TC02801

Appeal numbers: TC/2011/05340 & TC/2011/07307

VALUE ADDED TAX – irregular tax invoices evidencing the purchase of cars by the appellants – the tax invoices irregular in that instead of giving the appellants' names and addresses they gave the names and addresses of third parties who were aliases for the appellants – whether HMRC's refusal to exercise their discretion to accept alternative evidence of entitlement to input tax was reasonable as a matter of domestic public law – held on the facts that it was – whether HMRC's refusal contravened the Community Law principle of effectiveness – held on the facts that it did not – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EVERYCAR CONTRACTS LIMITED
SABRINA HAMMON t/a SJM GROUP **Appellants**

and

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

TRIBUNAL: JUDGE JOHN WALTERS QC
GEORGE BARDWELL CBE FCIPD BA

Sitting in public at Bedford Square, London on 19 February 2013

L. Ahmed, Controlled Tax Management Limited, for the Appellant

C. Shea, Officer, HM Revenue & Customs, for the Respondents

DECISION

Introductory

1. The appellants in these two appeals are connected. Sabrina Hammon is the daughter of Mark Hammon, who controls Everycar Contracts Limited ("Everycar"). Mr Hammon gave oral evidence before us. We were told (and accept) that Mr Hammon "does everything" in relation to the two businesses and that Miss Hammon "does nothing". Although Sabrina Hammon trading as SJM Group and Everycar are registered for VAT under different VAT registration numbers, the two appeals raise the same point and both parties conducted the hearing on the basis that no material issue was raised by the identity of the appellant – that is, whether Everycar or Sabrina Hammon trading as SJM Group was concerned in any particular supply.

2. Both Sabrina Hammon trading as SJM Group and Everycar carry on business buying cars from franchised dealers in the UK and exporting them, for instance to the far east, particularly Singapore. They take advantage of arbitrage opportunities, pricing their sales so as to undercut dealers in the foreign territories concerned. The trade is in "top end" cars, typically Mercedes-Benz and BMW models. The trade is not well regarded by the car manufacturers and the problem raised by the appeal arises from the fact that the UK franchised dealers concerned at the times material to the appeals preferred not to issue paperwork – particularly VAT invoices – naming SJM Group or Everycar. They preferred to issue paperwork naming unconnected individuals with those individuals' addresses, although they knew that their sales were in reality being made to SJM Group or Everycar. We were told that following the difficulties encountered by the appellants which have led to this appeal, the system has been changed and that supplier-dealers now place orders for cars in the unconnected individuals' names but are able to raise VAT invoices in the appellants' names, the identities of the actual purchasers of cars still being withheld from the car manufacturers.

3. Sabrina Hammon trading as SJM Group appeals against a decision not to allow input tax of £12,021 in period 07/10 and £82,097 in period 10/10. (The appeal is also formally against a decision not to allow input tax of £2,308 in period 10/10, but that related to a disallowance for a different reason – personal use by Miss Hammon of a vehicle purchased – and no argument was advanced on this point. We therefore formally dismiss the appeal insofar as it relates to that disallowance of £2,308 input tax.)

4. Everycar appeals against a decision not to allow input tax of £137,387.24 in period 11/10. The decision letter dated 17 February 2011 issued by Officer Lawrence Wootten, the control officer for Everycar (who also gave oral evidence in the appeal) refers to a consequent liability of £67,710.08 for the period. This is an adjustment from the claim for repayment of the excess of deductible input tax over accountable output tax originally made by Everycar (in the amount of £69,677.16).

5. Assessments issued to recover the tax said by HMRC to be due have also been appealed against.

6. As stated above, we heard oral evidence from Mr Hammon and Officer Wootten. We also heard oral evidence from Officer Mrs Patricia Ford (the reviewing officer) and from Officer Richard Jones (the control officer for Sabrina Hammon's business). We received witness statements from the three officers.

7. We also had before us a bundle of documents and Mr Ahmed, for the appellants, produced a useful Chronology of Events.

8. From this evidence we find the following facts.

Findings of fact (I)

9. On 27 January 2011, Officer Jones made a control visit to Sabrina Hammon's business at the premises (91 Milespit Hill, London NW7) from which both appellants trade. Although the visit was to Sabrina Hammon, Officer Jones interviewed Mark Hammon, as manager of Sabrina Hammon's business. Mr Hammon told him that Sabrina Hammon's business was set up by himself (Mr Hammon) to buy and sell new cars because some dealers had a limit on the number of vehicles they would sell to any one customer if they considered the goods would be exported. Sabrina Hammon's business was operated alongside Everycar.

10. Officer Jones reviewed the purchase invoices which were presented as evidence for the input tax claims made by Sabrina Hammon's business. He noted that of the 21 purchase invoices presented for vehicles for onward sale, only 3 were addressed to SJM Group, 3 were addressed to Mark Hammon and one to Miss S Hammon. The remaining 14 purchase invoices were addressed to various other individuals or companies.

11. Officer Jones asked Mr Hammon why the purchase invoices were made out to these individuals and companies and Mr Hammon said that he got people to go in and buy the cars on behalf of SJM Group to disguise the fact that the SJM Group business was buying so many vehicles. He said that the log books for the vehicles purchased were sent to the individuals or companies concerned and were then forwarded by them to Mr Hammon. In some cases, Mr Hammon applied for duplicate log books. He stated that the purchase price for all the vehicles was paid by SJM Group.

12. Officer Jones made the decision to disallow the input tax claimed on any purchase invoice other than: (1) one addressed to SJM Group or Miss Hammon; (2) one

addressed to Mark Hammon – Officer Jones having received an assurance from Officer Wootten that no input tax had been claimed in respect of these invoices by Everycar; and (3) one made out to a VAT registered trader, Bancofleet and Sonnauto (UK) Ltd. – on the basis that these two entities were VAT registered undisclosed agents of SJM Group.

13. The basis of his decision was that Business Brief 4/98 ("VAT: Treatment of 'Premium', 'Nearly New' and 'Personal Import' Cars") required that from 1 April 1998 non-franchised dealers would only be able to treat VAT as input tax if it was incurred on a supply made directly to them. In the case of a purchase through "undisclosed agents", non-franchised dealers would only be able to recover VAT on the agent's supply of the car to them if the agent was VAT registered and had issued a proper VAT invoice.

14. Officer Jones explained that he made the disallowance because there was no assurance that the invoices concerned might not be used by other VAT-registered traders to make similar input tax claims.

15. Officer Lawrence Wootten made an arrangement on 4 February 2011 to visit Mr Hammon on a control visit to Everycar at 91 Milespit Hill, London NW7 on 9 February 2011.

16. Officer Wootten's notes indicate that his examination of Everycar's records was generally satisfactory. He noted that the profit realised on sales of cars in the UK was "minimal" – about £2,000 per vehicle – and that the repayment of VAT claimed was due principally to the claim for input tax on 7 vehicles that had been exported in the quarter ended November 2010. In relation to input tax recovery, his note states:

> 'Noted practice of box breaking on selected vehicles i.e. private individual purchases car with company's money. Invoice addressed to private individual. Car then passes to company who claim input tax and make onward sale. Checks applied satisfactory. However input tax entitlement re box breaking queried with Policy. Ruling awaited.'

17. Officer Wootten in his Witness Statement said that he had had concerns about invoices addressed to private individuals (and not to Everycar) which he had noticed. On 16 February 2011, Officer Wootten received advice from 'HMRC Motor Trade Unit of Expertise endorsed by HMRC Policy' that input tax was not claimable in these circumstances.

18. He therefore made the decision not to allow the input tax concerned on the basis that the private individuals mentioned in the suppliers' invoices were the purchasers of the cars concerned, rather than Everycar. His decision was upheld on review (by Officer Mrs Ford) on the basis that whether or not an agency arrangement was

involved, the evidential requirements in relation to tax invoices, provided by regulations 29(2) and 14(1) of the VAT Regulations 1995 (SI 1995/2518) were not satisfied. Regulation 14(1) provides, among other things, that a VAT invoice should state the name and address of the person to whom the relevant goods or services are supplied. Regulation 29(2) requires a person claiming deduction of input tax in respect of a supply from another taxable person to hold 'the document which is required to be provided under regulation 13 [that is, a regular VAT invoice]'.

19. In all respects other than the name and address of the purchaser, the invoices issued by dealer-suppliers were detailed and accurate. They included a description of the goods, details of the supplier, the chassis/engine number, registration number, correct tax point, and so on.

20. Officer Mrs Ford's review letter was sent out on 21 June 2011.

21. On the same day Officer Jones wrote to Sabrina Hammon trading as SJM Group stating that following Officer Mrs Ford's decision in relation to Everycar, he proposed to raise an assessment to disallow input tax claimed by Sabrina Hammon trading as SJM Group for the periods 07/10 and 10/10 against purchase invoices addressed to individuals that had no link with the business. He allowed input tax on those invoices which had been addressed to Miss Hammon, SJM Group or Mr Hammon (because he accepted that Mr Hammon "runs the business").

22. Some 12 months later, Mr Hammon provided to Officer Wootten three letters from franchised dealers, Mercedes-Benz of Dorchester, Mercedes-Benz of Doncaster and Berry Chiswick (the trading name of Marsh Wall Limited, a BMW dealer).

23. These letters (the first two were addressed to Mr Hammon and the last to Officer Wootten) state that certain sales by them, documented as being to private individuals, should have been documented as being to Everycar and that the funds received for the sales came from Everycar, but the accounting system operated by the dealers makes it impossible for them to issue amended invoices. The letters were in the following terms:

Letter from Mathew Carrington, Sales Manager, Mercedes-Benz of Dorchester (undated):

> 'Dear Mr Hammon
>
> As per our telephone conversation with Mr Wootten the officer from HMRC's VAT Department, I would like to confirm that if the accounting system of Mercedes Dorchester allowed us to change the invoice details for cars supplied to [Everycar] we would be pleased to do so. However, the Kerridge system does not allow us to do this because the transactions have

been archived which means that we are unable to print a replacement invoice with a different name and address.

We are fully aware that the supply of these cars has been to Everycar and the deals should have been done in Everycar's name but were invoiced to private individuals and not in the name of the company. Therefore we are more than happy to provide changes showing the customer as [Everycar]. We also confirm that the cars were paid for by the company.

For confirmation, the vehicle registration numbers of the cars referred to above are: [registration numbers given].'

Letter from Deborah Lowles, Group Accountant, For and on behalf of Marsh Wall Limited (BMW Service)

'7 June 2012

Dear Mr Wootten

During a recent enquiry from [Everycar], it has come to light that four of our invoices from February and March 2011 were incorrectly addressed to the end user of the vehicles rather than [Everycar]. However I can confirm that funds were received from [Everycar] for the four vehicles.

Due to the length of time that has passed before this has been queried, our accounting system is unable to change the address on those invoices, but I hereby confirm that the following invoices should state [Everycar] in the "invoice to" section of our invoice header.

The vehicles in question, their respective invoice numbers and invoice/Tax dates are as follows [information given].

If you should need any further information, please do not hesitate to contact me on the above number [given].'

Letter from Mark Sampson, Sales Manager, Mercedes-Benz of Doncaster

'08/06/2012

Mr Hammon,

As requested, this letter confirms that any vehicle purchased from Mercedes Benz of Doncaster cannot have invoices re issued into the name of [Everycar].

This is due to our Kerridge system not allowing amendments once the sale has been 'archived'.

Whilst our sales were registered and invoiced to individuals, I can confirm that money received for these sales was from [Everycar]. At the time of payment and registration it wasn't made clear that the invoices should be made out to [Everycar] and on trying to amend we discovered that Kerridge will not allow us to make such amendments.'

24. An email dated 3 November 2011 from Jason Etherington, Sales Manager, Dick Lovett MINI Bristol to Mr Hammon was also in evidence. The text of that email was:

> 'We have supplied a number of new cars to Mr Mark Hammon and have invoiced these to various individuals provided to us by Mr Hammon. At the time these cars were sold we were aware that they were being supplied to Mr Hammon for the purpose of his business [Everycar].'

25. Officer Wootten considered the three letters mentioned at paragraphs 22 and 23 above, but did not change his decision because he was of the view that the appropriate course to entitle Everycar to deduct the VAT concerned as input tax would be for the dealers to issue credit notes to the private individuals concerned and raise correct invoices against Everycar.

The issues in the appeals

26. The Grounds of Appeal in the notice of appeal lodged by Everycar on 18 July 2011 state that "HMRC's view that [Everycar] uses third party agents to purchase vehicles is incorrect" – it was submitted that the purchases were made by Everycar and that therefore the input tax should be recoverable in full. The Grounds of Appeal also state that "alternative evidence of the supplies" should be considered in connection with allowing the recovery of input tax, where "the invoices are correctly issued in the name other than that of the registered entity".

27. The Grounds of Appeal stated in the notice of appeal lodged by Sabrina Hammon trading as SJM Group on 13 September 2011 were in similar terms.

28. HMRC's Statement of Case issued in connection with both appeals and dated 28 May 2012 defined the "matter at issue" as whether the appellants "have evidence to show there is no agency between the people named on the invoices and their businesses", and, as a second matter, whether the appellants have evidence "in accordance with section 24 [VATA] and regulation 29 of [the VAT Regulations 1995] to show that they should be given credit for the input tax refused by [HMRC]".

29. A Skeleton Argument dated 1 February 2013 and dealing with both these issues was served by Mr Shea on behalf of HMRC. A further Skeleton Argument dated 8 February 2013 was served by Mr Shea on behalf of HMRC. In this further Skeleton Argument, no reference is made to the issue of whether or not the persons named on the invoices were agents of either appellant. Mr Ahmed, on behalf of the appellants, made an application for a costs order in their favour in relation to this "agency" issue which had been dropped by HMRC and which Mr Ahmed says should never have been raised.

30. HMRC are taken by us therefore now to accept that the cars in question were in fact purchased by the appellant claiming deduction of input tax in relation to them and the individuals named on the invoices were effectively aliases for the purchasing appellant. The only remaining "matter at issue", as per Mr Shea's further Skeleton Argument is: "do the appellants have evidence to show [HMRC's] decision not to accept alternative evidence [for the deduction of input tax] exceeds the bounds of public law rationality?".

Findings of fact (II)

31. The transactions which both appellants enter into are, for the most part, initiated by orders from customers – that is, they buy cars to fulfil orders received. There are some cases where they buy cars speculatively in the hope of finding customers for them.

32. The individuals who lend their names to the purchase transactions are known to Mr Hammon and he does not pay commission to them for the assistance they give.

33. Officer Wootten's decision not to exercise his discretion to accept proof of input tax due other than regular tax invoices which presented no opportunity for use by other traders was taken on advice from his Policy department.

34. Officer Wootten accepted in cross-examination that he did not ask Mr Hammon 'a number of relevant questions about how the business operated'. He was however satisfied that the dealer-suppliers knew that Everycar was paying for the cars it claimed to have purchased.

35. Officer Wootten had said in his Witness Statement that the fact that invoices were issued by the dealer-suppliers in the name of a private individual meant that that individual must be "the one who ordered the car and contracted with the dealer to supply the car". But in cross-examination he drew back from this statement saying: "I can't say for sure". This reflects HMRC's change of case in dropping the allegation that private individuals purchased the cars as undisclosed agents for the appellants.

36. Officer Mrs Ford said in cross-examination that in conducting her review she noted nothing to suggest that a discretion to accept evidence alternative to regular tax invoices had been considered by the decision maker (Officer Wootten) and that she had considered the exercise of such a discretion as part of her review. She had concluded that there was no good reason given for HMRC to exercise such a discretion.

37. Officer Mrs Ford's approach was stated succinctly in the following passages of her witness statement:

> '… the situation here was that the invoices could have been made out by the supplier to [Everycar] but the company had deliberately for business reasons chosen to adopt a practice whereby the invoices were made out to third parties. The suppliers were by my understanding still in existence and the company could have obtained invoices from them had they chosen to. In my view it was therefore not in accordance with HMRC policy regarding alternative evidence to accept the third party invoices as alternative evidence to allow input tax deduction in this situation.
>
> In exercising my discretion I also considered the risk of fraud, in that if the third party invoices were to be accepted as alternative evidence, there was a risk to the Exchequer of duplicate claims being made to the input tax, both by [Everycar] and by the person to whom the invoice had been addressed. I considered that this risk of enabling fraud to be committed was a valid reason not to apply [HMRC's] discretion to accept alternative evidence. I also considered that if [Everycar] were permitted through the application of HMRC's discretion to claim back input tax on the basis of third party invoices, which they had chosen to use rather than obtaining invoices in their own name, in order to gain business advantage, then HMRC would be acting inequitably

> towards the many compliant taxpayers who did not engage in such business practices and who might be regarded as being disadvantaged as a consequence.
>
> Whilst it was open to me to vary the disputed decision on this basis as a conclusion to my review and accept that satisfactory alternative evidence had been supplied, I did not do so for the above reasons. I exercised my discretion but I decided not to apply the discretion, as it would be contrary to HMRC policy to do so.'

38. The letters from dealer-suppliers referred to above at paragraphs 22 and 23 had been written after Officer Mrs Ford's review. She said in evidence that she could not say whether they would have changed her view. She would have expected the dealer-suppliers to issue credit notes to the third party purchasers and fresh invoices to the appellants.

39. Officer Jones had the same expectation. His evidence was that he did consider exercising his discretion to accept alternative evidence of entitlement to input tax deductions, exercising it in favour of Sabrina Hammon trading as SJM Group in the cases of invoices made out to Sabrina Hammon and Mark Hammon. His decision was made in the light of HMRC's Statement of Practice "VAT Strategy: Input Tax deduction without a valid VAT invoice" issued in March 2007. The relevant passage is in paragraph 3 of the Statement, as follows:

> 'If you are a VAT registered business, and you have been issued with an invoice that is invalid, you should be able to return to your supplier and ask them for a valid VAT invoice that complies with the legislation. If for some reason you cannot, this Statement of Practice sets out whether or not you may be entitled to input tax recovery. In most cases, provided businesses continue to undertake normal commercial checks to ensure their supplier and the supplies they receive are '*bona fide*' prior to doing any trade, it is likely they will be able to satisfy HMRC that the input tax is deductible.'

The submissions

40. Mr Ahmed's submission on the outstanding issue of the reasonableness of HMRC's refusal to accept evidence alternative to the production of regular tax invoices to support the appellants' entitlement to input tax deductions was that the decision had been made taking into account irrelevant issues (namely, that the invoices had been issued to third parties in order to deceive the manufacturers) and that the decision had been made failing to take into account relevant material (namely the alternative evidence that taxable supplies had been made to the appellants in the relevant cases).

41. Mr Ahmed contends that now that HMRC have dropped their case that the third parties were undisclosed agents of the appellants and must be taken to accept that the cars in question were in fact purchased by the appellant claiming deduction of input tax in relation to them, there is no basis for their continued refusal to accept alternative evidence to entitle the appellants to claim the disputed input tax deductions.

42. He submits that the allegation that the invoices could be used for fraudulent ends in relation to VAT is without foundation because there is a clear audit trail in all cases leading from purchases by the appellants to sales by them.

43. He further submits that the letters produced by the appellants and referred to at paragraphs 22 and 23 above show that it is not realistically possible to obtain fresh correct invoices from the dealer-suppliers. He contends that a proper application of HMRC's Statement of Practice of March 2007 would result in the disputed input tax deductions being allowed and that the decision not to allow them was not one that any reasonable body of Commissioners would make.

44. He relies on the proviso in regulation 29(2) of the VAT Regulations 1995 in relation to evidence supporting claims for input tax, *viz:*

> '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'.

45. He further relies on the Statement of Practice of March 2007, and in particular paragraph 19 and Appendix 2 thereof:

> '19. As long as the claimant can provide satisfactory answers to the questions at Appendix 2 and to any additional questions that may be asked, input tax deduction will be permitted.
>
> Appendix 2: Questions to determine whether there is a right to deduct in the absence of a valid VAT invoice
>
> (1) Do you have alternative documentary evidence other than an invoice (e.g. a supplier statement)?
>
> (2) Do you have evidence of receipt of a taxable supply on which VAT has been charged?
>
> (3) Do you have evidence of payment?
>
> (4) Do you have evidence of how the goods/services have been consumed within your business or their onward supply?
>
> (5) How did you know that the supplier existed?
>
> (6) How was your relationship with the supplier established? For example:
>
> - How was contact made?
> - Do you know where the supplier operates from (have you been there)?
> - How do you contact them?
> - How do you know they can supply the goods or services?
> - If goods, how do you know the goods are not stolen?
> - How do you return faulty supplies?
>
> This list is not exhaustive and additional questions may be asked in individual circumstances'

46. Mr Ahmed submits that all these questions have been answered satisfactorily by the appellants and indeed HMRC's acceptance that that is so is, we consider, inherent in the position adopted by Mr Shea, namely that the Officers' refusal to exercise their

discretion to accept alternative evidence is justified by their duty to protect the revenue and the integrity of the VAT system and, the fact that, in the present cases, "the invoice could be made out to the taxable person to whom the supply has been made, but has deliberately at his request been made to someone else to whom the supply was not made" (paragraph 9.31 of Mr Shea's amended Skeleton Argument).

47. Mr Ahmed relies on the decision of this Tribunal (Judge Cannan and Miss Stott) in the appeal of *McAndrew Utilities Limited v HMRC* [2012] UKFTT 749 (TC) - in which *Reisdorf v Finanzamt Köln-West* [1997] STC 180 was cited – as authority for the proposition that the requirement to provide a tax invoice or other evidence is directed at the need to ensure the correct levying and collection of VAT. He submits that if all the evidence confirms that a taxable supply has taken place, the right to deduct the VAT chargeable as input tax should not be lost.

48. Mr Ahmed submits that in this case HMRC accept that taxable supplies have taken place in connection with the transactions evidenced by the disputed invoices but that their refusal to allow deduction of input is grounded only on the fact that the invoices are not in the appellants' names and that this is because the appellants have, in collaboration with dealer-suppliers, acted to deceive the car manufacturers.

49. He submits, drawing an analogy with 'box breakers' in the retail mobile phone business, who purchase mobile phones from retail shops for business purposes by sending out employees and others to buy one or two phones in their own names and are allowed by HMRC to claim deduction of the VAT chargeable as input tax, that it is unreasonable in this case for HMRC to take into account the arrangements between the appellants and dealer-suppliers as a reason for denying deduction of input tax.

50. Mr Ahmed also cited the decision of this Tribunal (Judge Porter and Miss Stott) in *London Wiper Company v HMRC* [2011] UKFTT 445 (TC), where the Tribunal was satisfied, as a result of the evidence deduced by the appellant in that case, that the officers of HMRC concerned acted unreasonably in refusing to accept that there was sufficient alternative evidence (i.e. evidence other than regular VAT invoices) to support claims to input tax deduction and directed a further review of the officers' decision.

51. Mr Shea accepts, at least for the purposes of this appeal, that the supplies evidenced by the disputed invoices did take place. He also accepts that the fact that the appellants arranged with dealer-suppliers for the issue of invoices to third parties in connection with supplies to the appellants, in order to deceive the car manufacturers was not a reason which ought properly to be taken into account by HMRC in deciding whether or not to exercise their discretion to accept alternative evidence. His case, for HMRC, is that it is fundamental to HMRC's proper supervision of VAT that taxable persons are required to issue, and to hold, when claiming input tax deductions, regular VAT invoices. He submits that there is no apparent reason why the appellants in this appeal should not be able to obtain regular VAT invoices from dealer-suppliers. There is an obligation on them under regulation 13 of the VAT Regulations 1995 to provide a regular VAT invoice to whichever of the appellants was the purchaser of a car in any particular case.

52. He says in his amended Skeleton Argument (at paragraph 9.32) that:

> '[t]he problem here is of [the appellants'] own making and the remedy also. The remedy is for [the appellants] to go back to the franchised dealer[s] with evidence of their purchase order[s] for the vehicle[s] and ask them to issue a credit note against the original invoice because it has been made out incorrectly and to have a tax invoice made out in the name of the business. The [appellants] would then be able to reclaim the input tax subject to the statutory time limits and normal conditions.'

53. Mr Shea submits in relation to the letters referred to at paragraphs 22 and 23 above that the dealer-suppliers concerned have given no good reason why they cannot comply with this procedure. He points out that they are under a legal obligation to issue regular tax invoices. He suggests that if their accounting procedures make the issue of a regular tax invoice impossible, these procedures should be changed. HMRC, he submits, should not be obliged to exercise their discretion to accept alternative evidence in cases, such as these, where it is possible for the person claiming deduction of input tax to obtain a regular tax invoice.

54. With regard to the Statement of Practice of March 2007, the questions in Appendix 2 are not relevant, because it is made clear at paragraph 2 that the question of the exercise of the discretion to accept alternative evidence does not arise unless 'for some reason' it is not possible for the trader to return to his supplier and ask for a valid VAT invoice that complies with the legislation – i.e. a regular tax invoice (see: *ibid.* paragraph 3).

55. Mr Shea submits that if the appellants' argument were to be accepted, this would amount in practice to an acceptance that a regular tax invoice was not a fundamental requirement. He emphasises that there is always a possibility that other invoices can be used to perpetrate VAT fraud and that this is a legitimate concern for HMRC to bear in mind when deciding whether or not to exercise the discretion to accept alternative evidence.

56. Mr Shea cited the decision of the VAT and Duties Tribunal in *Baba Cash & Carry Limited v HMRC* (Decision 20416 of 30 October 2007) in which *Reisdorf v Finanzamt Köln-West* was also considered, and in particular to paragraphs 44 and 45 of *Baba Cash & Carry* in which the Tribunal had held that the fact that another person (apart from the appellant in that case) might conceivably have claimed an input tax deduction by reference to the disputed invoices was (under the general heading of the protection of the revenue and the integrity of the VAT system) a relevant consideration to be taken into account by HMRC in deciding whether to exercise their discretion to accept alternative evidence. He referred to paragraph 18 of the Opinion of the Advocate General (Fennelly) in *Reisdorf* (also referred to by the Tribunal in *Baba Cash &* Carry) in which it is stated that 'the role of the invoice in the operation of the VAT system is pivotal.'

57. He also cited *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* (Case 35/05).

58. In particular, he referred us to paragraph 82 of the Opinion of the Advocate General (Sharpston) and paragraph 41 of the Court of Justice's Judgment in *Reemtsma*.

59. At [18] of her Opinion, Advocate General Sharpston she referred to the Commission's analysis (which she found persuasive in its entirety – *ibid.* paragraph 84) as follows:

> '… Member States must provide for rectifying errors in invoicing VAT, including both rectifying the invoice and reimbursing the tax wrongly paid. [The Commission] submits that that duty flows from the principle of neutrality and from the prohibition of unjust enrichment (here, on the part of the tax authorities). Member States may choose whatever procedure is suitable, provided that the principle of effectiveness is respected. A situation in which normally only the supplier, as person liable for the tax, may seek reimbursement from the tax authorities and the customer must seek reimbursement from the supplier, under civil law, appears in principle acceptable. However, provided that any risk of tax loss is wholly eliminated, the principle of effectiveness might require the customer to be able to claim against the tax authorities if recovery by the normal procedure proved "virtually impossible or excessively difficult".'

60. At [41] of its Judgment, the Court of Justice said:

> '… [A]s rightly submitted by the Commission, if reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, those principles [i.e. the principles of neutrality and effectiveness] may require that the recipient of the services to be able to address his application for reimbursement to the tax authorities directly. Thus, the Member States must provide for the instruments and the detailed procedural rules necessary to enable the recipient of services to recover the unduly invoiced tax in order to respect the principle of effectiveness.'

61. Mr Shea submitted that it was clear from these authorities that the circumstances where input tax evidenced by irregular tax invoices should be reimbursed (or deduction for it allowed) by HMRC were circumstances where reimbursement (or deduction) in the normal way – by the evidence of a valid (regular) tax invoice – was 'impossible or excessively difficult'. The circumstances referred to were ones where the supplier was insolvent or had been liquidated or had otherwise disappeared. In these cases, he submitted, the dealer-suppliers were still in business and it should not be impossible or excessively difficult for the appellants to obtain regular tax invoices from them.

62. Mr Shea submitted that an important aspect of the assessment of whether or not HMRC's conduct had been reasonable was the need for consistency in HMRC's treatment with regard to all traders. He criticised Mr Ahmed's reliance on any analogy with the treatment of 'box breakers' in the mobile phones industry because the invoices concerned there were retail invoices, which are different to tax invoices, and raise less potential for use in perpetrating VAT fraud. He cited the penultimate paragraph of Sir Thomas Bingham MR's judgment in *R v Inland Revenue Commissioners ex p. Unilever plc* [1996] STC 681, where he said:

> 'The threshold of public law irrationality is notoriously high. It is to be remembered that what may seem fair treatment of one taxpayer may be unfair if other taxpayers similarly placed have

been treated differently. And in all save exceptional circumstances the Revenue are the best judge of what is fair.'

Discussion and Decision

63. In our view this appeal raises two related but distinct issues. The first is whether HMRC's decision to refuse to exercise its discretion to accept alternative evidence (other than regular tax invoices) to support the appellants' claims to deduct input tax is one which no reasonable body of Commissioners in the circumstances could have made – this is a domestic public law issue. The second is whether Community law (especially the principles of neutrality and effectiveness) requires HMRC in all the circumstances of this case to exercise its discretion to accept alternative evidence in the appellants' favour.

64. We have no difficulty in deciding the first (domestic public law) issue in HMRC's favour. We note that Officer Jones did consider exercising his discretion to accept alternative evidence in relation to Sabrina Hammon trading as SJM Group and decided not to do so. We also note that although Officer Wootten did not consider exercising his discretion to accept alternative evidence in relation to Everycar, Officer Mrs Ford considered exercising her similar discretion as part of her review of Officer Wootten's decision and decided not to do so.

65. Also, it was not the basis of Officer Mrs Ford's decision that the third parties had purchased the cars as agents of the appellants. Her decision not to accept alternative evidence in relation to Everycar was taken purely on policy grounds that (1) the appellants had obtained the irregular tax invoices in question for business reasons; (2) that they could have obtained regular tax invoices from the dealer-suppliers if they had chosen to do so; (3) that acceptance of alternative evidence in these circumstances posed a risk of enabling fraud to be committed; and (4) that acceptance of alternative evidence in this case might involve HMRC acting inequitably towards compliant taxpayers. Officer Jones's decision was based on his view that the appellants could have obtained regular tax invoices from the dealer-suppliers if they had chosen to do so (the second reason given for Officer Mrs Ford's decision).

66. While we have some sympathy with Mr Ahmed's case that the reasons for obtaining the irregular invoices should not have carried much (or any) weight as grounds for the decision on whether or not to exercise the discretion to accept alternative evidence, and we have difficulty in seeing how a decision to accept alternative evidence in the appellants' case would have been unfair to other taxpayers (particularly taxpayers holding invoices from insolvent or liquidated suppliers), we regard the concern to prevent or limit the risk of enabling fraud to be committed by the use of irregular invoices and, in particular, the view, honestly held by the decision makers at the time they made their decisions, that the appellants could have obtained regular tax invoices from the dealer-suppliers if they had chosen to do so, as rational grounds for HMRC's decisions not to accept alternative evidence and to insist on the appellants' production of regular tax invoices.

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

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

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

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

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

72. As a matter of fact the supplies evidenced by the disputed invoices were made by the various dealer-suppliers to one or other of the appellants and therefore, as HMRC now accept, subject to the question of the evidence of the charge to VAT which HMRC accept is in principle deductible by the appellants, the claims for deduction of input tax are allowable. This is the effect of section 24 VATA and regulation 29 of the VAT Regulations.

73. Further, as the Tribunal in *McAndrew Utilities* decided, any alternative evidence which would be acceptable pursuant to an exercise of HMRC's discretion under the proviso to regulation 29(2) of the VAT Regulations, would need to be evidence to the

same level of detail as that which would be contained in a valid invoice (see: *ibid.* [122]). In this case we accept that the appellants have shown adequate alternative evidence in that HMRC are satisfied that the appellants, and not the third parties named on the irregular invoices, were the actual recipients of the supplies evidenced by the irregular invoices.

74. The relevant Community legislation is contained in articles 178(a), 180 and 182 of the Principal VAT Directive 2006/112/EC, as follows:

> 'Article 178: In order to exercise the right of deduction, a taxable person must meet the following conditions:
>
> (a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Section 3 to 6 of Chapter 3 of Title XI.
>
> Article 180: Member States may authorise a taxable person to make a deduction which he has not made in accordance with Articles 178 and 179.
>
> Article 182: Member States shall determine the conditions and detailed rules for applying Articles 180 and 181.'

75. The Community legislation therefore accords to the Member States the power to determine the rules relating to the supervision of the exercise of the right to deduct input tax, in particular the manner in which taxable persons are to establish that right – see also: the Court of Justice's Judgment in *Reisdorf* at [29].

76. In this case, HMRC's case reduces to the following: they acknowledge that the principle of neutrality requires that the appellants should benefit from the deduction of the disputed input tax, nevertheless they say that the principle of effectiveness is not infringed by HMRC's conditions for the exercise of the right of deduction, namely that either regular tax invoices are held (which they are not) or the appellants show that it is impossible for them to obtain regular tax invoices.

77. We consider that it would be sufficient for the appellants to show that it would be virtually impossible or excessively difficult for them to obtain regular tax invoices (by analogy with *Reemtsma*, referred to above).

78. Against this, Mr Ahmed stresses that HMRC have accepted that the appellants are entitled to the input tax deductions (subject to the requirements for evidence to support that entitlement). On this basis he submits that the evidence which has persuaded HMRC of that entitlement should be sufficient to support it. He further submits that the letters referred to at paragraphs 22 and 23 above show that it is not realistically possible to obtain fresh invoices from the dealer-suppliers and accordingly that it is virtually impossible or excessively difficult to obtain the evidence which HMRC say they require.

79. We have concluded that Community law gives the Member States the power to lay down the detailed conditions relating to the supervision of the exercise of the right to deduct input tax and accordingly we have to decide whether the appellants have shown that HMRC's requirement to see regular tax invoices issued by dealer-

suppliers who are still trading renders the exercise of the right virtually impossible or excessively difficult.

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

81. For these reasons we dismiss the current appeals.

82. We would add this. It is still open to the appellants to seek regular tax invoices from their suppliers. If they are successful, HMRC are on record as saying that they would then be able to claim the input tax subject to the statutory time limits and normal conditions (Mr Shea's amended Skeleton Argument at paragraph 9.32).

83. If or to the extent that they are unsuccessful and can prove as a fact that it is virtually impossible or excessively difficult to obtain regular tax invoices from their suppliers, then it will be open to them to approach HMRC again with the evidence of that fact and HMRC will, in the light of this Decision, presumably consider it appropriate to revisit the issue of the exercise of their discretion.

Costs

84. We are minded to accede to Mr Ahmed's application for an order for costs against HMRC on the basis that HMRC acted unreasonably in maintaining the argument that the third parties had acted as undisclosed agents of the appellants and then dropping that argument shortly before the hearing. We direct the appellants to make that application in writing, sending and delivering a schedule of the costs claimed (attributable to that argument) pursuant to rule 10(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 within 28 days of the date of the release of this Decision. HMRC must make any representations they wish to make in relation to the appellants' application within a further 28 days. The Tribunal will then consider the application so made in the light of any such representations.

Applications for permission to appeal this Decision

85. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 25 July 2013