



TC02417

Appeal number: TC/2011/03382

Value Added Tax – Whether supplies made – Input tax recovery – evidence required to discharge burden – insufficient evidence – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KENNETH CHARLES NOBLE

Appellant

- and -

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

**TRIBUNAL: JUDGE DR KAMEEL KHAN
 MS GILL HUNTER**

Sitting in public in Bedford Square, London on 27-28 September 2012

Tim Brown, Counsel for the Appellant

Michael Jones, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal under section 83 (1) (c) Value Added Tax Act 1994 (“VATA 1994”) against an assessment dated 23 March 2006. It relates to the Commissioners’
5 decision to disallow input tax claims made by the Appellant on his 04/03 to 04/05 VAT returns. The amount which is in dispute is the sum of £209,504 claimed in respect of the supply to him of labour by Harvey Bettsworth T/A HB Interiors (“HB Interiors”). The Appellant claimed input tax on HB Interiors invoices dated 30 November 2002 to 28 January 2005.

10 2. The core issue to be determined is whether, on the evidence presented, the supplies stated on the invoices took place. This must be determined before the alternative argument which is whether Her Majesty’s Revenue and Customs (“HMRC”) should have exercised their discretion to treat the invoices as satisfactory evidence of input tax recovery, which would only need to be considered if it is found
15 that those supplies took place.

Background facts

3. The Appellant has been in business for over 25 years installing suspended ceilings on large building projects. He is a sole trader registered under registration number 802 9237 42 between 20 November 2002 and 1 July 2009. The registration
20 was transferred as a going concern to K& B Ceiling Ltd.

4. On 18 March 2005 as part of a linked investigation, HMRC carried out a verification visit in order to verify the VAT return declarations (both output tax and input tax) submitted by the Appellant for the trading period 20 November 2002 (the date of his VAT registration) to 31 January 2005. There were concerns about the
25 income and expenditure disclosed on the submitted VAT returns and the supporting documentation evidencing the audit trail was poor.

5. The bulk of the input tax that had been claimed by the Appellant during the period in question related to supplies from HB Interiors.

6. The Appellant created sub contractors’ payment certificates which he asked Mr
30 Bettsworth to sign to show that he had been paid and that he understood the VAT he had received was due to be paid to HMRC as output tax. It was noted (by Officer Noelle Forsyth) that invoices from HB and the VAT receipts appeared to have a crease (as if they had been taken out of an envelope) but were crisp, clean and pristine for documents that had been on a building site. The Appellant stated that he had paid
35 substantially all invoices in cash.

7. The input tax claimed by the Appellant during the periods 04/03 to 01/05 was as follows:

Supplier	04/03	07/03	10/03	01/04	04/04	07/04	10/04	01/05
HB Interiors	£26,698.35	£26,095.30	£51,360.75	£32,918.72	£21,754.21	£19,539.97	£17,456.64	£9,164.75
Hilti (GT Britain Ltd)	0	0	0	0	0	0	£ 323.70	0
Adjustwide Ltd	0	0	0	0	0	0	£ 158.38	0
Sub-totals	£26,698.35	£26,095.30	£51,360.75	£32,918.72	£21,754.21	£19,539.97	£17,938.72	£9,164.75

8. The Respondents found that the VAT number of HB Interiors was cancelled on 11 December 2003 with effect from 3 December 2002 and there was no PAYE scheme operated despite the fact that the supplies to the Appellant were said to have consisted of supplies of labour.

9. On 23 March 2005, the Respondents wrote to the Appellant advising that he was no longer entitled to reclaim input tax in relation to invoices issues by HB Interiors. On 25 May 2005, the Respondents again wrote to the Appellant detailing output tax under-declarations totalling £17,022 for the period 04/03 to 01/05 and requested further evidence to support claims for input tax in relation to the invoices from HB Interiors. On 26 March 2006 the Respondents issued an assessment in the sum of £209,504 to recover the disallowed input tax which represented £204,984 for the periods 04/03 to 01/05 and £4,520 for the period 04/05. On 17 December 2010 and 18 January 2011, the Appellant's representative wrote to HMRC expressing disagreement with the assessment. HMRC then conducted an out of time review which upheld the decision. It is that review decision which is being appealed.

The Evidence

10. The Tribunal was presented with two ring binders, one of correspondence and one of authorities.

11. Witness statements were provided by Officer Martin Barnes and Officer Noelle Forsyth for HMRC both of whom also gave oral evidence.

12. A statement was provided by Kenneth Charles Noble with a schedule of workings.

13. The Tribunal was also given a summary of the VAT returns (input and output tax) for the period 07/03 to 07/06 and a reconciliation chart showing all payments made by the Respondent to HB Interiors. Mr Brown and Mr Jones provided further submissions on Reg. 29 VAT Regulations 1995.

Relevant Law

(1) By s.24, Value Added Tax Act (VATA) 1994, it is provided that:

5 (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;*

(b) *VAT on the acquisition by him from another member State of any goods; and*

10 (c) *VAT paid or payable by him on the importation of any goods from a place outside the member States,*

Being (in each case) goods or services used or to be used for the purpose of any business carried out or to be carried on by him.

...

15 (6) *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;*

(2) By s.25 VATA 1994, it is provided that:

25 “(1) *A taxable person shall –*

(a) *in respect of supplies made by him, and*

(b) *in respect of the acquisition by him from other member States of any goods,*

30 *Account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting period”) at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.*

35 (2) *Subject to the provisions of this section, he 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.*

.....

40 (6) *A deduction under subsection (2) above and payment of a VAT credit shall not be made or paid except on a claim made in such manner and at such time as may be determined by or under regulations; and, in the case of a person who has made no taxable supplies in the period concerned or any previous period, payment of a VAT credit shall be made subject to such conditions (if any) as the Commissioners think fit to impose, including conditions as to repayment in specified circumstances.”*

45

(3) The relevant parts of s.26 VATA 1994, read as follows:

5 “(1) *The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.*

10 (2) *The supplies within this subsection are the following supplies made or to be made by the taxable person in the course of furtherance of his business*

–

15 (a) *taxable supplies;*

.....”

(4) Regulation 29 of the VAT Regulations 1995 (as amended with effect from 1 April 2009), made under s.24(6) VATA, lays down further requirements to be met before a VAT credit can be recovered:

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

25 *invoice required by paragraph (2) below, he shall make his claim on the return for the first prescribed accounting period in which he holds that document or invoice.*

.....

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

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

.....

35 *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.”*

(5) Regulation 29(2) gives the Commissioners discretion to allow an input tax deduction on the basis of alternative evidence (in the absence of a proper VAT invoice). However, they have chosen in this case not to exercise that discretion. They say that if there was no supply the discretion point is not relevant.

45 (6) Regulation 13(1)(a) of the VAT Regulations 1995 obliges a registered person who makes a taxable supply to a taxable person in the UK to provide a VAT invoice to that other taxable person. Regulation 14 stipulates that a VAT invoice to be provided under regulation 13 must contain the following:

- “(a) a sequential number based on one or more series which uniquely identifies the document,
(b) the time of the supply,
5 (c) the date of the issue of the document,
(d) the name, address and registration number of the supplier,
(e) the name and address of the person to whom the goods or services are supplied,
(f)
10 (g) a description sufficient to identify the goods or services supplied,
(h) for each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in any currency,
(i) the gross total amount payable, excluding VAT, expressed in any
15 currency,
(j) the rate of any cash discount offered,
(k)
(l) the total amount of VAT chargeable, expressed in sterling,
(m) the unit price.
20 (n) where a margin scheme is applied under Section 50A or section 53 of the Act, a relevant reference or any indication that a margin scheme has been applied,
(o) where a VAT invoice relates in whole or part to a supply where the person supplied is liable to pay the tax, a relevant reference or any indication that the
25 supply is one where the customer is liable to pay the tax.”

- (7) In addition, it is provided by paragraph 4(1), Schedule 11 to VATA 1994 that the Commissioners may, as a condition of allowing or repaying input tax to any person, require the production of such evidence relating to VAT as they may
30 specify.

Findings of Fact

1. HB Interiors did not render any VAT returns during the 12 month period
35 of its registration from late 2002 to late 2003. After that period the registration was cancelled, retrospectively, as a missing trader.
2. There were no contracts or timesheets to show supplies from HB interiors to the Appellant. The Appellant has destroyed his diaries which contained
40 entries on projects, work undertaken, workers employed and other such details.
3. Substantially all payments from the Appellant to HB Interiors were in cash. The total payments were over one million pounds.
- 45 4. HB Interiors was not a taxable person during the period of the VAT assessment. It did not operate a PAYE scheme and though registered for CIS no vouchers or payments were declared by it for the relevant period.

5. There are few (except at the start of 2003) bank records showing payments by the appellant to HB Interiors.
- 5 6. The invoices show the location of the work being paid for and but they do not show the dates worked.
7. HB Interiors filed no self-assessment returns for the relevant period.
- 10 8. The Appellant must have had a supply of labour to undertake work for his clients.

The Appellant's Submissions

14. The Appellant says that supplies were made by HB Interiors to the Appellant. The supplies of labour were made as shown on the HB Interiors invoices.
- 15 15. The Respondents settled with the Appellant for direct tax purposes on the basis that the supplies did take place and this was accepted by the VAT Officer who carried out a formal review of the decision, in his letter dated 31 March 2011.
16. Since the Respondents did not disallow input tax on invoices issued prior to 31 January 2003 they must have been satisfied that those services were supplied. The Appellant could not have made his taxable supplies without being provided with labour to carry out the work.
- 20
17. With regard to invoices post 11 December 2003, which were not valid as HB Interiors was not registered for VAT, the Appellant states that HMRC should have exercised their discretion to allow input tax under Regulation 29(2) as the invoices prove the Appellant received taxable supplies from a taxable person. In practice the turnover of HB Interiors post de-registration was over the threshold for VAT registration and it was therefore a taxable person under Section 3(1) VATA 1994 and despite the de-registration taking place from 3 December 2002, at the time of supply until 11 December 2003, HB Interiors was a taxable person with a current VAT registration number.
- 25
- 30
18. The description on the invoices was sufficiently clear to fall within Reg. 14(1) (g), VAT Regulations 1995 which requires a description sufficiently clear to identify the goods or services.
19. In the event that the description did not satisfy the requirements, the Respondents should have exercised their discretion to allow input tax under Regulation 29 VAT Regulations 1995.
- 35
20. The point is that if the supplies are held to have taken place then HMRC should have exercised their discretion to allow the input tax based on the evidence presented.
21. The parties were allowed to make further written submissions on whether the original decision of the assessing officer to disallow input tax (27 March 2011), or the
- 40

subsequent decision of the review officer to uphold the decision (31 March 2011), is the subject of whether HMRC was unreasonable in not exercising its discretion to allow input tax in the absence of a valid VAT invoice. The Appellant says that it is the review officer's decision which must be the decision upon which HMRC are judged to be unreasonable. He draws reference to the decision in *CCE v Peachtree Enterprises (1994) STC 747*. The question is whether HMRC were unreasonable in not being satisfied that the transactions "actually took place". He referred to *Kohanzad v CCE (1994) STC 967 at p.969*.

Respondents' Submissions

10 22. The Respondents say;

(1) The supplies said to have been made by Mr Bettsworth did not in fact take place and/or that Mr Noble is unable, on the evidence he has presented to date, to discharge his burden of proving that those supplies were in fact made, so that Mr Noble cannot recover any input tax in relation to them and;

15 (2) Alternatively, even if those supplies did take place, which is denied by the Commissioners, the invoices used in respect of those supplies were not "VAT invoices" and in some cases were not provided by a "registered person" as required by Regulation 29 of the VAT Regulations 1995.

20 (3) Accordingly, the Appellant, was not, and still is not, in a position to make a valid claim for input tax credit in relation to the alleged supplies.

(4) In making the allowed further submissions, the Respondents agree that the review decision of 31 March 2011 (Mr Greene) ought to be the focus of the Tribunal and that decision can be shown to be one which a reasonable panel of Commissioners could have reached. The decision that no taxable supplies giving a right to recover input tax had been made, was a correct decision. The Commissioners have, under Reg. 29 (2), to consider the "evidence of the charge to VAT" which necessarily means considering whether taxable supplies were made to the person seeking credit and made in the course or furtherance of a business. This has to be done by reference to the information and evidence before the Tribunal.

Witness Statements (Summary)

23. **Martin Barnes –Inland Revenue Officer**

(1) Mr Barnes' witness statement is dated 29 March 2012. He works in the construction industry scheme functional lead team, London.

35 (2) He explained that this was a linked investigation where HMRC identified certain irregularities with respect to the CIS 24 Sub-contractors' Gross Payment Vouchers issued to Mr Bettsworth. The level of income recorded to Mr Bettsworth would normally indicate the presence of a workforce but Mr Bettsworth did not have a PAYE scheme to record payments to employees and he was not registered as a contractor to record payments to sub-contractors.

(3) Several unsuccessful attempts were made to contact Mr Bettsworth at the address and using phone details which were given to HMRC.

(4) He also did not keep various meeting appointments and this raised suspicions as to the legitimacy of the business and the person.

5 24. **Noelle Forsyth –Inland Revenue Officer**

10 (1) This witness statement is dated 20 March 2012 and Ms Forsyth is part of a Special Investigations Labour Provider Team based in Croydon. The officer visited the Appellant to verify certain details of his VAT returns for the trading period 20 November 2002 to 31 January 2005. This was because the contactor returns of the Appellant under the CIS (Construction Industry Scheme) did not support the level of VAT being claimed, and since Mr Noble supplied labour only, it was concluded that it was unlikely that the input tax related to the purchase of materials.

15 (2) The CIS scheme details payments made by contractors to their sub-contractors and each contractor submits a monthly return detailing the total payments to each contractor. The return includes the value of labour, materials and any tax deductions due on the labour element only.

20 (3) The Appellant indicated to the officer that he maintained all business paperwork; he calculated the VAT figures by adding the values disclosed on sales and expenditure invoices. He said he did not have any PAYE employees and only used one sub-contractor.

25 (4) An examination of the expenditure invoices showed that the bulk of the input tax claimed related to supplies from HB Interiors. He explained that all payments to that company were cash payments made in person and the recipient, Mr Bettsworth, had signed the relevant VAT receipt, at the time payment was received.

30 (5) There were 178 invoices between November 2002 and January 2005. The invoices and the VAT receipts were presented in pristine and clean conditions to the officer.

35 (6) It was verified on checking that the VAT number of HB Interiors had been cancelled from 3 December 2002 and there was no PAYE scheme operated by that company.

(7) The claims for input tax were denied.

(8) On 25 May 2005, HMRC issued a letter detailing output tax under-declared by the Appellant for the periods 04/03 to 01/05 totalling £17,022.

(9) There was further correspondence between the parties where it was noted that invoices presented by the Appellant did not match the layout when compared with the ones which had been provided by HB Interiors, even though the invoices had the same dates and for were the same amounts.

40 (10) An assessment was raised in the sum of £209,504 on 26 March 2006 on the Appellant.

Discussion

25. General Points

26. The recovery of input tax requires that there be a supply to a taxable person of goods or services. It is required therefore that a supply must have taken place and the
5 input tax can be claimed by the taxable person to whom that supply is made. The supply itself must be chargeable to tax, a chargeable supply, and the persons claiming the input tax credit must hold satisfactory documentary evidence of their entitlement to the input tax credit.

27. No entitlement to an input tax credit can arise unless the payment which has
10 been made relates to an actual supply. The VAT invoice would typically evidence the fact that the supply has been made but the invoice itself is not necessarily conclusive of the supply. The relevant question is to whom are the supplies made. This question is asked expressly in the Value Added Tax Act 1994 (“VATA 1994”) Section 24(1) which provides that a person who claims input tax credit must be the person to whom
15 the supply was made.

28. The party seeking to recover input tax provides documentary evidence to evidence the supply and this would normally be the VAT invoice. VATA 1994 Section 24(6) provides that a person is required to hold a VAT invoice or document treated as a VAT invoice before claiming input tax credit in respect of a supply from
20 another taxable person. The document itself does not create an entitlement to input tax credit; it merely evidences such an entitlement.

29. These are the bare bones of the legal requirement for recovering input tax and it is clear therefore that we need to start by looking to see whether there has been a supply.

25 30. It is well established, in hearings before the Tribunal relating to assessments to VAT, that the burden of proof is on the Appellant to show, on the balance of probabilities, that the assessment was wrong. The burden is not on the Respondents to show that it was correct. This means that Mr Noble has to show, on the balance of probabilities, that the supplies relating to HB Interiors invoices were in fact made.

30 31. It is the contention of the Commissioners that the evidence suggests HB Interiors never had a genuine economic activity and could not have made the alleged supplies. There is evidence that HB Interiors purported to make supplies of labour but there is no record of them operating the PAYE scheme nor was the business registered with HMRC as a contractor. The Respondents contend that HB Interiors
35 neither had its own employees nor procured the requisite labour from others as a contractor.

32. The fact that HB Interiors did not render any VAT returns to HMRC, although registered for VAT, and did not render any self-assessment returns for the relevant period does suggest that there was no proper and compliant business activity.

33. The Respondents made several efforts to contact Mr Bettsworth but these were unsuccessful. The address given as the place where he resided or conducted his business was shown on the HB Interiors invoices, but no response was obtained to phone messages and letters and the address was either not correct or there was no one present. The Respondents have also raised doubt as to the authenticity of invoices produced by the Appellant. The invoices appear to be in different layout and detail g
5 supplies were made and questions the credibility of HB Interiors as a supplier. It is accepted that input tax may be recovered without an invoice.

34. The Respondents have also raised concerns about the fact that the invoices have
10 been settled in cash which, over a two year period, amounted to some £1.1 million. When these cash withdrawals are cross referred to the Appellant's bank statements the withdrawals do not match the invoices and there is no evidence to suggest that the cash which was withdrawn was paid to HB Interiors.

35. The Respondents assert that the explanation provided by the Appellant has not
15 been adequate or satisfactory. It is not corroborative in nature and inadequate peripheral evidence has been produced to support the facts and circumstances surrounding the business transactions with HB Interiors. It is their view that the evidence taken as a whole does not discharge the burden of proof.

36. The Appellant says that the fact that HB Interiors had been deregistered with
20 effect from 3 December 2002 did not prevent the Respondents from settling the direct tax matters relating to the very same supplies. In that sense, there is evidence of the supplies being made which has been accepted by HMRC. The point is also made that the Respondents did not disallow input tax and invoices issued prior to 31 January 2003 so that they must have been satisfied that those services were supplied. It is
25 important to stress that the tests to deduct input tax go much further than the invoice requirements for direct taxes including income tax and self-assessment.

37. In addition, the Appellant asserts that he could not have made taxable supplies to his customers without being provided with labour to carry out the work. Given the assertion that HB Interiors provided labour, there is no reason to doubt that the
30 supplies did in fact take place. The Tribunal should point out that while it is not disputed that a supply of labour to the Appellant took place, the question is whether that supply was provided by HB Interiors.

38. The Appellant says that since HB Interiors was deregistered with effect from 3
35 December 2002 by a retrospective decision taken by HMRC on 11 December 2003 and while the Appellant accepts that the invoices issued by HB Interiors post 11 December 2003 cannot be valid VAT invoices, as HB Interiors was not registered for VAT, he asserts that the Respondents should have exercised their discretion to allow input tax as the invoices prove that the Appellant received taxable supplies, from a taxable person and as the deregistration was retroactively applied.

40 39. **Did a supply take place?**

40. The fundamental question, before any other question is answered, is did the supplies take place. It is evident that supplies of labour were made to the Appellant but were the supplies made by HB Interiors?

5 41. It was claimed that HB Interiors had a large workforce and supplied labour to the Appellant. The workers were largely East Europeans who were paid in cash and did not have bank accounts. The day rate for workers was approximately £100 and they worked at different sites in and around London (the worker may have received less than £100 per day). The Appellant said that he employed between 70 and 90 workers on several different projects. He kept records of the number of men
10 employed at the different sites in his diaries, which were not presented to the Respondents or the Tribunal. The diaries, with other records, had been destroyed by the Appellant. This presented some difficulty in assessing the peripheral information, which is to say, timesheets, number of men employed, hours worked, payment and frequency. There would have been a need to operate a fairly sophisticated system of
15 record keeping for such a large number of staff who were making supplies of labour. In her oral evidence Ms Forsyth said, in her opinion, this was unusual and not believable.

20 42. The Appellant said that he prepared the VAT returns from information which he kept and recorded in his diary among other places. It strikes the Tribunal that it would have been a huge task to keep tabs on 70 to 90 men working on different projects; to record the number of hours worked, absentees, late arrivals and payments. He would have to involve the foreman on the site to verify the information. There is no real evidence that records were kept as one would expect in a business of this size. It would have been required that the labour invoiced was accurate and was checked
25 against daily timesheets before payment was made. It would not have been left to trust as the Appellant indicated.

30 43. Ms Forsyth explained that, in her experience, the invoices would be paid after checking a cash book which records the number of man-hours and other details and the bank statement should correlate to the flow of money for payment on the project. This was not done. The tracing aspect and audit trail for the money was virtually non-existent.

35 44. When HMRC raised questions about the supply having taken place and a possible fraud on the Exchequer, it was correct that a closer examination of the invoices and supporting evidence was undertaken. An invoice is a request for payment for goods or services supplied and is evidence of what has been supplied. If the invoices are not credible it does place some doubt as to whether the supplies took place.

40 45. The total invoicing for the period amounted to roughly £1.3 million whereas the cash withdrawn amounted to approximately £1.15 million. This is comprised of the following:

- (1) December 02 to March 03 - £108,508
- (2) 1 April 03 to 31 March 04 - £718,991

(3) 30 April 04 to 5 March 05 – £332,120

46. This shows total withdrawals to be approximately £1.159 million

47. The shortfall in payment of £200,000 (actual figure £219,795) has not been fully explained by the Appellant. The Tribunal would have expected a proper explanation of such a substantial shortfall. Mr Brown for the Appellant said that there were part payments in some cases. The Tribunal saw cash withdrawals and cheque withdrawals of cash as money taken out to pay HB invoices in part, never in full. There is no evidence that those monies withdrawn were paid to HB at all. The Tribunal is not convinced that part payments took place. In spite of the claims to part payments, neither the invoices nor the payment certificates recorded any of the part payments. This suggests that cash was not withdrawn to pay the invoiced amounts. There were handwritten figures on the invoices which Mr Brown suggested were the accountant's attempt to reconcile the cash withdrawals from the bank statements to the invoices. This was unconvincing. This conclusion conflicts with the Appellant's evidence that all sums were paid in full and that he met Mr Bettsworth at his home and sat down with all records and made full payment. The Respondents suggested that the VAT (at 17.5%) on £1.1 million is roughly £200,000 and this amount has not been paid to HB Interiors. It has remained outstanding.

48. There are discrepancies between some of the invoices and the sub-contractors' payment certificates. For example, one sub-contractor's payment certificate is dated 27 July 2003, but the corresponding invoice is dated 25 July 2003. This would only make sense if the certificate records the date of payment. However, the sub-contractor's payment certificate for 24 April 2003 is dated before the date of the invoice, which is dated 25 April 2003. The invoice for the 25 July 2003 is for an amount of £14,593.50 but the sub-contractors payment certificate for the same job states £14,734.50.

49. These show discrepancies in the invoicing and the sub-contractors' payment certificates, which evidence the payment and which are signed by Mr Bettsworth on behalf of HB Interiors. The certificates were prepared by the Appellant and the invoices were prepared by HB Interiors.

50. These discrepancies question the authenticity of the recorded transactions. Further if one looks at the HB Invoices which were used to support the application for the Construction Industry Scheme (CIS) these are very different from the invoices which were presented by the Appellant as coming from HB Interiors. The layout, typeface, colouring and details of the work schedule listed in the invoices are different. This is particularly noticeable with regard to invoices for 29 August 2003, 29 September 2003, 31 October 2003 and 28 November 2003. The invoices produced by the Appellant show the spelling Swiss Ree whereas the HB invoices presented for its CIS application show the spelling Swiss Re. The invoices do not appear to have been created by the same person. The Appellant's explanation was that one set might have been created by Mr Bettsworth's wife. Those invoices, provided by the Appellant, gave a VAT number and an address of 254 Croydon Road, Beckenham, Kent BR3 4DA as well as contact numbers. This contrasts with the invoices sent to

HMRC by HB Interiors which show an address of Flat 5, 254 Croydon Road, Beckenham, Kent. The address on the receipts was the Flat 5 address.

51. Officer Forsyth conducted a detailed examination of some 178 invoices from HB Interiors in the period 30 November to 28 January 2005 for the total amount of
5 £1,349,062.54 which included VAT of £201,011.44.

52. In her witness statement and after evaluating all of the evidence she concluded as follows:

10 “After evaluating all the information and documentation supplied by Mr Noble, I concluded that, whilst I could accept that he had engaged the services of workers to fulfil his customers’ large-scale construction projects, the evidence he held to support the position that he obtained those workers from HB Interiors was, in my view, insufficient to support his entitlement to reclaim as input tax all sums of VAT detailed on the invoices from HB Interiors.

15 The disputed input tax totalled £209,504 for periods 04/03 to 04/05. During the course of my investigation I had cause to examine the file held by HMRC relating to HB Interiors. I noted that in that file were copies of invoices purportedly issued to Mr Noble and which had been submitted by HB Interiors to HMRC to support HB Interiors’ application for gross status registration within the CIS Scheme. I noted that those invoices were on a different letter
20 head and had different layout as compared to the ones which had been provided by Mr Noble. I also noted that while the invoices had the same dates as invoices provided by Mr Noble, and related ostensibly to the same supplies, they were for slightly different amounts”.

53. The documentary evidence presented to the Respondents was not to their
25 satisfaction and raised various questions as to the authenticity of the invoices. Whilst it is not disputed that the Appellant did supply his workers to his customers it is questionable whether those workers came from HB Interiors. In his evidence, the Appellant described how HB provided workmen for his jobs but he was unable to explain, from the invoices, how many men would have been working at each site and
30 for how many hours and at what rate. The lack of reliable and credible commercial records which evidence an audit trail and payments made, give reasons to doubt the commerciality of the transactions and whether the transactions took place. It also casts doubt on the credibility of the evidence. The Appellant, in his evidence, was not able to explain the invoice discrepancies.

35 54. HB Interiors did not operate a PAYE scheme or a CIS scheme for the entire period. Important questions of evidence were raised as to whether the HB Interiors business did exist or make supplies given that they could not be contacted and their principal did not return calls, attend meetings or comply with his obligations under the VATA 1994 for making returns and accounting for VAT. He was not listed on the
40 electoral role at the addresses given to HMRC. There was no contract or similar evidence produced by the Appellant to evidence a legal relationship with HB Interiors and the making of a supply. The Tribunal agrees with the view of Mr Jones for the

Respondents who said that, from the records, it appears that there was not a genuine economic activity between the parties which could have led to the making of the supplies.

5 55. In the witness statement evidence presented by Mr Barnes his view was that the business of HB Interiors was not conducted on a commercial basis, he explained that:

10 “The level of income recorded to Mr Bettsworth would normally indicate the presence of a workforce but Mr Bettsworth did not have a PAYE scheme to record payments to employees and he was not registered as a contractor to record payments to sub-contractors. His CIS 24 vouchers also bore an indication of possible misuse because the signatures appeared to be the only entry in Mr Bettsworth’s hand”.

15 56. Mr Brown for the Appellant seeks to give credibility to the business transactions by pointing out that the Respondents had accepted, for direct tax purposes, the Appellant’s records, supplies and figures. The Tribunal’s view however is that we are dealing here with the VATA 1994 which places very different obligations on the Appellant and the fact that the direct tax arm of HMRC accepted the figures, while persuasive, cannot be used to support a claim for input tax under the VATA legislation. Further, the direct tax part of HMRC would not have looked in detail at 20 the VAT compliance and whether or not there were discrepancies within that legislation. The requirements for deducting VAT as input tax go further than the invoice requirements for direct taxes. The Tribunal finds this argument interesting but not persuasive.

25 57. The further evidence provided by the Appellant was not convincing. First, his witness statement was a statement which was not signed nor dated. The evidence which was provided under oath was vague and self-contradictory. He could not, for example, properly explain the details on the invoices relating to the work schedule, number of men and charges. He was not able to describe how he arranged for additional workers to be provided by HB Interiors. He also indicated that all 30 payments were made in cash to workers since this was industry practice and part payment was made to minimise the security risks. That is understandable. It does not however explain why he could not have paid HB Interiors by cheque. He could not provide a satisfactory explanation to this question. The payment of such large sums is remarkable in itself and there is no real evidence that the payment, though made, was 35 made to HB Interiors.

40 58. In explaining the discrepancy between the amount paid and the invoice amount, the Appellant stated that he would make part payments to HB Interiors. It is possible that the amount outstanding was due as a part payment. However, the records do not provide any evidence that such part payments were made and, in any event, his personal business diaries and cash books which recorded those transactions were not available since they had been destroyed. It seems strange that Mr Noble, who said he kept meticulous records, would destroy those records after the transactions were completed. Officer Forsyth, who saw the original invoices held by Mr Noble and

which were presented in an envelope, said that they did not show signs of wear-and – tear that one would normally expect of documents passed between contractors on a building site. The physical evidence to support the transactions was sparse or unavailable.

5 59. The Appellant provided various receipts evidencing the payments to HB
Interiors. However the invoice and payments date did not always match. The receipt
itself was not dated when it was signed and it was not clear if the date on the receipt
was the date when the receipt was created or when the payment was made. It seems
more likely that a date on the receipt was the date when the document was created.
10 In some cases the receipt predates the invoice.

60. One would have expected the Appellant to provide more credible and cogent
information on the payments which were made to HB Interiors which supported the
audit trail. The absence of adequate contemporaneous records of the purported cash
payments makes the Appellant’s explanations difficult to believe. The Tribunal places
15 little weight on the invoices as evidence of a supply being made. The invoices
themselves did not bear sequential numbers, a requirement for VAT purposes, and the
evidence presented was not fully credible. This was accepted by Mr Brown at the
beginning of the hearing. The Appellant himself did not operate a PAYE system or a
CIS and given the number of men employed this is a major omission.

20 61. The Appellant’s counsel Mr Brown said that the Appellant had supplied bank
statements which show withdrawals of cash used by him to pay HB Interiors. It is
correct to say there were withdrawals of cash but there is no evidence that these were
actually withdrawn to pay HB Interiors or indeed that the sums withdrawn were given
to HB Interiors.

25 62. There was also no evidence that he had met Mr Bettsworth to make those
payments. The fact that receipts were provided to HB Interiors to confirm that the
payment was made is not convincing since the receipts and invoices were not very
credible documents. As explained previously, the fact that the invoices were used in
the settlement of direct tax matters cannot, by itself, be used to support a claim for
30 input tax.

63. **Conclusion**

64. In the Tribunal’s view and in assessing the evidence, it has come to the
conclusion that the supplies relating to the invoices put forward by the Appellant did
not actually take place. There is insufficient evidence to show that payment for the
35 supplies had been made. The Appellant has not discharged the burden of proof,
which has been placed upon him, to show that those supplies did in fact take place. It
is not enough to say that the labour had been supplied from a source. What matters is
whether the labour was supplied from HB Interiors to the Appellant.

40 65. The Tribunal in making its determination also considered the fact that Mr
Bettsworth, who was absent throughout, never made a sworn statement and took no

steps to do so. It would have assisted the Tribunal to have his side of the story and an explanation of his business relationship with Mr Noble.

5 66. Given that the Appellant was a high end operator one would have expected a more professionally run business with proper records, staff and professional help to assist with compliance. It is understandable if the Appellant sought to do his own VAT returns to save costs but it is not convincing if he could not explain the figures or provide reconciliations for invoices. The Tribunal was therefore not convinced by the evidence presented by the Appellant to support his case and he therefore did not discharge the burden which was placed on him to show that the supplies were made.

10 67. In the circumstances, it is not necessary for the Tribunal to address the alternative arguments as to whether the Commissioners should have exercised their discretion to allow input tax. This argument only arises if the supplies took place.

68. Accordingly, the Appeal is dismissed. No issues of cost were raised but these can be addressed at a later date on application.

15 69. 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
20 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

25 **Dr K KHAN**
TRIBUNAL JUDGE

RELEASE DATE: 11 December 2012