commissioners. I do not see how I can properly give effect to regulations made by a body with no power to make them.

59. I should add that I do not consider that I am precluded from reaching such a conclusion by the absence of any judicial review jurisdiction in this tribunal. The issues in *Oxfam* focused on the existence or otherwise of a binding contract, and on the taxpayer's legitimate expectation. There is, therefore, only a partial correspondence with this case. However, what Sales J said was of general application and not confined to the circumstances of that case. At [62], he pointed out that the jurisdiction of the tribunal is defined by s 83 of VATA to include, by sub-s (1)(c), the determination of "the amount of any input tax which may be credited to a person" and, at [63], he explained what that entailed:

> "On the ordinary meaning of the language of that provision, it appears that it covers all the issues between Oxfam and HMRC regarding the question whether HMRC should have allowed Oxfam credit for a higher amount of input tax under the approved method formula, including both the contract issue and the legitimate

> expectation issue. The words, 'with respect to', in s 83(1) appear clearly to be wide enough to cover any legal question capable of being determinative of the issue of the amount of input tax which should be credited to a taxpayer. The tribunal's jurisdiction is defined by reference to the subject matter specified in the section, not by reference to the particular legal regime or type of law to be applied in resolving issues arising in respect of that subject matter."

60. It seems to me quite clear, applying that statement, that the question whether a statutory instrument, relevant to the amount of input tax for which a person may be credited, has been lawfully made by the respondents to an appeal is within the jurisdiction of this tribunal. I do not consider the further analysis in *Noor* undermines that view; on the contrary, an essential feature of the conclusion in that case was that the tribunal must determine an appeal within s 83(1)(c) of VATA in accordance with the law. As part of that process it is obviously necessary to determine what the law is.

61. It follows from what I have said that the Reimbursement Regulations do not give rise to any right to a taxable person in the position of the appellants to claim credit for input tax incurred by their employees on fuel used for the taxable person's business. I recognise that this is a wholly unsatisfactory and unattractive result but I am driven to the conclusion that, for this reason alone, the appeals must be dismissed.

62. I should, however, deal with some remaining matters in case I am found elsewhere to have fallen into error. In what follows I therefore assume, contrary to my earlier conclusion, that the Reimbursement Regulations were validly made in accordance with s 24(6)(a), and that they provide an employer in the position of the appellants with a means of recovering the input tax on fuel purchased by their employees, whether that is achieved by deeming the supplies to have been made to the employer or by allowing the employer to claim credit for the input tax notwithstanding the supply was to the employee. The first question which then arises is whether it was open to HMRC to exclude, in reg 6, any discretion to accept something less than a VAT invoice as evidence of supply. On one view it was not: the enabling provision allowed for some discretion but, by limiting the acceptable evidence of supply to a VAT invoice and excluding any alternative, HMRC have, for no clearly identified reason, eliminated any possibility of exercising that discretion. I do not, however, think that is the correct view.

63. First, it is apparent from perusal of the PVD and VATA that in the ordinary case the evidence of supply should consist of a valid VAT invoice and it is only exceptionally that some alternative might be accepted. I agree with Mr Jones that it is clear from what the CJEU said in *Reisdorf v Finanzamt Köln-West* and *Terra Baubedarf-Handel GmbH v Finanzamt Osterholz-Scharmbeck*, quoted above, that possession of a VAT invoice is not, as Mr Firth argued, a matter of mere form; it is a central feature of the VAT system, for the reasons the court supplied, namely that it is the means by which the national tax authorities can ensure that the system is being correctly operated. Second, the court concluded in the infraction proceedings that the failure of the 1991 Order to insist upon the production of a VAT invoice offended art 18(1)(a) of the Sixth Directive (now art 178(a) of PVD) (see the judgment at [30]); it is difficult to see how a provision which remedies that failure can itself be regarded as offensive. Third, it does not seem to me that the wording of s 24(6)(a) of VATA is such as to exclude the making of regulations omitting any element of discretion. Rather, it seems to me to be intended to allow but not require HMRC to bestow a discretion on

themselves and that there is nothing offensive to the provision in regulations which, in a particular case, do not confer any discretion. One can, indeed, see good reason for a stricter approach when what is in issue is not a supply to the taxable person himself but to a third party.

64. It follows that I do not need to deal with the manner in which any discretion which HMRC might have had was exercised in this case, but I think it appropriate to make some brief comments. As I have just said, the issue in this case is whether the appellants should be entitled to credit for input tax which they have not themselves incurred, and for which, save in a small number of instances, the only evidence they can produce is the claim forms, carefully checked though I accept them to be, of their employees. I do not see how it can be said to be unreasonable of HMRC to say that in circumstances of this kind evidence from a third party source is required. I recognise, as indeed did Mrs Rose-Love and Mr Watts, that simplified VAT invoices would prove little, but they would nevertheless prove something, namely that fuel had in fact been purchased. If independent evidence of purchase were not required it would be simple for the unscrupulous to exploit the system. I have no reason to think that the appellants are anything but scrupulous traders, but the rules must plainly be the same for all. In addition, it is not at all clear to me why there should be any legitimate resistance on the part of employees to the handing over of their fuel receipts when making reimbursement claims. Relaxation of a requirement is, self-evidently, harder to justify when there is no real difficulty in compliance; on this point too I agree with Mr Jones. Were this a live issue, I would conclude that HMRC had exercised their discretion reasonably.

65. I come finally to legitimate expectation. I said above that I do not need to consider whether the limited power I have to give effect to a legitimate expectation extends to this case. The reason is that, even if I do have the jurisdiction, I cannot exercise it since I agree with Mr Jones that the evidence does not enable me to find, as a fact, that the appellants had any legitimate expectation capable of enforcement. As I have mentioned, Mrs Kelly was not present at the 2007 visit, and I had no evidence, beyond the brief note in the visit report, of what was said; what Mrs Kelly told me she had heard is little more than anecdotal. It is of course possible, as Mr Firth's argument requires, that the officer examined the working papers, saw that no receipts were being kept, and told the member of the appellants' staff present at the time, in clear terms, that it was acceptable not to keep them, notwithstanding the terms of the Reimbursement Regulations and HMRC's published guidance. But there is no evident reason why he should have told the appellants that they could safely disregard not only the law but also HMRC's guidance—on the contrary, it seems to me inherently improbable that a VAT officer would give such advice—and there is nothing in the note to support the proposition that he did. Rather, the phrase "Examined basis of i/t claims" seems to me more consistent with HMRC's proposition that he examined the calculations rather than the underlying supporting documents. In addition, the evidence was that the instruction to employees to hand over their receipts remained on the claim forms, even if it was not enforced, and I was left with the impression that despite her professed understanding of what had been said in 2007 Mrs Kelly thought that receipts had been retained and was surprised to discover, when Mrs Rose-Love asked for them, that very few were available. For those reasons I cannot be satisfied that the appellants were told that they could ignore reg 6 and, consequently, that they had a legitimate expectation that their claims would nevertheless be met.

66. For all those reasons the appeals must be dismissed.

Appeal rights

67. 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.

COLIN BISHOPP
TRIBUNAL JUDGE

RELEASE DATE: 19 JANUARY 2017