[2020] UKFTT 254 (TC)

TC07738

VAT – input tax - whether HMRC acted unreasonably to refuse alternative evidence in absence of VAT invoice –no – evidence of zero rating for export - no – whether unexplained bank payment subject to VAT - yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appealnumber:
TC/2018/02185

BETWEEN

KARDI VEHICLES LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE IAN HYDE

Sitting in public at Birmingham on 17 and 18 July 2019

Tim Brown, counsel, for the Appellant

Mark Boyle, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns whether in the absence of correct VAT invoices, HMRC acted reasonably in not accepting alternative evidence to justify obtaining credit for input tax in respect of the purchase of motor vehicles, whether the appellant had sufficient evidence for zero rating the export of the hire of certain vehicles and the correct treatment of an unexplained receipt in the appellant's bank account.

2. Following the hearing the Tribunal asked for written submissions from the parties on the decision of the Upper Tribunal in *Commissioners for Revenue & Customs v Boyce* [2017] UKUT 177, a decision pre dating the hearing and which overturned the First-tier Tribunal decision which had been relied upon by the appellant.

THE ISSUES

3. There were originally four issues in this appeal;

(1) whether pursuant to Section 73(6) Value Added Tax Act 1994 ("VATA") assessments were out of time being more than one year after HMRC had sufficient facts in order to raise assessments ("the Time Limit Issue")

(2) whether, in circumstances where the appellant did not have VAT invoices addressed to it for vehicles it had purchased, HMRC acted unreasonably in refusing to exercise its powers under Regulation 29(2) of the Value Added Tax Regulations 1995 ("Regulation 29") to accept alternative evidence and so denying the appellant entitlement to recover input tax ("the Input Tax Issue")

(3) whether the appellant was liable to output tax in respect of supplies of vehicles on hire originally treated as zero rated ("the Export Issue")

(4) whether HMRC were entitled to treat a payment of £341,960 shown in the appellant's bank statement as consideration for a taxable supply and assess the appellant for unpaid output tax ("the Loan Issue")

4. The assessments also reflect a number of smaller VAT adjustments made by HMRC ("the Minor Issues") including:

(1) contra entries in the accounts book

(2) claims for credit based on evidence that was not a VAT invoice, other then the Input Tax Issue

(3) discrepancies within cash book and sale book listings

(4) discrepancies in the VAT declared on cars sold through the second hand margin scheme

5. However, the Minor Issues were not argued in front of me and the parties are agreed that these do not form the basis of the appeal. Further, Mr Brown for the appellant withdrew the Time Limit Issue during the hearing. This appeal is therefore only concerned with the extent to which the assessments depend upon the Input Tax Issue, the Export Issue and the Loan Issue.

THE FACTS

6. The appellant carries on the business of selling and leasing motor vehicles and has been registered for VAT since 1 September 2010.

7. Ms Rose Wilmot of HMRC, the principal investigating officer, gave evidence in the hearing for HMRC and I found her to be an honest and credible witness.

8. Mr Alisdair Watts was the original investigating officer for earlier periods including 12/14, 1/15 and 2/15. Ms Wilmot was appointed to investigate the 07/15 return on 22 October 2015 and was subsequently allocated the 07/16 return. However, due to the deterioration of the relationship between Mr Sherlock, a director of the appellant, and Mr Watts, from July 2016 Ms Wilmot took over all contact with the appellant for all periods under investigation but Mr Watts remained involved in the background, including reviewing evidence sent by the appellant.

9. Since the investigation Mr Watts has retired and did not give evidence in the hearing. No witness evidence would therefore presented by HMRC for the conduct of the investigation prior to October 2015. Mr Brown for HMRC objected to not being able to cross examine Mr Watts. However, in my opinion, Ms Wilmot was a credible witness and, due to her familiarity with the earlier accounting periods was able to give evidence as to the material issues in this appeal. In my view, having heard the evidence and considered the position, nothing turns on how the investigation was managed save as to the documents produced by the appellant and so there is no prejudice to the appellant arising from Mr Watts not being a witness in this appeal.

10. Mr Kieran Sherlock, the owner and a director of the appellant and gave evidence in the hearing on behalf of the appellant. I find Mr Sherlock to be honest but difficult and at times unhelpful.

11. Based on the evidence of Ms Wilmot and Mr Sherlock and the documents produced to me I find the facts as set out below.

The investigation, assessments and appeals

12. In December 2014 HMRC started an investigation into the appellant's VAT affairs which subsequently expanded to cover a number of VAT periods between periods 12/14 and 7/16 inclusive.

13. The investigation has been protracted and often been heated. The parties gave lengthy evidence as to the detailed progress of the investigation including allegations of bad faith and failure to cooperate. I have considered these points but do not consider them relevant to this appeal save as set out below.

14. This appeal is concerned with the following VAT periods where the appellants submitted VAT repayment claims in the following amounts;

(1) 12/14 in the amount of £46,352.44

(2) 01/15 in the amount of £42,473.12

(3) 02/15 in the amount of £24,971.39

(4) 07/15 in the amount of £14,314.11

(5) 07/16 in the amount of £82,915.47

15. HMRC initially raised assessments in respect of each of these periods except 07/16, the net tax payable being the net effect of the denial of input tax in respect of the Input Tax Issue, the imposition of output tax in respect of both the Export Issue and the Loan Issue and adjustments arising from the Minor Issues. For example in 07/15 the appellant had made a repayment claim of £14,314.11 but HMRC raised an assessment in respect of that period of £219.89 being calculated by the denial of £9,660 of input tax and additional output tax of £4,874.

16. During the course of the investigation HMRC requested information and data from the appellant. The parties disagreed as to what was provided at various points in the investigation. The appellant's complaints were principally that they provided what was asked for, it was

difficult if not impossible to deliver the information and HMRC ignored what was provided. HMRC complained that the documents and data were not provided, it was provided late and what was provided was incomplete.

17. On 10 November 2017, following HMRC raising assessments for the VAT periods 12/14, 01/15, 02/15 and 07/15, the appellant's agent requested an independent review arguing that the assessments were raised outside of time limits.

18. On 2 March 2018 HMRC issued a review conclusion letter upholding the denial of input tax and the issuing of assessments for VAT periods 12/14, 01/15, 02/15 and 07/15.

19. On 27 March 2018 the appellant appealed the 2 March 2018 review conclusion letter to the Tribunal.

20. On 31 July 2018 HMRC issued an assessment in the amount of £53,967.53 in respect of the 07/16 return.

21. On 28 August 2018 the appellant e mailed to the Tax Tribunal in respect of the 07/16 assessments seeking to appeal. By a direction of the Tribunal in a letter dated 4 October 2018 the appellant's appeal of the 07/16 assessment was treated as an amendment to the March 2018 appeal.

The Input Tax Issue

22. As part of its business the appellant purchases vehicles, chiefly cars, in the UK and exports them to the Republic of Ireland.

23. Mr Sherlock gave evidence as to the difficulties in buying vehicles for export. There was a decent margin to be had by buying vehicles from dealerships and exporting them but car dealerships did not like selling to anyone who was doing so. Accordingly, it was common practice for the purchases to be made in the name of third parties. Mr Brown in submissions and in the hearing referred to two decisions of this Tribunal being *Boyce v Commissioners for Revenue & Customs* [2015] UKFTT 0489 and *Everycar Contracts Ltd v HMRC* [2013] UKFTT 405 where this practice was also found to be the case.

24. The appellant would buy the cars earmarked for export in the name of dormant group companies, including Kardi Contract Vehicles Limited and Kardi Vehicle Leasing Limited. These companies were neither VAT registered not in the same VAT group as the appellant. Others were bought in Mr Sherlock's name who was also not registered for VAT personally. There was no evidence that anyone at the sellers knew about the fiction.

25. HMRC accepted the appellant's evidence on the nature of the scheme and I accept that it is a common practice, although the detail may vary. Further, HMRC did not challenge that the relevant vehicles had been bought nor the appellant's assertion that the scheme was the purpose behind buying through the dormant group companies.

26. However, the parties disagreed about the extent of the information provided by the appellant to HMRC. During the course of the investigation, there was significant correspondence and a number of meetings but the parties were unable to provide the Tribunal with any clarity as to what had been provided. Indeed it was agreed by the parties that I would make a decision on the Input Tax Issue in principle based on the assumption of a VAT invoice being issued to an associated company of the appellant or Mr Sherlock but the appellant having produced to HMRC the purchase stock book and sale stock book. Nevertheless I need to make a finding as to whether the bank statements for all periods had been supplied.

27. Mr Brown's position was that all relevant bank statements had been supplied. Bank statements for 02/15 and 07/15 periods were listed on a schedule produced by HMRC summarising documents provided by the appellant on 6 September 2016.

28. As to the bank statements for the other periods, Mr Brown said it was very difficult in the absence of Mr Watts to establish whether they were provided. It could, in Mr Brown's view, be inferred that they had been provided from a letter from HMRC dated 23 June 2017 which listed as not having been received;

> "bank statements showing payment for vehicles paid for and received outside of the verification period (October 2014 to the current date)"

If bank statements outside the period under investigation have not been supplied, then those within the period must have been.

29. HMRC's position on whether the bank statements had been provided was muted if not neutral, save as to the statements for 02/15 and 07/15 periods which HMRC conceded had been supplied as they were listed on HMRC's schedule provided by the appellant on 6 September 2016.

30. The parties' evidence as to whether the bank statements were supplied is unsatisfactory. For reasons set out in this decision below it is unnecessary for me to determine whether the bank statements were supplied but, on balance, and in the light of no evidence from HMRC, I find that the bank statements were supplied for all periods.

The Export Issue

31. The appellant also carries on the activity of leasing vehicles to business customers in the Republic of Ireland.

32. For the VAT periods 07/15 and 07/16, HMRC identified defects in the VAT invoices issued by the appellant, which according to HMRC meant the appellant did not have adequate evidence to justify zero rating such supplies.

33. Based on the 8 invoices produced to the hearing I find that they had the following features:

(1) They were addressed to customers with addresses in the Republic of Ireland

(2) The invoices did not quote the customer's Irish VAT number or country prefix

(3) They included the appellant's name, address and VAT registration number

(4) They included an invoice number and invoice date

(5) No VAT was charged

(6) Some but not all of the invoices stated "zero VAT rated to Southern Ireland"

(7) The product being supplied was "hire" with additional descriptions:

(1) 7 of the 8 contained additional descriptions, typically:

"HIRE- MEWP

RENAULT MIDLINER

NOT INSURED FOR USE ON PUBLIC ROADS

ZERO RATED TO SOUTHERN IRELAND"

(2) the other invoice included:

"CAR HIRE"

(8) There was no description of the length of hire

(9) There was no description as to the location it was made available nor was the place of consumption identified

34. Ms Wilmot in her evidence explained that in the course of her investigation she considered the VAT invoices relating to these supplies to be inadequate. Ms Wilmot therefore asked the appellant for further information to establish the place of supply of the services and to prove that consumption of these services was in another member state. Specifically, she asked Mr Sherlock for evidence of transport showing where and when the goods had been made available. This evidence was not supplied. Mr Brown did not suggest that alternative evidence had been produced by the appellant and I therefore find that no such evidence was produced.

35. Ms Wilmot in her evidence that none of these supplies were included in the appellant's EC Sales List. Mr Brown did not suggest otherwise and I find that they were not included in the Sales list.

The Loan Issue

36. During the course of the investigation Ms Wilmot identified a bank receipt from a Mr Kowalski of £341,960 paid into the appellant's account during the VAT period 07/16. Ms Wilmot could not reconcile the amount with any sales invoice, sales day book or margin stock record.

37. Mr Sherlock initially in the investigation gave HMRC the explanation that it was a director's loan but later in 2016 said that the payment was a loan from a friend. His evidence was that he had given the original explanation because he wanted to keep the matter private.

38. Ms Wilmot asked for further information on the loan but no further information was provided. In the absence of further information Ms Wilmot treated the payment as a VAT inclusive sale price, resulting in an assessed output tax charge of £56,993.33 included in the net assessment for period 07/16.

THE VAT LEGISLATION, REGULATIONS AND NOTICES

39. The Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("the Principal VAT Directive") provides as follows:

> "Article 168
>
> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;
>
> ...
>
> 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 Sections 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.

40. Section 7A VATA provides insofar as relevant:

> "(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.
>
> (2) A supply of services is to be treated as made—
>
> (a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and
>
> (b) otherwise, in the country in which the supplier belongs.
>
> (3)….
>
> (4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person—
>
> (a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,
>
> (b) is registered under this Act,
>
> (c) is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom, or
>
> (d)…
>
> and the services are received by the person otherwise than wholly for private purposes.
>
> (5) Subsection (2) has effect subject to Schedule 4A…."

41. Section 24 VATA provides insofar as relevant:

> "(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 as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;…"

42. Section 30 VATA provides insofar as relevant:

> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section—
>
> (a) no VAT shall be charged on the supply; but
>
> (b) it shall in all other respects be treated as a taxable supply;
>
> and accordingly the rate at which VAT is treated as charged on the supply shall be nil.
>
> (2)A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.
>
> (3)…
>
> (4)…
>
> (5)…

(6)…

(7)…

(8) Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where—

(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both—

(i) the removal of the goods from the United Kingdom; and

(ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and

(b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.

(8A)…

(9) Regulations may provide for the zero-rating of a supply of services which is made where goods are let on hire and the Commissioners are satisfied that the goods have been or are to be removed from the United Kingdom during the period of the letting, and such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.

(10) Where the supply of any goods has been zero-rated by virtue of subsection (6) above or in pursuance of regulations made under subsection (8), (8A) or (9) above and—

(a) the goods are found in the United Kingdom after the date on which they were alleged to have been or were to be exported or shipped or otherwise removed from the United Kingdom; or

(b) any condition specified in the relevant regulations under subsection (6), (8), (8A) or (9) above or imposed by the Commissioners is not complied with,

and the presence of the goods in the United Kingdom after that date or the non-observance of the condition has not been authorised for the purposes of this subsection by the Commissioners, the goods shall be liable to forfeiture under the Management Act and the VAT that would have been chargeable on the supply but for the zero-rating shall become payable forthwith by the person to whom the goods were supplied or by any person in whose possession the goods are found in the United Kingdom; but the Commissioners may, if they think fit, waive payment of the whole or part of that VAT. "

43. Schedule 4A VATA provides insofar as relevant:

"Hiring of means of transport

3(1) A supply of services consisting of the short-term hiring of a means of transport is to be treated as made in the country in which the means of transport is actually put at the disposal of the person by whom it is hired.

But this is subject to sub-paragraphs (3) and (4).

(2) For the purposes of this Schedule the hiring of a means of transport is "short-term" if it is hired for a continuous period not exceeding—

(a) if the means of transport is a vessel, 90 days, and

(b) otherwise, 30 days.

(3) Where—

(a) a supply of services consisting of the hiring of a means of transport would otherwise be treated as made in the United Kingdom, and

(b) the services are to any extent effectively used and enjoyed in a country which is not a member State,

the supply is to be treated to that extent as made in that country.

(4) Where—

(a) a supply of services consisting of the hiring of a means of transport would otherwise be treated as made in a country which is not a member State, and

(b) the services are to any extent effectively used and enjoyed in the United Kingdom,

the supply is to be treated to that extent as made in the United Kingdom."

44. The Value Added Tax Regulations 1995 ("the VAT Regulations") provide to the extent relevant:

"**13 Obligation to provide a VAT invoice**

(1) Save as otherwise provided in these Regulations, where a registered person

(a) Makes a taxable supplies in the United Kingdom to a taxable person, or

(b) Makes the supply of goods or services to a person in another member state or the purpose of any business activity carried on by that person, or

(c) Receive the payment on account in respect of the supply he has made or intends to make from a person in another member state

he shall provide such persons as are mentioned above with a VAT invoice…"

….

(5) the documents specified in paragraphs (1), (2), (3) and (4) above shall be provided within 30 days of the time when the supply is treated as taking place under section 6 of the Act, or within such longer period as the Commissioners may allow in general or special directions"

14 Contents of VAT invoice

(1) Subject to paragraph (2) below and regulation 16 and save as the Commissioners otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars –

(a) a sequential number base on one or more series which uniquely identifies the document,

(b) The time of the supply,

(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) …

(g) A description sufficient to identify the goods for 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 currency

(j) The rate of any cash discount offered,

(k) …

(l) The total amount of VAT chargeable, expressed in sterling

(m) The unit price,

(n) Where a margin scheme is applied under section 50A or section 53 of the Act, the reference "margin scheme: works of art", "margin scheme: antiques or collectors' items", "margin scheme: second-hand goods", or "margin scheme: tour operators" as appropriate

(o) Where a VAT invoice relates in whole or part to a supply where the person supplied is liable to pay the tax, the reference "reverse charge"

29 claims for input tax

(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 became chargeable save that, where he does not at that time hold the document will 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

….

(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

…..

provided that where the Commissioners so direct, either generally or in relation to particular cases all classes cases, a claimant shall hold or provide such other evidence of the charge to VAT that as the Commissioners may direct"

…

134. Supplies to persons taxable in another member State

Where the Commissioners are satisfied that—

(a) a supply of goods by a taxable person involves their removal from the United Kingdom,

(b) the supply is to a person taxable in another member State,

(c) the goods have been removed to another member State, and

(d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A(1) of the Act, for VAT to be charged by reference to the profit margin on the supply,

the supply, subject to such conditions as they may impose, shall be zero-rated."

45. HMRC Notice 725 provides;

> "**4.3 Zero-rated supply of goods**
>
> This paragraph has force of law.
>
> A supply from the UK to a customer in an EU member state is liable to the zero rate where:
>
> - You get and show on your VAT sales invoice your customer's EU VAT registration number, including the 2-letter country prefix code
> - The goods are sent or transported out of the UK to a destination in another EU member state
> - You get and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4….."
>
> **5.2 what to show on documents used as proof of removal**
>
> The following paragraph including bullet points has force of law
>
> The documents you use as proof of removal must clearly identify the following:
>
> - the supplier
> - the consignor (where different from the supplier)
> - the customer
> - the goods
> - an accurate value
> - the mode of transport and route of movement of the goods,and
> - the EU destination
>
> vague descriptions of goods , quantities or values are not acceptable. For instance, "various electrical goods" must not be used when the correct description is "2,000 mobile phones (make ABC and model number XYZ2000)". An accurate value, for example £50,000 must be shown and not excluded or replaced by a lower or higher amount"

THE INPUT TAX ISSUE

The appellant's arguments in the hearing

46. Mr Brown for the appellant accepted that, while the appellants did not have the correct VAT invoices, Regulation 29 provides that HMRC can accept alternative evidence. The issue is whether HMRC acted unreasonably in denying the appellant's claim based on the information in their possession and the Tribunal's jurisdiction in this matter is supervisory (*London Wiper Company v Revenue & Customs* [2011] UKFTT 445 (TC).

47. The decision that is the subject of this appeal was dated 2 March 2018 and so what is relevant is whether HMRC acted unreasonably based on what HMRC knew on that date.

48. The documents and explanations given by the appellant on or before 2 March 2018 to HMRC proved that the transactions took place and that it had purchased the vehicles in question. This was sufficient to render HMRC's decision to refuse the input tax claim unreasonable.

49. Mr Brown argued that it is a plausible and not uncommon practice in the motor trade that legitimate purchases are made from authorised distributors but the recipient of the vehicle is not openly made known to the supplier, especially where vehicles are due to be dispatched to another member state. For example, in *Everycar Contracts Ltd v HMRC* [2013] UKFTT 405 this Tribunal at paragraph 2 said of the practice of buying cars from franchised dealers and selling abroad at a profit:

> "the trade is not well regarded by the car manufacturers and the problems 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 and connected individuals with those individuals' addresses, although they knew that their sails were in reality being made to SJM Group or Everycar."

50. Mr Brown in the hearing relied heavily on the *Boyce* decision which also concerned VAT invoices issued to associated companies in order not to alert sellers that the vehicles were to be exported. Mr Brown acknowledged it was only a decision of this Tribunal and so not authoritative. Nevertheless it was another decision that illustrated the practice of buying vehicles from sellers using third party names to disguise the purchaser. Further, according to Mr Brown, *Boyce* helpfully summarised the law and should be followed by this Tribunal.

51. Mr Brown quoted with approval paragraph 26 of the *Boyce* decision where Judge Chapman said:

> "The focus of the present claim is upon the proviso to regulation 29(2) and HMRC's discretion to accept alternative evidence of the charge to VAT. It was common ground between the parties that we had a supervisory jurisdiction in this regard. We agree with this approach (see *Kohanzad v Customs and Excise Comrs* [1994] STC 967 per Schieman J at 969). As such, Mr Boyce has the burden of proof of satisfying us that HMRC did not take into account all relevant factors or took to account any irrelevant matter or that no reasonable body of Commissioners would have reached the decision that HMRC made. It follows that we are restricted to considering the information available to HMRC have the time of the decision."

52. Further, Mr Brown referred me to paragraph 31 in *Boyce*:

> "In the present context, the availability to HMRC of a discretion pursuant to the proviso to regulation 29(2) provides the instrument to allow recovery notwithstanding the absence of a VAT invoice where appropriate to do so. Having regard to *Everycar* and *Reemstma,* the relevance of Community Law is that the principles of neutrality and effectiveness must be observed when considering HMRC's discretion to accept alternative evidence of the charge to VAT."

53. Mr Brown sought to draw a comparison with the facts in *Boyce* which were summarised at paragraph 42 of the decision, including:

> "42. The following findings of fact are particularly relevant to our decision:
>
> (1) Mr Boyce was acting honestly in entering into the transactions. As far as Mr Boyce was concerned the Dealerships' employees and managers had authority to bind the Dealerships and did so.
>
> (2) The Named Purchasers were acting as Mr Boyce's agents and nominees.

(3) It is clear from the Agency Agreements that the supplies of the vehicles were made to Mr Boyce. It is also clear that Mr Boyce was acting as agent for his customers.

(4) The bank statements evidence the flow of funds from Mr Boyce to the Named Purchasers and from Mr Boyce's customers to Mr Boyce.

(5) The Agency Agreements precluded the Named Purchasers from reclaiming input tax themselves.

(6) Although employees (and even managers) of the Dealerships were complicit in the transactions, Mr Boyce and his customers were hidden from view from the owners of the Dealerships and the manufacturers.

(7) The Dealerships would be extremely unlikely to supply Mr Boyce with a replacement VAT invoice or to credit the Named Purchasers and reissue an invoice to Mr Boyce…

(8) HMRC's reason for disallowing the Vehicle Purchased Input Tax was limited to the absence of evidence of supplies to Mr Boyce…"

54. The Tribunal then went on:

"43. We do not accept HMRC's central premise that it was not virtually impossible or excessively difficult for Mr Boyce to obtain regular VAT invoices. In reaching this conclusion, HMRC failed to take into account the fact that the whole point of the arrangements as described by Mr Boyce was that he and his customers were being hidden from view from the manufacturers for the owners of the Dealerships. It was virtually impossible or excessively difficult for Mr Boyce to obtain a regular VAT invoice because the Dealerships were not prepared to give him them at the time of the transactions (as signified by the need to involve the Named Purchasers). There was no basis presented to us for suggesting that they would have been any more prepared to do so at any later date.

44. Further we take the view that HMRC acted unreasonably be reaching the decision that Mr Boyce had not provided sufficient evidence to support the supply being made to him. We remind ourselves of Mr Wilson's concession that we can consider all the information which was available to us in hearing for this purpose (although, again, we note that we would normally be restricted to the evidence available to the decision maker but in the present case HMRC have reconsidered the review decision upon the basis of the information now available and invite us to test of reasonableness of the review decision against that information).

45. We reach this conclusion because HMRC either failed to take into account the following matters or, if they did take into account, reached a decision which no reasonable body of Commissioners would have reached;

(1) The inability to obtain VAT invoices in Mr Boyce's name as set out in paragraph 43 above.

(2) The agency agreement clearly evidenced the true relationship between Dealerships, the Named Purchasers and Mr Boyce.

(3) Mr Boyce's bank statements evidenced the payments to the Named Purchasers and tallied with the Dealerships' invoices.

(4) HMRC had previously investigated Mr Boyce's affairs and work presumably satisfied that these arrangements constituted supplies to Mr Boyce."

55. Mr Brown highlighted item (3) in paragraph 45. As in the current appeal the bank statement would have evidenced the real purchaser as the appellant.

56. Mr Brown accepted *Boyce* was not binding but it was persuasive because the facts are similar;

(1) there is no allegation of dishonesty

(2) an associated company – here a member of the group with the same addresss - acted as purchaser

(3) the bank statements show that the real purchaser is the appellant

(4) the other companies were dormant and not registered for VAT

(5) the dealerships were extremely unlikely to issue fresh invoices in the appellant name so that it was virtually impossible or excessively difficult to do so

57. In the current appeal the evidence provided by the appellant to HMRC was principally:

(1) The invoices made out to third parties

(2) The day book on which the purchases were recorded as specific transactions with specific registration numbers

(3) The sales book in which the sales were recorded, again as specific transactions with registration numbers

(4) Bank statements for 02/15 and 07/15 (and, by inference from HMRC's letter of 23 June 2017), in respect of all periods

58. If HMRC had looked at the bank statements they would have seen that the purchases had been made but if they did not then that would be unreasonable.

The Upper Tribunal decision in *Boyce*

59. Following the hearing in writing this decision I established that the First-tier Tribunal decision in *Boyce* had been appealed and in 2017 the Upper Tribunal allowed HMRC's appeal. Given the appellant relied heavily on the First-tier Tribunal decision I asked for written submissions.

60. As the decision Upper Tribunal was not considered in the hearing I have quoted extensively from the judgment, including HMRC's argument as it is relied upon by the Upper Tribunal in its decision.

61. HMRC in its grounds of appeal in *Boyce* argued that the FTT had erred in law, for a number of reasons including the ground that the FTT had erred in its application of the principle of effectiveness. Arnold J summarised HMRC's argument as follows;

> "17…the FTT appears to have considered that the fact that it was virtually impossible or excessively difficult for Mr Boyce to obtain valid VAT invoices meant that there had been a breach of the principle of effectiveness as a result of HMRC's decision not to accept alternative evidence.
>
> 18. Counsel for HMRC submitted that the FTT had erred in law in this regard. The European law right that Mr Boyce was attempting to exercise in this case was the right of deduction of input tax under Article 168(a) of the Principal VAT Directive. Mr Boyce was unable to exercise the right to deduct input tax because he did not hold the requisite VAT invoices, contrary to the requirement in Article 178 of the Principal VAT Directive, which was

implemented by regulation 29(2)(a) of the 1995 Regulations. But that situation did not arise by reason of anything in the UK's national rules. On the contrary, Articles 180 and 182 of the Principal VAT Directive gave Member States the power to authorise the deduction of input tax without VAT invoices, and those provisions were implemented by the proviso to regulation 29(2), which gave HMRC an unfettered discretion to accept alternative evidence. Mr Boyce's difficulty in obtaining VAT invoices was due not to that national rule, but to the nature of the transactions which Mr Boyce chose to enter into. Therefore, even if it was, as a matter of fact, virtually impossible or excessively difficult for Mr Boyce to obtain valid VAT invoices, HMRC's refusal to accept alternative evidence of his purchases did not amount to a breach of the principle of effectiveness. The FTT had thus misinterpreted and misapplied the principle of effectiveness.

19. Furthermore, counsel submitted that the FTT was wrong to hold that no reasonable body of Commissioners could have concluded that the fact that it was virtually impossible or excessively difficult for Mr Boyce to obtain valid VAT invoices was not sufficient to justify accepting alternative evidence. The FTT had failed to take into account the fact that there was a real and obvious risk of fraud in that the VAT invoices made out to the Named Purchasers could be used in order to make duplicate claims for the recovery of the VAT shown on them. That risk distinguished this case from one where no VAT invoice had been issued at all.

20. Turning to the second and third factors identified by the FTT at [45], counsel submitted that the FTT had correctly noted that the alternative evidence required was not just that of a supply taking place, but also the detail which ought to have been contained in a valid invoice if one had been available. The FTT went on to say, however, that the Commissioners had not identified what details were missing. But the onus was on Mr Boyce to demonstrate that all relevant details were present; it was not for the Commissioners to show what was lacking.

21. As regards the fourth factor identified by the FTT at [45], counsel submitted that, not only was there no evidential basis for such a presumption, but this factor, even if factually accurate, was irrelevant to the exercise by the Commissioners of their discretion in relation to entirely different supplies.

22.Finally, counsel submitted that, in addition to the real and obvious risk of fraud mentioned above, the FTT had failed to keep in mind when assessing the Commissioners' decision that: (i) the *rule*, as a matter of both EU and UK VAT law, is that without a valid invoice there can be no input tax deduction; (ii) the use of the discretion in regulation 29(2) involves creating an *exception* to that rule; and (iii) it is therefore entirely reasonable for the Commissioners to insist on strict adherence to that rule unless and until the taxpayer can demonstrate why an exception to it should be made. Given that the problem arises from the nature of the transactions which Mr Boyce had entered into, there was nothing unreasonable in the Commissioners' decision to adhere to the ordinary rule of EU and UK law."

62. Arnold J in his decision said:

"23. In my judgment the FTT erred in law in reaching its conclusion for all of the reasons given by counsel for HMRC. Of those reasons, the most important are the ones relating to the first factor identified by the FTT, since it is clear that the FTT's misapplication of the principle of effectiveness was central to its reasoning and conclusion.

> 24. In those circumstances the question arises as to whether I should remake the decision or remit the matter to the FTT. In his skeleton argument, counsel for HMRC submitted that I should remake the decision. In his oral submissions, he acknowledged that there were arguments in favour of remission, in particular that it was not clear precisely what facts and matters had been available to HMRC when making the decision. An inquiry into that question could not improve Mr Boyce's position, however.
>
> 25. Mr Boyce advanced a number of arguments to the effect that he had done nothing wrong. It is important to appreciate, however, that HMRC has never suggested any wrongdoing by Mr Boyce. It does not follow that HMRC should have exercised their discretion in his favour. The fact of the matter remains that he chose to enter into transactions the nature of which was such that he did not obtain proper VAT invoices which are ordinarily required to reclaim input tax. The same goes for Mr Boyce's statement that he had taken advice from KPMG.
>
> 26. In my judgment there is no tenable basis for contending that HMRC's exercise of their discretion not to accept alternative evidence in lieu of proper VAT invoices is one that no reasonable body of Commissioners could have reached. On the contrary, I consider that it was entirely justifiable. Accordingly, I shall allow HMRC's appeal, remake the FTT's decision and dismiss Mr Boyce's appeal to the FTT."

the appellant's further submissions on *Boyce*

63. Following my request for submissions, Mr Cowgill, the appellant's tax adviser made written submissions on the Upper Tribunal decision.

64. Mr Cowgill sought to distinguish the Upper Tribunal decision on the grounds that;

(1) The appellant exported directly to Ireland whereas Mr Boyce's customer exported to Singapore

(2) The dealerships in the UK would not approve of Mr Boyce`s customer Great Harvest purchasing the vehicles in the UK whereas the purchases made by the appellant were made in their or a group company`s name in the UK.

(3) The appellant, unlike Mr Boyce, held invoices for the purchase of the vehicles in their or the group company name. There was no deliberate attempt by the appellant to hide the true ownership of the vehicle during the supply chain and they could have a reasonable reliance on the supply not being subject to MTIC trading. The invoices may have reflected different entities but they were all trading styles of the principal company.

65. Mr Cowgill further objected to being asked to comment on a case that neither party introduced into the hearing and which the parties have not had an opportunity to discuss and properly interrogate in a hearing.

HMRC's arguments in the hearing

66. Mr Boyle for HMRC argued that the appellant has not produced evidence to support its claim for input tax and the onus is on the appellant to show they have correctly claimed input tax.

67. The appellant had adopted a structure for buying vehicles where it did not obtain VAT invoices in its name and either could not or refused to ask the sellers for replacement VAT invoices.

68. Where a taxpayer does not have correct VAT invoices and HMRC have refused to accept alternative evidence the decision in *Scandico v Revenue and Customs Commissioners* (2018)

STC 153 is of direct relevance. *Scandico* looked at whether or not there was sufficient alternative evidence to prove that the substantive requirements for obtaining a deduction are met in the absence of valid VAT invoices. At paragraph 43 the Upper Tribunal stated;

> "In appeals of this kind, the First-tier Tribunal should address only the decision which is before it, namely HMRC's decision that, in the absence of VAT receipts, they were not prepared to exercise their discretion to accept the alternative evidence provided by the taxpayer as to whether there had been a taxable supply. The test that the First-tier Tribunal applies in reviewing that decision is the test set out in *Kohanzad*"

69. The test in *Kohanzad v Customs and Excise Comrs* [1994] STC 967 referred to in *Scandico* was set out by Schieman J at 969;

> "It is established that the Tribunal, when it is considering a case where the commissioners have discretion, exercises a supervisory jurisdiction over the exercise by the commissioners of that discretion. It is not an original discretion of the tribunal, it is one where it sees whether the commissioners have exercise their discretion in a defensible manner. That is the accepted law in this branch of the court's jurisdiction and it is recently been decided that the supervisory jurisdiction is to be exercised in relation to materials which were before the commissioners, rather than in relation to later material."

70. Mr Boyle submitted the test in *Kohanzad* was a high hurdle for the appellant to overcome to show HMRC acted unreasonably in refusing to accept alternative evidence.

71. The test was to be applied at the time appellant has not provided HMRC with suitable alternative evidence in support of their claim for input tax to demonstrate that a supply has been made to the business for use in making a taxable supplies.

72. HMRC argued that the input tax disallowed was not recoverable because;

(1) Invoices were addressed to a different legal entity

(2) Invoices were not provided

(3) Input tax was claimed in an incorrect period

(4) Transactions included where the deal was not completed

(5) VAT registration number of customer not included on invoices

(6) No dispatch evidence provided

(7) Errors in sales book

(8) Incorrect use of margin scheme sales

(9) Purchase invoice not reconciling with sales records

73. The appellant was on occasion slow in providing documents, had to be asked on a number of occasions and there are instances where documents were missing. Ms Wilmot received hundreds of pages of bank statements but needed an audit trail to be able to understand it. HMRC officers are not required to exercise the deductive powers of Sherlock Holmes. The appellant could have signposted the basis of the bank statements being alternative evidence and what they were relying on but did not do so. Indeed at the time of the assessments the appellant had not said it was relying on the bank statements.

74. In all the circumstances HMRC submits that where the appellant has provided VAT invoices which were addressed to a different entity and the appellant has failed to produce

acceptable alternative evidence to verify proof of purchase, the relevant input tax is not deductible.

HMRC's further submissions on *Boyce*

75. Mr Boyce for HMRC made written submissions on the Upper Tribunal decision.

76. The Upper Tribunal decision is binding on this Tribunal and there are a number of similarities between the two cases:

(1) Both taxpayers are engaged in similar activities involving motor vehicles

(2) Both sought to purchase vehicles using other persons to hide the nature of the transactions

(3) Neither had VAT invoices in their own names

(4) It was the operating procedure that resulted in the invoices being issued in a different name

(5) HMRC did not accept there was sufficient alternative evidence to support the claim of input tax

77. Following the reasoning of the Upper Tribunal the appellant is not entitled to reclaim input tax. The appellant chose to enter into transactions which resulted in it not having proper VAT invoices and a refusal by HMRC to accept alternative evidence cannot therefore be unreasonable.

Decision on the Input Tax Issue

78. Both parties are agreed that the issue in respect of the input tax claims is that the VAT invoices issued by the sellers of the relevant vehicles did not comply with Regulation 13 and 14 in that they were not addressed to the appellant (Regulation 14(1)(e)). Accordingly, as no correct VAT invoices were held by the appellant as required by Regulation 29(2)(a), the issue is whether it was unreasonable for HMRC not to have directed under Regulation 29(2) that alternative evidence was sufficient to enable the appellant to reclaim the associated input tax.

79. The parties are also agreed that the role of the Tribunal in this matter is a supervisory one. HMRC relied upon *Scandico v Revenue and Customs Commissioners* (2018) STC 153 especially at paragraph 19 and the appellant on the formulation in *Boyce* in the First-tier Tribunal at paragraph 26 which adopts the test set out by Scheimann J in the High Court in *Kohanzad*. Both cases - and therefore both parties in the current appeal - rely upon the test in *Kohanzad*.

80. The test was further summarised by Arnold J in *Boyce*:

> "14. The proviso to regulation 29(2) confers a discretion on HMRC to accept alternative evidence to the purchase invoice which a person claiming deduction of input tax must ordinarily have. The exercise of such a discretion can only be challenged by the taxpayer on the ground that it was a decision that no reasonable body of Commissioners could have reached: see *Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747 at 752 (Dyson J) and *Kohanzad v Commissioners for Customs and Excise* [1994] STC 967 at 969 (Schiemann J). The burden lies on the taxpayer to demonstrate this, based on facts and matters available to HMRC at the time the decision was taken."

81. I agree that this is the relevant test to be applied and that it is to be applied at 2 March 2018, the date of HMRC's letter setting out the outcome of the internal review upholding HMRC's refusal to allow the input tax claims in respect of all periods except 07/16.

82. No submissions were made to me by either party that different considerations applied to the later appeal in respect of the 07/16 period. For convenience I will therefore refer to the 2 March 2018 review decision as being relevant to all the assessments.

83. The appellant in the hearing sought comparison with the First-tier Tribunal decision in *Boyce*, albeit in submissions Mr Cowgill for the appellant sought to distinguish the facts following HMRC's successful appeal to the Upper Tribunal. HMRC for its part was rather more enthusiastic about *Boyce* after the Upper Tribunal decision.

84. The Upper Tribunal decision in *Boyce* is in my view binding on me and I reject Mr Cowgill's attempt to distinguish it. In my view the detail of the onward supply chain as relied upon by Mr Cowgill is irrelevant to the point of law established by the Upper Tribunal, which is plainly applicable in the current appeal. Further, the fact that the Upper Tribunal decision, decided before the date of the hearing, was not considered in the hearing is to say the least, in the context of the appellant relying on the First-tier Tribunal in the hearing, an unattractive point for the appellant to be making. In any event the parties have been given the opportunity to make submissions on the point of law arising.

85. The Upper Tribunal decision is clear and binding authority on the question as to whether HMRC's refusal is *necessarily* unreasonable as being in breach of the principle of effectiveness where the taxpayer has adopted a structure to disguise its identity and which prevents it from asking the seller for a VAT invoice. Arnold J categorically rejected that argument.

86. Further, Arnold J considered whether to remit the decision to the First-tier Tribunal on the basis that it was not clear what facts and matters had been available to HMRC when making its decision. Arnold J declined to remit the matter which in my view is consistent with deciding that, in the context of the appellant's buying structure in *Boyce*, irrespective of the evidence HMRC's decision could not be unreasonable. On that interpretation, the Upper Tribunal decision in *Boyce* is authority for the wider principle that a refusal to allow alternative evidence where the taxpayer uses dummy purchasers to disguise its identity is *never* unreasonable.

87. If this wider interpretation of *Boyce* is correct I am bound to dismiss the appellant's appeal on the Input Tax Issue, irrespective of the evidence. However, in the event I am wrong as to the wider interpretation of *Boyce*, I will consider whether on a narrower construction, HMRC's refusal as unreasonable. On this basis, HMRC's refusal is not *necessarily* unreasonable as being in breach of the European principle of effectiveness but HMRC might still in the circumstances be unreasonable to accept alternative evidence.

88. In the current appeal I have been asked to determine on the basis that HMRC had been sent;

(1) The third party VAT invoices

(2) The day book

(3) The sales book

(4) (as I have found them to have been sent to HMRC) Bank statements for the relevant periods

89. HMRC's objection (leaving aside that in their view a number of documents were never supplied) is primarily that they were provided with these documents on a sporadic manner with no explanation identifying the evidence for each supply. HMRC should not be required to review the documents supplied to piece together an audit trail.

90. I agree with HMRC. The appellant failed during the investigation to provide particularised evidence on each supply, but supplied documents and data on a sporadic and

generic basis, leaving it to HMRC to try and identify relevant evidence for each supply. HMRC has a discretion to admit alternative evidence but a taxpayer's complaint can only be that the refusal to exercise that discretion was a decision that no reasonable body of Commissioners could have reached. That is a high hurdle and the burden of proof is on the appellant. In my view the appellant has not shown that HMRC acted unreasonably.

91. Accordingly, I dismiss the appellant's appeal on the Input Tax Issue. I do so firstly on the ground that the Upper Tribunal decision in *Boyce* is binding authority that HMRC's refusal can never be unreasonable where the taxpayer uses dummy purchasers to disguise its identity. Further, in case I am wrong on *Boyce*, I also dismiss the appeal on the grounds that HMRC did not act unreasonably in refusing to allow the appellant to use alternative evidence.

THE EXPORT ISSUE

The appellant's arguments

92. In respect of the zero rating argument Mr Brown argued that it had sufficient evidence to justify zero rating to apply. The vehicles were dispatched on hire from the UK to a taxable person in another member state, the Republic of Ireland.

93. However, in an argument only formulated with any detail in the hearing, Mr Brown disagreed with HMRC as to the nature of the supply being made by the appellant, characterising it as a hire of vehicles and therefore a supply of services and not goods. Accordingly HMRC's argument as to compliance with Notice 725 was misplaced.

94. Mr Brown argued that the hire of vehicles to another member state was instead governed by Schedule 4A VATA or otherwise Section 7A VATA.

95. Under paragraph 3(1) of Schedule 4A the supply of services consisting of the short–term hiring of a means of transport is to be treated as made in the country in which the means of transport is put at the disposal of the person by whom it is hired. Short-term is defined by paragraph 3(3)(a) as a continuous period not exceeding 30 days. Where the period of hire is not short-term then the general rules on supply of services in Section 7A apply, the effect of which is to treat a supply to a "relevant business person" as made where the recipient belongs. A "relevant business person" is defined in section 7A(4) as including someone who is a taxable person or identified for the purposes of VAT in another member state.

96. Mr Brown submitted that, whether the hire was for short term or otherwise, the supply should be zero rated. If it was a short-tem hire, the supply would meet the requirement in Schedule 4A that it was put at the disposal of the hirer in Ireland. If it was not short-term then it was supplied to a hirer registered for VAT in Ireland, satisfying the condition in Section 7A.

97. Mr Brown relied upon the decision of the Court of Justice of the European Union in *Plokl v Finanzamt Schrobenhausen* (Case C-24/15 [2017] STC 379) for the principle that fiscal neutrality requires that zero rating be allowed if the substantive conditions are satisfied even if the taxable person has failed to comply with some of the formal requirements (VAT exemption being in UK terminology zero rating):

> "39. Accordingly, the principle of fiscal neutrality requires that an exemption from VAT be allowed if the substantive conditions are satisfied, even if the taxable person has failed to comply with some of the formal requirements (see, by analogy, judgment of 27 September 2007, Collée, C-146/05, EU:C:2007:549, paragraph 31).
>
> 40 In that regard, the Court has held, in connection with an intra-Community supply, that an obligation to communicate the VAT identification number of the person acquiring the goods constitutes a formal requirement

with regard to the right to exemption from VAT (see, to that effect, judgment of 27 September 2012, VSTR, C-587/10, EU:C:2012:592, paragraph 51).

41 The same applies to an obligation to provide, in connection with an intra-Community transfer, the taxable person's VAT identification number issued by the Member State of destination. While the provision of that number is proof that such a transfer has been effected for the purposes of that taxable person's undertaking and, therefore, as is apparent from paragraph 31 of the present judgment, that that taxable person is acting as such in that Member State, proof of that capacity cannot, in every case, depend exclusively on the provision of that VAT identification number. Article 4(1) of the Sixth Directive, which defines 'taxable person', does not make that capacity subject to the possession by that person of a VAT identification number (see, to that effect, judgment of 27 September 2012, VSTR, C-587/10, EU:C:2012:592, paragraph 49). The provision of that number is not, therefore, a substantive condition for the exemption from VAT of an intra-Community transfer.

42 It follows from the foregoing that an authority of a Member State cannot, in principle, refuse to grant an exemption from VAT in respect of an intra-Community transfer on the sole ground that the taxable person has not provided the VAT identification number issued to him by the Member State of destination."

98. *Plockl* was a case about the supply of goods but the same principle applied to the provision of services. Crucially it is not a precondition of zero rating for the supplier to produce the VAT registration number of its customer.

99. The conditions which must be satisfied in order for a transaction to be capable of being described as an intra-community transfer are that any tangible property dispatched or transported by or on behalf of the taxable person out of the member state but within the European Union for the purposes of his undertaking.

100. In this appeal the following can be shown;

(1) Some invoices describe the sale a zero rated to southern Ireland

(2) 7 of the invoices were addressed to one company, Grifton Limited, who must be carrying on an economic activity in that in one month it hired commercial vehicles and a car at a total cost of £18,450

HMRC's arguments

101. Mr Boyle submitted that where sales are made to another member state the burden is on the appellant to obtain and retain satisfactory documentary evidence in order to satisfy HMRC that they are eligible for zero rating of their sales.

102. Mr Boyle submitted that the VAT invoices were defective for the following reasons;

(1) Some of the invoices did not quote the customers Irish VAT number or country prefix

(2) The description in the invoice was invalid because:

(1) it was vague and generic in that the vehicle being hired was not identified

(2) there was no length of hire described and

(3) neither the location it was made available nor the place of consumption was identified

(4) there was no indication that the supply was subject to the reverse charge

103. Further, no reference is made to any of these supplies on the appellant's EC Sales List

104. In the absence of a VAT invoice with the correct information, the appellant did not provide the evidence required to show that they have made sales to a taxable person in the Republic of Ireland and therefore the sales were correctly assessed as standard rated.

105. A responsible and prudent business would have retained such information to support their claim as part of normal business records.

106. In the hearing Mr Boyle expanded on his submissions by making reference to the conditions for zero rating as set out in VAT Notice 725, and in particular paragraphs 4.3 and 5.2, which have force of law.

107. The VAT invoices relating to the supplies did not comply with the conditions in paragraphs 4.3 and 5.2, so the default must be for the supply to be standard rated. However, HMRC had asked for alternative evidence including transport evidence to support the movement of the vehicles to Ireland. This was not supplied.

Decision on the Export Issue

108. Mr Boyle relied upon Notice 725 and I agree with Mr Brown that this is not in point as it is concerned with supplies of goods.

109. Mr Brown took me to Section 7A and Schedule 4A and submitted that either applied depending on the length of hire of the vehicles. Mr Brown's argument was that on either basis an export could be shown to have taken place. If it was a short-tem hire, the supply was put at the disposal of the hirer in Ireland. If it was not short-term then it was supplied to a hirer registered for VAT in Ireland.

110. In my view, whilst Mr Brown is right as to the test to be applied and, leaving aside why the appellant could not show whether the vehicles were on short-term hire or not, there is insufficient evidence to demonstrate Section 7A or Schedule 4A are satisfied. It cannot be the case that a significant expenditure on vehicles demonstrates in itself either that the supply was put at the disposal of the hirer in Ireland or that it was supplied to a hirer who belongs in Ireland. For example, the hire could have taken place entirely in the UK.

111. I do not find that *Plokl* assists the appellant because that decision was concerned with the absence of a VAT invoice where the substantive conditions for zero rating were met:

> "39…the principle of fiscal neutrality requires that an exemption from VAT be allowed **if the substantive conditions are satisfied**, even if the taxable person has failed to comply with some of the formal requirements…" (emphasis added)

112. In the current appeal the appellant has had the opportunity during the investigation and on appeal before me to demonstrate the substantive conditions for zero rating have been satisfied but has not done so.

113. I therefore dismiss the appeal in respect of the Export Issue.

THE LOAN ISSUE

The appellant's arguments

114. Mr Brown accepted that the burden of proof was on the appellant to demonstrate that the funds were not consideration for a supply.

115. Ms Wilmot has not been able to find any other instance here the appellant has sold a vehicle and not provided an invoice, notwithstanding that as at a few months before the hearing there had been another 12 VAT periods where HMRC have not raised any other concerns about sales of vehicles.

116. The amount is unusual and it is a strange way to pay for a vehicle worth more than £300,000. The money was an informal loan from a customer. Mr Sherlock had initially given HMRC the explanation that it was a director's loan because he wanted to keep the matter private. Mr Sherlock has been in business for 35 years and is honest and trustworthy.

117. On the balance of probabilities therefore the payment should not be treated as consideration for the standard rated sale of a car.

HMRC's arguments

118. Mr Boyle submitted that the assessment was one to best judgement and referred to paragraph 11 of the well known decision of Carnwarth J in the High Court in *Rahman v Customs and Excise Commissioners* [1988] STC 826:

> " I have referred to the judgement in some detail, because there are dangers in taking Woolf J's analysis of the concept of 'best judgment' out of context. The passages I have italicised show that the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment has been reached 'dishonestly vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of the judgment are missing'; or is 'wholly unreasonable'. In substance those tests are indistinguishable from the familiar *Wednesbury* principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment"

119. There was a rationale for Ms Wilmot's assessment. It was not dishonest, vindictive or capricious. Despite being asked to do so the appellant had failed to provide any evidence of a loan in respect of the payment of £341,960 by Mr Kowalski, a customer of the appellant. The amount transferred was an unusual amount for a loan. Mr Sherlock had been in business for 35 years and knows of the requirement to keep records and it was highly unlikely there was no evidence at all of a loan.

DECISION ON THE LOAN ISSUE

120. I agree with HMRC that the burden of proof in this matter is as set out by Carnworth J in *Rahman*. An assessment having been raised it is for the appellant to show the decision to raise the assessment is unreasonable on *Wednesbury* principles.

121. Based on the evidence I can find no reason to disturb HMRC's assessment on this issue. It is not unreasonable to expect a loan of this size to be evidenced by contemporaneous evidence or for the appellant to produce evidence when challenged, for example from Mr Kowalski.

122. I therefore dismiss the appellant's appeal in respect of the Loan Issue.

DECISION

123. Having decided against the appellant on the Input Tax issue, the Export Issue and the Loan issue I dismiss the appellant's appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

124. 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.

IAN HYDE

TRIBUNAL JUDGE

RELEASE DATE: 12 JUNE 2020