



Neutral Citation: [2023] UKFTT 495 (TC)

Case Number: TC08837

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/00267

Value Added Tax – input tax recovery – section 24(1), Value Added Tax Act 1994 – whether supplies made to Appellant were made for the purposes of its business and so constituted input tax – in certain cases, yes - appeal allowed in part

Heard on: 21 November 2022

Judgment date: 12 June 2023

Before

TRIBUNAL JUDGE MARK BALDWIN

Between

3D CROWD CIC

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Andrew Boucher and Mr Anthony Jones, directors of the Appellant

For the Respondents: Mrs Phylis Okpara and Mrs Jessica Parlour-Carlson, litigators of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. On 23 March 2020 the then Prime Minister announced significant restrictions on the circumstances in which people could leave their homes (a “lockdown”) to prevent the spread of COVID-19 and “reduce the number of people needing hospital treatment at any one time, so we can protect the NHS’s ability to cope – and save more lives”. It was also apparent that there was a profound shortage of personal protection equipment (“PPE”) for use by individuals in high-risk settings such as hospitals and care homes. This position is explored in a Report “The supply of personal protective equipment (PPE) during the COVID-19 Pandemic” produced on 25 November 2020 by the Comptroller and Auditor General. Many people sought to contribute to the national response to the COVID-19 emergency. Among them were a small group of individuals, including Mr Andrew Boucher, one of the two individuals who represented the Appellant (“3D”) in this tribunal. They mobilised a group with access to 3D printers to produce PPE in the form of protective face shields.

2. On 26 March 2020, 3D was incorporated as a community interest company (CIC) as the vehicle for these endeavours. By the end of May 2020, they had enlisted many thousands of volunteers and over 200,000 face shields had been donated to the NHS (hospitals, “hot clinics” and GP surgeries) and care homes. Using a “Go Fund Me” account, 3D had raised over £150,000 by way of public subscription towards its costs. The hearing bundle contained a briefing note from April 2020 and the extracts from that note below give some idea of what had been achieved in the first few weeks:

“So a long, long time ago (4 weeks) a group of 6 people who didn’t know each other set up a slack channel after hearing there was a PPE shortage and seeing a design on the Prusa website, to allow them to supply a local care home or GP surgery or two with a few units to help their local community. This group opened up the channel to everyone and a few extra people trickled in the first day. By the end of day two there were 50 people.

Except it didn’t stop there the number of volunteers started growing, a 1000 within a week and then the orders started coming in not from just care homes and chemists but hot clinics, A&E departments and intensive care units in hospitals and not from just doctors and nurses but the heads of procurement and we started heading to orders totalling 500000 units.

If you joined at this point or afterwards you’ve probably thought this was a group that had a plan and organisation to supply the whole country with masks from the beginning, it didn’t. A couple of hundred masks was the plan and every day since we’ve had to tear up the plan and put together a new one knowing that the following day we’ll do the same, getting bigger and more complex each time.

However despite our initial beginnings we have put that national system in place and we are delivering 10’s of thousands of units out to where they are needed, we got 40,000 units into hospitals for the Easter weekend peak. A certain very large internet retailer told us we were the biggest and best organised group they had come across (not just in the UK but Europe).”

By any reckoning, this is a very impressive achievement indeed.

3. 3D incurred VAT on supplies made to it. Some of this VAT was incurred in connection with 3D’s seeking CE certification (which was only achieved on 21 September 2020), some related to general overheads and part related to VAT incurred on materials bought to produce face masks. 3D sought to recover this VAT as input tax in its VAT return

for the period 08/20, but the Respondents (“HMRC”) denied that claim. HMRC accept that 3D was properly registered for VAT (we will explore the significance of this in due course), but say that, as 3D gave away all the PPE it produced, the VAT it incurred was not linked to taxable supplies in the period it was incurred and so is not deductible. It is against this decision that 3D appeals, and the question for me is, whether the VAT charged on supplies made to 3D is input tax within the meaning of section 24(1), Value Added Tax Act 1994 (“VATA”).

4. 3D gave notice of its appeal on 22 January 2021. HMRC’s decision is contained in a review letter dated 24 November 2020. 3D is, therefore, out of time to appeal, as it should have brought its appeal within 30 days of the date of the review letter; section 83G, VATA. This tribunal has not previously granted permission to 3D to appeal out of time, but HMRC do not object to my doing so and I give permission to 3D to appeal out of time.

5. Before turning to my decision, I should make two preliminary points. The first is that I should put on record that, although HMRC denied 3D’s input tax recovery claim, they were at pains to make it clear that they sympathise with 3D’s position and are aware of the importance of their actions. They say they are bound by the legislation and are unable to act outside it; they have considered the evidence available to them and, in their opinion, have applied the legislation correctly. The second is simply to apologise to the parties for the inexcusable length of time it has taken me to produce this decision.

6. Finally, I remind myself that the burden of proof is on 3D. Although the decision under appeal is HMRC’s, it is not their task to justify their decision; it is 3D’s task to establish (to the ordinary civil standard of the balance of probabilities) their right to deduct the VAT in question as input tax.

VAT RECOVERY: THE LAW

7. As a general rule, and certainly so far as relevant for this appeal, VAT charged on supplies of goods or services to a person, or on the importation of goods by that person, can only be credited by that person if they are a “taxable person” and the VAT is “input tax” in relation to them.

8. Section 3 VATA provides that a person is a taxable person if they are, or are required to be, registered under VATA. Schedule 1 VATA requires a person who makes taxable supplies over certain limits to register. Paragraph 9 of Schedule 1 entitles a person who is not required to be registered but who makes taxable supplies, or is carrying on a business and intends to make taxable supplies in the course of that business, to be registered. Section 4(2) VATA provides that a taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

9. Section 24 VATA provides that “input tax” in relation to a taxable person means VAT charged on the supply of goods or services to that person, or the importation of goods by them, “being (in each case) goods or services used or to be used for the purposes of any business carried on or to be carried on by him”. In other words, VAT incurred can only be credited if it is incurred by a person who is in business (which includes a person seeking to set up a business) and it is incurred on supplies/importations for business purposes.

10. Section 24(5) VATA provides that

“Where goods or services supplied to a taxable person ... or goods imported by a taxable person ... are used or to be used partly for the purposes of a business carried on or to be carried on by him and partly for other purposes

- (a) VAT on supplies ... and importations shall be apportioned so that so much as is referable to the taxable person's business purposes is counted as that person's input tax, and
- (b) the remainder of that VAT ("the non-business VAT") shall count as that person's input tax only to the extent (if any) provided for by regulations under subsection (6)(e)."

11. The legislation does not tell us how to carry out the required apportionment. In *The Dean and Chapter of Hereford Cathedral v CCE* (MAN/92/721) the VAT Tribunal held that the business/non-business apportionment should be a subjective exercise, made by considering the relative importance of each separate purpose in the minds of those carrying on the business. In another case, *Creflo Dollar Ministries v CCE* (MAN/01/64) the VAT Tribunal held that the apportionment should be carried out by dividing the taxpayer's business income by its total income and applying that percentage to the VAT incurred on the relevant costs.

12. In addition, subject to exceptions for samples and business gifts, if goods forming part of the assets of a business are transferred or disposed of so as not to form part of the assets of the business, that is a supply by the business, whether or not there is consideration; paragraph 5, Schedule 4 VATA. There is a similar rule deeming there to be a supply of services if business goods are put to private use. These provisions do not require anything done otherwise than for a consideration to be treated as a supply unless the person in question is entitled to credit for the whole or part of any VAT on the supply or importation of the goods or anything comprised in them; see paragraph 5(5), Schedule 4 VATA. These rules, and the sometimes tortuous relationship between them and the rules on initial input tax recovery, were not in point in this appeal, but what these rules, together with the definition of input tax and section 24(5) VATA do make clear, and this is an important point for us to keep in mind, is that the structure of the VAT legislation is to allow VAT incurred to be recovered as input tax only if it is incurred for business purposes and, if (that rule notwithstanding) goods in relation to which VAT has been recovered are put to private use or disposed of outside the business, the integrity of that principle is preserved by the imposition of an output tax liability.

13. Until 1 May 2020, the supply of PPE was subject to VAT at the standard rate. It was only with effect from that date that the supply of PPE was zero-rated; see the Value Added Tax (Zero Rate for Personal Protective Equipment) (Coronavirus) Order, SI 2020/458, which inserted Group 20 into Schedule 8, VATA. I asked Mr Boucher whether he was sure that 3D would benefit from winning this appeal, or whether, if 3D were to establish a right to deduct VAT as input tax, the donation of PPE would fall within paragraph 5, Schedule 4 VATA creating a risk that VAT charged on any deemed supplies of donated PPE in the period before 1 May 2020 would be significantly higher than the input tax 3D seeks to recover through these proceedings. He assured me that 3D had considered this issue and he was happy that the balance of advantage lay in proceeding with this appeal.

14. As I mentioned earlier, HMRC accept that 3D is a taxable person properly registered for VAT. It follows (and Mrs Okpara confirmed this to be the case) that they accept that 3D was in business and that it intended to make taxable supplies. As we have seen, if that were not the case, 3D would not be entitled to be registered for VAT. HMRC's objection to 3D's attempt to recover VAT charged on supplies to it is that (they say) 3D never intended to make, and never made, taxable supplies of the PPE in relation to which VAT was incurred in this period. To the extent it needed funds and was not relying on its volunteers, 3D was funded entirely by donations and gave the PPE away. So, even though 3D might have been a taxable person, 3D's activities in the period, and to which the supplies giving rise to the VAT

in dispute relate, were not business activities; they were entirely altruistic. There were no supplies in the period 08/20 and so the VAT incurred in this period was not related to the cost component of a taxable supply and was not input tax.

THE FACTS

15. Mr Boucher and Mr Jones gave evidence about 3D's activities and plans in the period in question. Mr Boucher was briefly cross-examined by Mrs Okpara. We also reviewed the contents of a hearing bundle of some 648 pages (excluding legislation and authorities).

16. Mr Boucher explained that, at the start of the COVID-19 lockdown, a small group of likeminded individuals had come together to think about whether 3D printing might be a solution to the problem, identified in numerous news reports, that the country did not have PPE stocks of the necessary volumes and, because borders were closed, imports would be difficult if not impossible. Mr Boucher explained that a 3D printer allows someone with a template to create a product relatively quickly. To begin with, there were only five or six people involved in this endeavour, but by the end of the first week this number had risen to several thousand following appeals via social media. All volunteers used the same file to generate face masks, so all items were the same. This meant that 3D (which was set up very shortly after the time lockdown was introduced) could produce thousands of items of PPE at a time when the Royal Mint was the only other producer. As well as a standard design, 3D provided volunteers with operating procedures (dealing with matters such as cleanliness and health and safety) which were later adopted by NHS Trusts.

17. As well as arranging the production of the PPE, there were significant logistics issues to be dealt with. Members could contact DPD (which helped with deliveries free of charge) which would collect their units and, take them to a warehouse, where they were sterilised and packed and then dispatched. It was also necessary to purchase plastic sheets, elastic and other component parts. Mr Jones joined to help with the logistics exercise.

18. Mr Boucher explained that it is/was illegal to sell medical devices (including PPE) without first proceeding through the approval process of a notified body (e.g. BSI) towards CE marking under the EU Medical Devices Directive. This is a multi-stage process:

- (a) Stage 0 – prior to application
- (b) Stage 1- application to be accepted into the system
- (c) Stage 2 – acceptance into system, at this point goods may be sold to the NHS/health workers
- (d) Stage 3 – physical testing by the notified body leading to pass/fail
- (e) Stage 3 – documentary and process review of the product leading to pass/fail
- (f) Stage 4 –CE certification, subject to approval of the project.

19. The Government position on supply of donated PPE to medical facilities changed regularly during the first few weeks of lockdown with individual health authorities and central Government issuing regular and conflicting changes in policy. A consistent, coordinated approach finally emerged in late May 2020 – 5 weeks after lockdown and several weeks after the first peak of infections. At this point donated PPE needed to meet the same criteria as sold PPE.

20. As obtaining a contract to supply PPE to NHS trusts etc was initially impossible, due to timescales and certification requirements, 3D raised £150,000 from donations from the public to facilitate the urgent provision of PPE to the NHS.

21. During the tax period 08/20 3D received requests for millions of units and supplied 200,000 face-shields to over 190 NHS trusts and health care authorities (out of a total of 219) at no cost with the majority supplied during April when its BSI certification was at Stage 0/1 – at that point it was illegal for 3D to sell goods but legal to donate. At the point when donated PPE came under the same restrictions as sold PPE, 3D had achieved Stage 2 with the intention of being able to achieve CE status and sell its products into the market.

22. All the time 3D was working on logistics and delivery, it was in contact with the Government. My understanding from Mr Boucher's evidence is that, although sales to NHS trusts etc directly was illegal before 3D's products reached stage 2 in the certification process, it would still be possible to sell to central Government. The hearing bundle contained an email of 22 April 2020 from Ben Sauer indicating that the Crown Commercial Service (CCS) had got back in touch that day (three weeks after he had filled in some forms) and said that they were looking into 3D as a supplier for larger volumes. This, Mr Sauer observed, could solve 3D's injection moulding/scale/funding issues. He said that he had told CCS that 3D needed an order for a million pieces at a minimum "£2 per unit (or less, I emphasised at cost)". 3D would need to submit technical files on their website and it would take 2-3 weeks for CCS to respond. Mr Sauer's overall comment was that "this could be the solution to scale, but of course it's hard to say, as we can't count on what they decide."

23. Mr Boucher said that, whilst they were trying to contact the Government through conventional routes, they were not aware of the priority route. By this Mr Boucher is referring to the so-called "VIP lane" used by certain companies, some of which are said to have had close links to the Government. Certain issues presented by the "VIP lane" were, of course, the subject of challenge in the courts and Mr Boucher referred me to the decision of Chamberlain J in *R (OAO Good Law Project Limited and Others) v. Secretary of State for Health and Social Care*, [2021] EWHC 346 (Admin). Mr Boucher said that 3D was not aware of this priority route/VIP lane. The company needed a contract with the Government if it was to be able to sell PPE before getting BSI certification. Mr Boucher submits that, as evidenced by Mr Sauer's email and his discussions with the CCS, 3D had always wanted to supply PPE under a contract (not looking to make a large profit, simply to cover its cost on a sustainable basis), but it had been shut out and been unable to make any headway.

24. 3D had contacted MP's, including Mr Boucher's local MP, Bim Afolami MP, in order to try to advance its cause. The hearing bundle contained copies of Mr Boucher's exchanges of emails with Mr Afolami. These emails do not contain anything of substance, but they support Mr Boucher's assertion that he was in contact with MPs. He said that Mr Afolami was critical of NHS procurement procedures and offered to put Mr Boucher in touch with Matt Hancock (then the Secretary of State for Health and Social Care), but Mr Boucher declined this offer as he thought he would simply be passed over to the civil service, which is what was already happening.

25. In an update email entitled "Where we were, where we are and where we want to be" issued in April 2020 (the document from which the extract in paragraph [2] above is sourced), 3D wrote to its members setting out what had happened over the preceding four weeks and put significant emphasis on the process of getting CE approval. Given the size of the operation, it was considered crucial to obtain CE approval, in part to protect producers. In addition, the company had been established to put a line of protection "so that as far as insurance and anyone else is concerned you are all volunteers for the entity 3dcrowd.uk and do not stand alone". The question of finance was addressed, both in terms of raw materials as well as overhead costs such as insurance and regulatory approval. There was an acknowledgment that "we know you can't print forever". In terms of future direction, under the heading "Finances", the note observed that

“Finances - corporate sponsorship and individual payments are great but that won't keep us going, the NHS Trusts have the money to buy them and they want to buy them but they can't donate so our CE application (yup told you it was important) allows us to sell to them – at cost – again it is not a money making exercise it is the most effective way of getting them to the frontline and covering the expenses that you the volunteers have initially fronted.”

26. 3D had also begun to explore injection moulding, as a way of meeting large orders, but volunteers were still needed to deal with smaller orders. The core group was negotiating with companies which could provide resources and other help.

27. Mr Boucher explained that 3D had been funded via donations (the GoFundMe account) because this was the only way to get enough money within the first few days. 3D needed money for the BSI certification process and insurance cover, as well as trying to provide some cost cover for their volunteers. For example, after making 20 units a hobbyist's printer would need a new nozzle. In effect, people who had 3D printers as a hobby were now starting to operate them on a commercial scale and 3D needed to offer to cover their costs, or at least to be able to do so if a volunteer asked for some help. There were also some shipping costs; DPD didn't provide all the logistic support they needed.

28. Mr Boucher explained that, as the document referred to above indicated, what 3D was looking for was a commercial model that would be self-sustaining. The idea was to be cost neutral not profitable. Mr Jones said that it would be “lovely” to do everything for free, but this was just not possible. A CIC had been chosen as the vehicle for this project, because everyone knew that donations would run out. If they had simply wanted to give money or PPE away, they could have set up a charity. If they had wanted to be a fully commercial operation, a straightforward private limited company would be the right vehicle. A CIC reflected their objectives of being sufficiently commercial to cover their operating costs so that they could continue to operate, without looking to make a profit.

29. Needing to get BSI certification before they could sell PPE other than to the Government had limited what they could do. BSI certification finally came in towards the end of September 2020, but by then the Government had found other sources of supply. Although the Government had developed alternative sources of supply by May 2020, 3D nevertheless still progressed with its BSI application. Its intention was to create a business, initially funded via donations, that would be able to use the same approach in other fields, such as prosthetics, ventilator splitting and even the creation of artificial reefs. It would not be possible to sustain a thousand plus volunteers on a purely altruistic basis. The idea was to see whether they could mobilise a large volunteer force, whose costs were reimbursed, to address humanitarian and similar challenges.

30. On a more general level, Mr Boucher said that there had been a lot of speculation about whether 3D printing could contribute to the type of manufacturing 3D was using (which he called “distributed manufacturing”). What 3D had achieved in those first few weeks demonstrated that “distributed manufacturing” could be made to work using 3D printing. Quality control was the main issue, but by giving detailed specifications and briefings, 3D had been able to address this.

31. In answer to a question from Mrs Okpara, Mr Boucher confirmed that it might have been possible to sell PPE in May or June, but 3D had been advised not to sell PPE to individual NHS groups prior to formal BSI certification and instead only to sell to central Government (which of course required a central Government contract). Their PPE specialists were hesitant about selling to NHS trusts, GP's and others. They were concerned that the BSI would look unfavourably on 3D if it sold without an overarching Government contract. Obtaining BSI accreditation was more important than forcing people to pay for items they

could produce, as long as they could cover their costs. They had expected that the BSI process would be short, but in the end BSI accreditation took a lot longer than expected.

32. Mrs Okpara referred to 3D's GoFundMe page. It included the following:

"Update: 10th May 2020. Six weeks after this community grew from nothing, we've 3D Printed and dispatched 130,000 face shields. Sadly, we are still needed by front line workers to provide essential PPE across the UK. So we have raised our funding target from £160,000 to £250,000 to better reflect the money we need to meet the urgent demand that is still out there from the NHS and care homes. We need your support and donations more than ever until the traditional PPE supply chain catches up with demand, something we had hoped would have happened by now. The COVID-19 crisis is not over, but there's now hopefully some light at the end of the tunnel. This is not the time to take anything for granted, or to take our foot off the gas. We need your support and donations to ensure that we can continue to do our bit to support the people who are looking after those who need it most. Thank You!"

33. She asked Mr Boucher whether donors were aware that the company intended to get a Government contract, or did they just think that they were making a donation? Mr Boucher said that all that they had said was that their intention was to provide face masks to the NHS. Mr Jones said that the volunteer group had a communication channel in which they had discussed the longevity of the project and the idea of getting Government support or contracts. It had never been suggested that everything was being done for free or that this was just a temporary activity. Mr Jones said that there is no conflict between being commercially viable and doing good. 3D arose out of an altruistic endeavour, but it was never 100% altruistic. 3D was looking to establish itself on sound commercial principles (such that it could reimburse its suppliers). 3D was borne out of a response to a crisis, but was looking to have a longer existence.

HMRC's SUBMISSIONS

34. HMRC refer to the legislation (summarised above) which regulates a person's ability to recover VAT incurred as input tax. As well as being incurred by a person whose in business to be input tax VAT must be incurred for business purposes. So, to determine the issues before us, we need to decide what 3D was doing in relation to PPE would amount to a business so that we can go onto decide whether VAT was incurred for business purposes. Turning to the question of business, HMRC refer to the decision of the Court of Appeal in *Longridge on the Thames v HMRC*, [2016] EWCA Civ 930, which (they say) emphasised that the correct test for determining whether an activity is a business activity is whether there is a direct link between the services or goods supplied and a payment received by the supplier. They also referred to another Court of Appeal decision, *Wakefield College v HMRC*, [2018] EWCA Civ 952. They say that this case stands as authority for the proposition that an activity is a business activity if it results in the supply of goods or services for a consideration and the supply is made for the purposes of obtaining income from that activity. HMRC say that 3D did not carry out an activity that resulted in a supply of goods (or services) for consideration, because the PPE was made to be given away, and therefore the costs incurred cannot be said to have been incurred for any business activity.

35. HMRC do not say that, in order to be in business, a person must be looking to make a profit, but they do say that they must have been making (or intending to make) supplies in return for consideration so that there are taxable supplies, as an activity that involves no taxable supplies cannot be a business activity.

36. HMRC accept that it may be possible for VAT incurred on research and development to be recovered. Whether it can be in any particular case will be determined by the liability of the business activities that the research and development support. If the activities are taxable, the input tax is recoverable. Here, HMRC say, 3D's activities were outside the scope of VAT because they were not business activities, and therefore the VAT incurred on R&D and similar costs is not recoverable because the costs are not linked to any taxable supplies.

3D'S SUBMISSIONS

37. 3D agree that the core issue is whether its activities met the test for it being in business.

38. 3D contends that the entirety of its activities should be looked at as a whole to determine if its claim for VAT recovery is justified. They take from the *Inzo* and *Rompelman* cases (discussed below) the proposition that even the first investment expenditure incurred for the purposes of a business may be regarded as an economic activity and that, in that context, HMRC must take into account the declared intention of the business. This extends to costs which involved no direct onward supply of goods or services but which laid the groundwork for them. Accordingly, the costs involved in preparation for supplying taxable supplies (such as accreditation through BSI) and the research and feedback needed for it must be allowed.

39. 3D submits that the FTT decision in *Gravel Road Records Ltd v HMRC*, [2017] UKFTT 80 (TC), provides support for their view that it is the intention to make taxable supplies which is crucial in determining whether VAT incurred is input tax. In that case HMRC had sought to deregister the taxpayer and reclaim amounts previously repaid as input tax on the ground that no business activities had taken place during the period of VAT registration and so the taxpayer had no entitlement to claim repayment of the input tax it had suffered. The taxpayer submitted that construction delays meant that it was unable to provide the intended recording facilities to its initial customers. Furthermore, during the extended period it took to construct its facilities, the recording and music industry markets had suffered a severe economic downturn. As a result, by the time the construction issues had been resolved, the taxpayer's potential client base had virtually disappeared. It had nevertheless been the taxpayer's intention throughout to carry on a commercial studio recording business. The tribunal concluded that the taxpayer had always intended to carry on a commercial business activity and intended to make taxable supplies. So, it was entitled to be registered for VAT and to recover VAT incurred as input tax.

40. Mr Boucher submitted that the intention of 3D was to pursue a path towards making taxable supplies and this can clearly be demonstrated through its correspondence with numerous arms of government including the NHS, MoD and Crown Commercial Service, which included discussion around sizable quantities (orders of magnitude greater than the actual supplied numbers) and cost. 3D submits that seeking accreditation through BSI provides further evidence of its intention to provide taxable supplies. If it intended merely to donate PPE, there was no reason for it to pursue such a course as it would merely incur expense for no benefit, as it could always donate PPE without BSI accreditation. However, seeking (and achieving) accreditation would allow it to sell goods that it would not otherwise have been able to do. The regulations concerning donations only changed after it had started down this path.

41. 3D operated an entirely novel approach to manufacturing – distributed manufacturing - involving thousands of individual producers feeding supplies into localised hubs that then performed quality control, cleaning and delivery functions. The numbers of units it subsequently made available to the NHS was proportional to the size and complexity of its organisation. In 3D's submission, this means that all expenditure could be classified as

research and development spend with a view to creating, sustaining and developing a business model that was capable of delivering millions of units. This was in addition to the requirement for accreditation that required robust procedures to be developed and for manufacturing capability to be tested.

42. 3D further submits that Government action precluded any realistic opportunity for it to make subsequent taxable supplies to the NHS. 3D was not aware of, and had no means of learning about, the fact that (in its view) the Government chose to restrict NHS contracts for relevant goods to participants associated in various ways with senior government ministers and MPs (the “VIP lane”). The fact that this process was not made public caused 3D to continue to hope for success in selling PPE, which was realistic since it offered good value for money, a proven track record and competitive pricing.

43. It is reasonable for 3D to classify the supplies it had made to the NHS as business gifts provided in the furtherance of its business; it was reasonable to expect that someone who had received a unit would favourably view and prefer a supplier/manufacturer which had previously provided goods in reasonable numbers.

44. Looking at the tests for a business set out in the VAT Manual (derived largely from *Lord Fisher*), 3D say:

45. *Is the activity a serious undertaking earnestly pursued?* The manufacture of life saving devices in sufficient numbers and with a sufficient organisation of thousands of volunteers during a global pandemic to make a material difference cannot be seen as anything other than a serious undertaking earnestly pursued.

46. *Is the activity an occupation or function, which is actively pursued with reasonable or recognisable continuity?* 3D was unable to sell PPE because the Government had enforced a “closed shop” supply chain. 3D had made supplies every day for several months of thousands of units and had expressions of interest from numerous healthcare entities. Peak of operation was dependent on global availability and so tailed off as alternative sources of supply emerged, but the fact that a product is no longer needed does not invalidate any business activity carried out whilst it was.

47. *Does the activity have a certain measure of substance in terms of the quarterly or annual value of taxable supplies made (bearing in mind that exempt supplies can also be business)?* As there was a clear intention to make taxable supplies through the sale of face-shields the corresponding market value of the units supplied at zero cost can be used to equate to the value of taxable supplies. This would be somewhere between £200,000 and £1,200,000 depending on market availability.

48. *Is the activity conducted in a regular manner and on sound and recognised business principles?* 3D possessed a workforce, financial governance and a declared purpose of developing and supplying goods for consideration. It operated in an entirely legitimate and legal environment involving standardised procedures and mechanisms, HR, corporate insurance, recognised quality certification, finance, IT, manufacturing and logistics.

49. *Is the activity predominantly concerned with the making of taxable supplies for a consideration?* There is clear evidence of an intention to make taxable supplies and this is sufficient

DISCUSSION

50. As we have seen, 3D’s claim to recover VAT incurred as input tax can only succeed to the extent 3D is carrying on a business and incurs that VAT for a business purpose. HMRC accept that 3D is a taxable person (a person carrying on a business and intending to make taxable supplies) but say that the VAT we are concerned with (largely VAT incurred on costs

relating to PPE which was given away) is not input tax. It is not sufficient that 3D is carrying on a business and intends to make taxable supplies. There must be a link between supplies to it and supplies (or intended supplies) by it in order to find a business purpose behind the supplies incurred. 3D say that this VAT is input tax as it was incurred on supplies to it for the purpose of the business activity (of selling PPE) it intended to carry out. To determine whether that is the case, we need to understand what is meant by a business activity so that we can determine whether 3D incurred this VAT on supplies made for the purposes of a present or intended business activity, and it is to that question I now turn.

Did 3D intend to supply PPE as (or as part of) a business activity?

51. The question whether an activity amounts to an economic or business activity has been considered in a number of cases. In *Wakefield College v HMRC*, [2018] EWCA Civ 952, the Court of Appeal considered whether the provision of further education courses to students paying a fixed but publicly-subsidised fee amounted to carrying out an “economic activity” within the meaning of article 9 of the VAT Directive. Having reviewed the earlier UK and European authorities, David Richards LJ made a number of observations. At [52] and [53] he noted:

“Whether there is a supply of goods or services for consideration for the purposes of article 2 and whether that supply constitutes economic activity within article 9 are separate questions. A supply for consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient: see, for example, the judgment in *Borsele* at [24]. That is what is meant by “a direct link” between the supply of the goods or services and the consideration provided by the recipient: see *Borsele* at [26] and contrast *Apple and Pear Development Council v Customs and Excise Comrs*. There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied.”

52. As far as article 9 itself is concerned, he commented:

“Whether article 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in *Borsele* at [29]. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to make a profit. Although a supply “for the purpose of obtaining income” might in other contexts, by the use of the word “purpose”, suggest a subjective test, that is clearly not the case in the context of article 9. It is an entirely objective enquiry.”

53. In an earlier Court of Appeal case, *Longridge on the Thames v HMRC*, [2016] EWCA Civ 930, Arden LJ considered whether the taxpayer was carrying on a business/economic activity. Starting at [91], she said:

“The starting point has to be the General Rule [that an activity will be an economic activity where it is “permanent and is carried out in return for remuneration which is received by the person carrying out the activity”]. The General Rule can be displaced by evidence that there was no direct link between the service and the payment or by other evidence which shows that there was no economic activity. I agree with Mr Thomas that, as his various examples show, that evidence can be of varying kinds and involves the FTT

when making its factual findings looking widely at the circumstances of the case.

As to direct link, the FTT made clear findings of fact about the charges which neither party challenges. Even after deductions were made (save in cases with which we are not concerned) for available grants and donations, the amount of the charge was more than nominal in amount and was directly related to the cost of the activity being provided. In those circumstances, in my judgment, the charges did not prevent the application of the direct link test leading to the result that there was an economic activity in this case.

As to other evidence, in [103] of its determination, the FTT referred to a number of factors. It referred to the internal systems of Longridge: it described Longridge as conducting and seriously pursuing its activities on a regular basis and having prudent financial management. It also referred to the scale of its activities, which was substantial, and the fact that it operated in a market where similar services were supplied on a commercial basis. I accept Mr Beal's argument that none of these matters can rebut the General Rule. On the contrary they support the impression of economic activity. The concessionary charges were also not an indicator against the existence of an economic activity because the economic activity springs from the receipt of income, not profit.

That leaves the FTT's final point in [103] that Longridge's predominant concern was to further its charitable objectives. That was demonstrated by its considerable use of volunteers But economic activity is assessed objectively and so the concern of Longridge, which is its reason for providing the services which it does provide, is not enough to convert what would otherwise be economic activity into an activity of a different kind for VAT purposes. The reduction in costs due to the work of unpaid volunteers would also not lead to that conclusion."

54. It is clear from two cases in the Court of Justice of the European Union, *Gemeente Borsele v Staatssecretaris van Financiën* (Case C-520/14) and *Commission v Finland* (Case C-246/08), that, for there to be a business/economic activity, there must first be supplies made for a consideration. That is not sufficient, but it is necessary; without making supplies for a consideration, there can be no business/economic activity. Making supplies for a consideration requires that the enterprise charges for what it supplies and, whilst it need not be looking to make a profit (or even to cover its costs where it receives donations or subsidies), its charges must be driven at least to an extent by the cost of what it supplies and be more than a notional fee or a contribution driven by the payer's means.

55. Having reviewed the evidence, I find as a fact that 3D was seeking to enter into contracts to supply PPE in return for payment and was looking to cover its costs through these charges (supplemented by donations where these could be sourced) so that it had a sustainable basis for a long-term operation. On that basis, 3D was intending to make taxable supplies of PPE at some point in the future. As to the other features identified by Arden LJ in *Longmore* as supporting the analysis that an economic activity was being carried on, 3D was seriously pursuing its activities and looking to do so on a regular, continuing basis. It had developed systems for managing production to agreed standards and dealing with logistics issues. It was well managed, and widely recognised as such. The scale of its activities, albeit at this point not involving the making of supplies for a consideration, was substantial, and it operated in a market where similar services were supplied on a commercial basis. In short, I agree with Mr Boucher that, looked at in the round, the requirements for a business other than charging for supplies were already present and I am satisfied that 3D was looking to charge for PPE supplies on a basis that went beyond notional fees and would put it on a sound,

sustainable footing. It is clear from *Longmore*, that using volunteers to provide labour and being partially financed by grants or subsidies will not prevent an entity being in business.

56. If 3D was looking to make taxable supplies of PPE, the next question is whether the VAT in question was incurred for the purposes of this economic activity.

Was VAT incurred by 3D for the purposes of making supplies of PPE in the future?

57. In principle, tax paid is input tax only if the goods or services giving rise to it are used or to be used 'for the purposes of any business' carried on or to be carried on by the taxable person concerned. To test this, it is necessary to ascertain the person's intention in making the purchase, acquisition or importation concerned in order to determine whether the goods or services are used or to be used for a business purpose. In *Ian Flockton Developments Ltd v C&E Commrs*, [1987] STC 394 (at p400), Stuart-Smith J put the test like this:

“The test is were the goods or services which were supplied to the taxpayer used or to be used for the purpose of any business carried on by him? The test is a subjective one: that is to say, the fact-finding tribunal must look into the taxpayer's mind as it was at the relevant time to discover his object. Where the taxpayer is a company, the relevant mind or minds are those of the person or persons who control the company or are entitled to and do act for the company. . . . The tribunal must look at all the circumstances of the case and draw such inferences as they think fit. In the end it is a question of fact for them whether they were satisfied on the balance of probability that the object in the taxpayer company's mind at the time the expenditure was incurred was that the goods and services in question were to be used for the purposes of the business.”

58. 3D say that VAT can be recovered on costs which involved no direct onward supply of goods or services but which laid the groundwork for them. Accordingly, costs such as accreditation through the notified body and the research and feedback needed for it must be allowed.

59. 3D also say that the costs had to be incurred in producing PPE before it could be sold, as it was developing and validating a new manufacturing technique (using 3D printing in distributed manufacturing). It needed to create, sustain and develop a business model that was capable of delivering a large number of units in order to stand a chance of winning a supply contract. This was in addition to the requirement for accreditation that required robust procedures to be developed and for manufacturing capability to be tested. These arguments were not challenged by HMRC and I accept them as a summary of what 3D needed to do in order to be able to make taxable supplies of PPE in the future.

60. So, we have a situation where 3D's intention is to supply PPE for consideration (more than just a notional charge) in the future and to do that it needs to show that it can deliver reliable goods in quantity and at speed. Is that sufficient to make the VAT incurred on the costs at producing PPE input tax? This raises the question of the quality of the link or relationship required between a cost incurred and a supply made before VAT incurred on the cost counts as input tax. In *'Sveda' UAB v Valstybine mokesciu inspekcija prie Lietuvos Respublikos finansu ministerijos* (Case C-126/14) the CJEU held that:

“27. According to settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the

expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct

28. Nevertheless, as the Advocate General observed in points 33 and 34 of her Opinion, the Court has held that a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the expenditure incurred is part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such expenditure does have a direct and immediate link with the taxable person's economic activity as a whole

29. It is apparent from the case-law of the Court that, in the context of the direct-link test that is to be applied by the tax authorities and national courts, they should consider all the circumstances surrounding the transactions concerned and take account only of the transactions which are objectively linked to the taxable person's taxable activity. The existence of such a link must thus be assessed in the light of the objective content of the transaction in question”

61. In that case Sveda incurred costs in creating a Baltic mythology recreational/discovery path. The public would be allowed to use the recreational path without charge. Sveda’s plan was that the recreational path would attract visitors because the path ended at a shop Sveda ran where it made taxable supplies of goods and services for consideration. The CJEU concluded that “there does appear to be a direct and immediate link between the expenditure incurred by Sveda and its planned economic activity as a whole”.

62. This decision was followed by the FTT in *Durham Cathedral*, [2016] UKFTT 750 (TC), where it was held that a proportion (after applying the agreed split between religious and economic activities and, in respect of the latter, between exempt and taxable activities) of the VAT incurred on repairing a bridge, which gave access to the peninsula on which Durham Cathedral stands, could be recovered. The FTT held (at [47] and [50]):

“In this case we have found that the business activities and non-business activities are carried on by the appellant in the same place, the cathedral and its precincts, so that it is impossible to say that the expenditure on a structure some way away from the cathedral can be linked to non-business activities only, or, for that matter, to business activities only. So we reject HMRC's submission that it can be linked only to the non-business activities: it is either linked to the total activities or to none at all.

In our view then, the costs of maintenance and repair of the Prebends' Bridge is capable of being linked to all the appellant's activities, business and non-business. It seems to us obvious that there is no direct and immediate link between the expenditure and any particular taxable transaction of the appellant, and none was suggested. The question then is whether there is, contrary to HMRC's submission, a direct and immediate link between the expenditure and the business activities of the appellant. We add that we do not have to be satisfied that there is no link with the non-business activities, as if there is a link to both types of activity the NB/B split will apply to reduce the deduction accordingly.”

63. *Durham Cathedral* is as significant a decision as *Durham Cathedral* is a building. It clarifies that, to count as input tax, VAT does not need to be incurred on a supply which is directly and immediately consumed by making a taxable supply.

64. Following those authorities, I hold that VAT incurred by 3D on the direct costs of accreditation through the notified body will count as input tax. This is because those costs

were incurred in order to be able to sell PPE in the future and for no other purpose (see [40] above) and the fact that these costs are not linked to a particular supply (and is in the nature of preparing the ground for future supplies) does not matter.

65. Of course, 3D was never able to realise its intention of making taxable supplies and that brings us to our next question:

Does it matter that 3D never made taxable supplies of PPE?

66. The short answer to this question is, No. It is clear from domestic law that an intending trader (a person carrying on a business with the intention of making taxable supplies in the future) can be registered for VAT and be in a position to recover VAT incurred as input tax; paragraph 10, Schedule 1, VATA. The cases cited by 3D support the proposition that VAT incurred by an intending trader can be recovered as input tax. In *Rompelman v Minister van Financien* (Case 268/83) the European Court held that the concept of economic activity (business) included preparatory acts, such as the acquisition of units in premises under construction with a view to letting them out and where the properties had not been let out when the input tax relief claim was made. The Court held that, in order to achieve fiscal neutrality expenditure incurred for the purposes of and with a view to starting up an economic activity must be regarded as expenditure incurred in an economic activity, but tax authorities may require objective evidence to support a claim.

67. In *INZO v Belgische Staat* (Case C-110/94) the European Court considered the position of a company which had been accepted as a taxable person (in UK terms) because it had declared an intention to commence an economic activity giving rise to taxable transactions. The Court held that the company could recover VAT on a profitability study in respect of the planned activity, even if the purpose of that study was to investigate to what degree the activity envisaged was profitable. The profitability study led to a decision not to move into the operational phase of the project but instead to put the company into liquidation. The Court held that, except in cases of fraud or abuse, the status of the taxable person for the purposes of VAT may not be withdrawn from that company retroactively where, in view of the results of that study, it has been decided not to move to the operational phase, but to put the company into liquidation, with the result that the economic activity envisaged has not given rise to taxable transactions.

68. In short, 3D's inability to realise its plans does not, in the absence of fraud or abuse (of which there is absolutely no suggestion here), impact on its ability to recover input tax as an intending trader.

Does it matter that 3D donated all the PPE it manufactured?

69. HMRC's submission is that the VAT incurred in the period was not related to the cost component of a taxable supply and so was not input tax. It is clear from *Rompelman* and *INZO* that VAT incurred by an intending trader (who by definition will not yet have made any taxable supplies) can be recovered as input tax even if the intending trade is never carried on. *Sveda* and *Durham Cathedral* make it clear that, to count as input tax, VAT does not have to be incurred on a cost component of a particular taxable supply. So, a submission that, because no supplies have been made, none of the VAT incurred by 3D can be input tax must be wrong. But it nevertheless remains the case that 3D incurred VAT on costs which it knew at the time it incurred them it would not be able to use to make taxable supplies, because it would need a government contract or BSI accreditation to be able to sell PPE and it never had one. I note that 3D could have sold PPE in May or June (see [31]) but had been advised that it should not do so, other than to the Government. At all relevant times, 3D was not intending to sell the PPE then being produced (as opposed to PPE that might be produced in the future) because it could not (or had decided that it should not) do so.

70. 3D submitted that the costs incurred on PPE equipment should be regarded as research and development expenditure or the costs of business gifts or samples. The purpose and scale of 3D's operation and the sheer amount of PPE produced and donated support HMRC's submission that it is not realistic to see the PPE 3D gave away as samples or business gifts; they were donating PPE to try to meet all or a substantial part of the recipient's need for PPE. No evidence was produced to me to suggest that PPE was donated so that it could be tried out or tested by the recipient or with a view to encouraging the recipient to return and purchase PPE. I do, however, accept 3D's submission that they needed (and knew they needed) to prove the concept of "distributed manufacturing"; they needed to test whether their dispersed army of volunteers could produce a sufficient volume of PPE of a uniformly high standard.

71. So, I hold that, at least to some extent, the VAT incurred on the costs of producing the PPE had a business purpose, of enabling 3D to validate its distributed manufacturing processes and (it hoped) put it in a position to win CE approval and enter into future contracts to supply PPE at a price beyond a nominal amount (i.e. to make taxable supplies).

72. However, as I have noted above, at the time 3D incurred these costs, it had concluded that it would be unable to sell PPE in current production, initially because the stage its accreditation application had reached meant that it could only sell to the Government, and it was seemingly unable to contract with the Government (why that was the case is beside the point), and later, when some sales to NHS trusts were allowed, it had been advised not to sell PPE. It knew that it would have to donate this PPE. Moreover, its initial purpose had been to supply PPE to the NHS and care homes to help alleviate the national shortage of PPE, "to do our bit to support the people who are looking after those who need it most" (to quote from the Go Fund Me page extracted at [32] above). Looking at all the circumstances of the case (as Stuart-Smith J put it in *Ian Flockton*; see [57] above), whilst I am satisfied that there was a business purpose in 3D's incurring costs in relation to the production of PPE, I am not satisfied that it was the only (or indeed necessarily the predominant) purpose. Looking at the immediate (and only) use to which 3D could (and did) put the PPE (giving it away) and given the way 3D projected itself to the outside world, I am satisfied that producing PPE it could give away as its and its volunteers' contribution to the fight against COVID-19 was one of the purposes behind the incurring of that expenditure. Indeed, I consider that any other conclusion would be entirely out of line with the only reasonable conclusion the evidence points to. Possible future business activity was too far in the future and too contingent to be the only purpose for which this expenditure was incurred.

73. On this basis, as required by Section 24(5) VATA, the VAT incurred by 3D on the production of PPE will need to be apportioned between its altruistic / non-business purpose and its business purpose. As far as general overhead costs (not related to PPE production or BSI/CE accreditation) are concerned, these too will need to be apportioned as (by definition) they relate to both business and non-business activity.

DISPOSITION

74. For the reasons discussed above, I have determined that of the VAT incurred by 3D in the period 08/20:

- (1) VAT incurred on the direct and immediate costs of BSI/CE accreditation was incurred solely for business purposes and counts as input tax in full;
- (2) VAT incurred on the general overhead costs of the company and on the costs of producing PPE was incurred in part for business purposes.

75. There was no argument before me as to how the amounts of VAT referred to in (2) should be apportioned between the amounts incurred for business purposes and the amounts

incurred for other (non-business) purposes and the parties will need to agree the apportionment among themselves. Given the range of possibilities discussed at [11] above, the first step will be to decide on the apportionment methodology. In the light of the amounts involved, I would encourage HMRC and 3D to approach this exercise in as pragmatic a way as possible, but, if they are unable to reach agreement, there is liberty to apply to the tribunal.

76. To the extent set out in paragraph [74], this appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

77. 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.

**MARK BALDWIN
TRIBUNAL JUDGE**

Release date: 12th JUNE 2023