



[2017] UKUT 177 (TCC)
Appeal number: UT/2016/0011

VAT – input tax – absence of purchase invoices – discretion to accept alternative evidence – whether national rule rendered exercise of rights under European law virtually impossible or excessively difficult – whether Commissioners’ exercise of discretion open to challenge

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**THE COMMISSIONERS FOR HER
MAJESTY’S REVENUE AND CUSTOMS**

Appellants

- and -

JAMES EDWIN BOYCE

Respondent

Tribunal: The Hon Mr Justice Arnold

Sitting in public in London on 10 April 2017

Michael Jones, instructed by the Solicitor to HM Revenue and Customs, for the Appellants

The Respondent in person

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MR JUSTICE ARNOLD:

Introduction

1. This is an appeal from a decision of the First-Tier Tribunal (Tax) (Judge Richard Chapman and Derek Robertson) (“the FTT”) dated 9 October 2015 [2015] UKFTT 489 (TC) allowing an appeal by James Boyce against a decision of the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”) to disallow a claim for repayment of input tax in the sum of £100,663 in the absence of purchase invoices.

Factual background

2. As the FTT recorded, there is no dispute about the factual background. The following summary is drawn from the FTT’s decision at [5]-[23] and [41]-[42].
3. Mr Boyce traded as Glenwood at the material time. He has since ceased trading. His business was involved in the purchase, supply and export of new and used motor vehicles. These were mostly prestige vehicles, including Porsches, Mercedes and Range Rovers. Most of the vehicles in question were exported by Mr Boyce’s customer, Great Harvest Ltd, to Singapore.
4. The manufacturers of the vehicles and the owners of the dealership franchises would not have approved of Great Harvest purchasing them in the UK for the purposes of export in this way. Great Harvest’s solution to this was to disguise its involvement by Mr Boyce purchasing the vehicles and then selling them on to Great Harvest. In turn, Mr Boyce’s involvement was disguised by individuals purchasing the vehicles from the dealership franchises for him (“the Named Purchasers”). The managers of the dealerships where the vehicles were purchased (“the Dealerships”) were not only well aware of what was happening, but in fact actively sought Mr Boyce out to sell the vehicles to him. Indeed, some of the Named Purchasers were themselves employees or contacts of the Dealerships.
5. The Named Purchasers entered into a written agreement entitled “Buying Agent Agreement” in respect of each transaction. An example of such an agreement included the following terms:
 - “1. This agreement is of [sic] the purpose of purchasing new motor vehicles for and on behalf of James Boyce and any associated companies/business, herein known as “the Company”. This is not an employment contract.

We [agent’s name] (known as ‘the Buyer’) have purchased the following car on behalf of “the company” [invoice details].

We have no legal title to the motor vehicles, even though vehicles may be invoiced to us directly, or taxed (registered keeper) in our name.

We will not claim the Value Added Tax (VAT) from the purchase of this said motor vehicle. In doing so I will be committing a breach of the agreement and will be liable for any amounts that ‘the company’ is unable to claim, by our actions.

2. Payment of services. The company has paid via [recipient’s name] a commission for the services supplied.
3. Property. Any documents or information supplied to ‘the buyer’ is the property of ‘the company’ and will remain so.”
6. Bank statements in evidence before the FTT showed flows of funds from Mr Boyce to the Named Purchasers and from Mr Boyce’s customers to him.
7. The very nature of the arrangements described above meant that the Dealerships’ invoices referred to the Named Purchasers, rather than Mr Boyce, as the purchasers of the vehicles. The FTT found that 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. Mr Boyce was the subject of a series of routine VAT assurance visits between 24 June 2013 and 1 October 2013. This resulted in an assessment, notice of which was given in a letter dated 18 December 2013, in the sum of £124,983 plus interest. The assessment related to the periods from 08/11 to 11/12 and was divided into four categories. The relevant category for the purposes of this appeal was “Vehicle Purchase Input Tax”, the sum in question being £100,663 and representing the repayment of input tax disallowed in the absence of satisfactory purchase invoices.
9. HMRC considered the exercise of their discretion under the proviso to regulation 29(2) of the VAT Regulations 1995 to allow a person claiming deduction of input tax notwithstanding that the person does not hold a valid VAT invoice (and thus is not entitled to a credit as of right) to rely upon alternative evidence, but refused to exercise their discretion to allow Mr Boyce credit for the Vehicle Purchase Input Tax.
10. Mr Boyce appealed against the assessment. At the hearing before the FTT, the presenting officer then appearing for HMRC accepted that, although the FTT would normally be restricted to considering the facts and matters available to HMRC at the time they took the decision under appeal, the FTT should consider the totality of the evidence before it, which included evidence provided by Mr Boyce in the context of the appeal.

Legal framework

European law

11. Articles 168(a), 178(a), 180 and 182 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (“the Principal VAT Directive”) provide 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.”

12. It is a well established principle of European law that national rules must not render virtually impossible or excessively difficult the exercise of rights conferred by European law (the “principle of effectiveness”): see e.g. Case C-35/05 *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* [2007] ECR I-2425 at [37] and Case C-591/10 *Littlewoods Retail Ltd v Her Majesty’s*

Commissioners of Revenue and Customs [EU:C:2012:478], [2012] STC 1714 at [28].

Domestic law

13. The power conferred on Member States by Articles 180 and 182 of the Principal VAT Directive has been exercised by the United Kingdom in regulation 29(2) of the Value Added Tax Regulations 1995 made under section 24(6) of the Value Added Tax Act 1994. This provides:

“(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 or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a), (b), (c), (d), (e) or (f) above, such other documentary evidence of the charge to VAT as the Commissioners may direct.”

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.

The FTT’s decision

15. The FTT allowed Mr Boyce’s appeal for reasons which it expressed as follows:

“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 or 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 in reaching the decision that Mr Boyce had not provided sufficient evidence to support the supply being made to him. ...
45. We reach this conclusion because HMRC either failed to take into account the following matters or, if they did take them 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 Agreements clearly evidenced the true relationship between the 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 were presumably satisfied that these arrangements constituted supplies to Mr Boyce.
46. We note that the evidence required is 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. However, HMRC have not suggested that any evidence was missing other than that of the supply to Mr Boyce taking place."

HMRC's appeal

16. HMRC contends that the FTT erred in law in reaching its conclusion on the Vehicle Purchase Input Tax issue.
17. As to the first of the factors identified by the FTT at [45], which referred back to its finding at [43], 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.

Assessment and conclusion

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.

MR JUSTICE ARNOLD

Release date: 5 May 2017