[2020] UKUT 244 (TCC)

Appeal number: UT/2019/0083

VAT – appeal against HMRC's decision to amend effective date of registration – whether FTT correct to find that the evidence in support was the same as advanced on a previous appeal where the appellant had been unsuccessful - no, new evidence was submitted– however even when new evidence considered appellant's appeal on registration dismissed – appeal on input tax refusals in later period allowed in part

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ANDREW ADELEKUN **Appellant**

-and-

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

TRIBUNAL **JUDGE SWAMI RAGHAVAN**
JUDGE GUY BRANNAN

Sitting in public by way of remote video skype for business hearing treated as taking place in London on 14 July 2020, further written submissions received on 17 and 20 July 2020

Rosana Bailey, counsel for the Appellant

Isabel McArdle, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The Appellant, Mr Adelekun, appeals against a decision (the "2019 FTT Decision") of the First-tier Tribunal (the "FTT") released on 14 February 2019 (TC/2016/03724) concerning VAT matters in relation to Mr Adelekun's project advisory business.

2. The 2019 FTT Decision dealt with two issues: 1) HMRC's decision to amend the effective date of the Appellant's VAT registration from 1 March 2007 to 20 July 2012 ("the VAT registration issue") 2) whether certain personal services Mr Adelekun provided in the UK to overseas clients in a later period in which he was VAT registered were ancillary to his main project advisory business, such that together they formed a composite supply ("the composite supply issue").

3. On the first issue, the FTT upheld HMRC's decision that he was not carrying on a business activity which could be VAT registered during the period 2007-2012 and in turn that his claims for input VAT in that period should be refused. It regarded it as relevant that in 2014, another FTT tribunal panel had dismissed Mr Adelekun's appeal in relation to VAT registration because he had not provided sufficient evidence to meet the test of making taxable supplies between 1 February 2007 and 19 July 2012 ("the 2014 FTT Decision"). The 2019 FTT agreed with HMRC's view that no significant new evidence had been provided following the 2014 FTT Decision, that had not already been provided before, and which changed the outcome.

4. With permission of the Upper Tribunal ("UT"), Mr Adelekun appeals to the UT. He argues the FTT wrongly overlooked various documents and also findings in another FTT decision, relating to his income tax, which post-dated the 2014 FTT Decision, which, he submits, supported his case that he had made taxable supplies since 2006.

5. Mr Adelekun was successful on the second issue before the 2019 FTT; the FTT found his personal services did, together with his project advisory services, constitute a composite supply. HMRC did not appeal against that conclusion but they apply, late, for permission to add a new ground to their Respondents' notice. They argue the FTT erred in not dealing with all the issues before it, namely HMRC's decision to disallow amounts claimed as input VAT or refusing repayment of such amounts for specific VAT periods.

Background and Decision

6. In order to understand the 2019 FTT's reasoning on the VAT registration issue and Mr Adelekun's grounds in relation to that, we need to start with the FTT 2014 Decision, which dealt with his appeal against HMRC's decision to de-register him for VAT with effect from 19 July 2012 and disallow his input tax claim for £25,253.59 for the period from 1 February 2007 to 30 September 2011. Mr Adelekun represented

himself at that hearing. The FTT noted that under Schedule 1 to VATA 1994, HMRC had to be satisfied that taxable supplies were being made in order to register a person for VAT purposes. Mr Adelekun produced various evidence, including schedules he had prepared, an explanation of his business banking and office set-up, a copy of his contract with a South African company, Lubbe Construction, sales invoices to that company, referring to "professional services provided" and a letter from them (summarised at FTT2014 [16] – [24]). The 2014 FTT noted that HMRC were trying to establish whether his income stated in his unaudited accounts included any rental income from residential properties he owned (which would be an exempt supply).

7. The 2014 FTT went on to dismiss Mr Adelekun's appeal explaining its conclusion as follows:

> "[27] We have considered the evidence as a whole and are satisfied that Mr Adelekun is engaged in a business activity. However, we are unable to conclude that it is one involving the making of taxable supplies due to the lack of documentary evidence available to support this claim. Some of the evidence produced suggests that he is involved in VAT exempt activities. We consider that, had Mr Adelekun been involved in taxable trading to the extent that he suggests over the relevant period, he would have been able to produce satisfactory evidence of it, such as letters from clients engaging him for specific work or copies of sales invoices for specific work completed…
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> [28] We note that the documentation that the Appellant did produce to the Tribunal was inconclusive as to the nature of the business activity undertaken due to the lack of specificity in the invoices and client letters. The fact that the Appellant has a bank account, business premises, a business loan etc indicates that he is engaged in a business but it is not evidence that he is making taxable supplies. We agree with HMRC that the description of "professional services" only on the invoices we have seen is too broad a description to serve as validation of his claimed business activities."

8. Mr Adelekun's application for permission to appeal the 2014 FTT Decision to the UT, which sought to introduce new evidence that was not before the FTT, was refused by the UT on 23 July 2014. The new evidence was too late, but the UT mentioned that it was open to Mr Adelekun to apply again to HMRC for VAT registration if he could show he was making taxable supplies.

9. He accordingly applied again for registration. HMRC issued a certificate of registration on 22 July 2015 with the effective date of registration backdated to 1 March 2007. Mr Adelekun then applied for repayment claims in this period. On 17 January 2017, HMRC decided that the 1 March 2007 effective start date was an error since they had already considered the periods up to July 2012 and had decided that Mr Adelekun was not carrying on a business of making taxable supplies which was eligible to be

VAT registered during that period. The effective start date of the second registration was changed to 20 July 2012.

10. Mr Adelekun appealed to the FTT against HMRC's decision to amend Mr Adelekun's effective date of reregistration for VAT to 20 July 2012. HMRC sought, unsuccessfully, to strike out his appeal on the basis there was no new evidence that had not already been considered by the 2014 FTT.

11. The matter proceeded to a substantive FTT hearing on 20 June 2018 and 29 October 2018, at which Mr Adelekun was represented by Ms Bailey, who also appeared before us in this appeal.

12. Before the 2019 FTT, HMRC argued: that as a person could not be registered more than once in respect of the same period, then because Mr Adelekun had previously been registered for that period, the earliest HMRC could register him from was 20 July 2012; even if Mr Adelekun was entitled to and was correctly registered from 2007, the same evidence considered under Mr Adelekun's previous VAT registration number had been considered and rejected by HMRC and the 2014 FTT.

13. HMRC no longer pursued their previous suggestion that Mr Adelekun's activities included exempt property rental activity.

14. The FTT noted that no challenge had been made to Mr Adelekun's witness statement covering his business activities which it went on to accept as factually correct. Mr Adelekun provided business advisory and consultancy services primarily to clients based in Nigeria and South Africa which included project initiation, structuring, development, investment and implementation, and general business support, such as preparation of financial forecasts. His clients were predominantly companies and he estimated that 90% of these projects were outside the UK. In addition, he also performed personal services for the shareholders and directors of his corporate clients when they were in the UK. These services included legal assistance, helping the individuals to find suitable investment properties, helping to find tenants for these properties, helping them to find suitable schools for their children and obtaining visas for the individuals and members of their families. He also provided cars for use by the individuals when they were in the UK. (That was important for the purpose of the appeal before the FTT, as many of the input VAT claims in dispute related to invoices from car rental companies to Mr Adelekun for car hire.) (FTT [8]-[10])

15. Regarding the registration issue, the FTT accepted that, as Mr Adelekun's earlier registration had effectively been cancelled, there was no issue with there being two concurrent VAT registrations (FTT [32]) and went on to consider whether or not HMRC were correct to refuse Mr Adelekun's pre-20 July 2012 input tax claims. As for the evidence Mr Adelekun put forward, the FTT accepted that much of his potentially supportive documentation had been destroyed in a fire. It went on to note however that

Mr Adelekun had been unable to obtain copy invoices or similar documentation from his major clients in respect of the period in question and that it found this "much more difficult to understand". ([FTT [9])

16. The precise basis on which FTT rejected Mr Adelekun's case in relation to the pre-20 July 2012 input tax is a matter of dispute. We set those reasons out in our discussion section below at [23].

Grounds of appeal against the 2019 FTT Decision

17. The essence of the ground upon which Mr Adelekun was granted permission to appeal was expressed as follows:

> That the FTT erred in concluding that no significant new evidence had been put forward, that had not already been considered and rejected in the 2014 FTT Decision, and in thus rejecting his appeal in relation to HMRC's decision regarding re-registration. In particular the FTT overlooked or did not take proper account of:
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> (1) a number of relevant documents, and findings within another FTT Decision made in 2016 (discussed in more detail below) which were put before the FTT and which post-dated the 2014 FTT Decision;
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> (2) Mr Adelekun's witness statement and oral evidence on the nature and duration of his business given the evidence was not challenged in cross-examination by HMRC;
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> (3) The fact the 2014 FTT decision was made on a different basis in that:
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> (a) the 2014 FTT's rejection of Mr Adelekun's case was swayed by HMRC's view that he was involved in VAT exempt property rental business whereas this point was dropped by HMRC at the 2019 FTT.
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> (b) Mr Adelekun was unrepresented at the 2014 FTT hearing but not at the 2019 FTT.

New documents and matters referred to

18. The additional documents which Mr Adelekun says were overlooked may be summarised as follows:

> (1) There are a number of letters to Mr Adelekun from a South African company Lubbe Construction (Pty) Ltd in response to his requests to provide various information.
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> (a) In the first, dated 24 February 2014, Lubbe Construction states that Mr Adelekun "offered project advisory services to the company on a more formal basis since 2006". A bullet pointed summary of his role included variously: advising on designing

and implementing business strategies, general financial analysis, sourcing equipment and possible opportunities and "logistic support in the UK including facilitating any visit". The letter went to explain "the logistic support has not been part of our agreement but you have provided the service regularly as a gesture of goodwill towards the company". The letter confirmed Mr Adelekun was not allowed to retain any documentation and that on the invoice figures having been agreed "by way of dialogue" the services were described as "Professional Services Provided".

(b) In its letter of 2 June 2014, headed "Confirmation of Paid invoices between 2007 and 2012 for your Project Advisory Services", Lubbe Construction states that it was not able to provide copy invoices as requested by Mr Adelekun but provided Sterling figures of the totals paid for the calendar years 2007-2012 ranged from £156,835 to £231,130.

(c) Lubbe's 11 July 2014 letter confirmed the various countries in Africa in which "work performed and currently being performed for the company and its projects" were based.

(2) An affidavit from an in-country agent in South Africa (Mr Sallam) and a witness statement from one in Nigeria (Mr Ogunkoya) (both dated 13 June 2017). These state the nature of Mr Adelekun's business as provision of project and business advisory services. Mr Sallam confirms he has been working with Mr Adelekun's business in South Africa since 2007 and Mr Ogunkoya confirms he has been working with Mr Adelekun's business in Nigeria since 2008.

(3) Sales Breakdown analysis – Mr Adelekun compiled this document. In it he sets out a list of years and figures stated to be sales for each year from 2007 to 2014 and for 2015 up until August.

(4) An FTT decision (*Adelekun v HMRC* [2016] UKFTT 806 (TC)) in which the FTT dismissed Mr Adelekun's appeal against an income tax discovery assessment for 2011-12 and where, following a preliminary decision, the FTT had been asked to determine the final amount of Mr Adelekun's liability to tax and penalties for the years under appeal (2009-10 – 2012-13) in relation to a subsequent claim for bad debt relief. At [2] of the decision, the FTT explained that the preliminary decision was Mr Adelekun's activity of owning operating and leasing an oil water separator (OWS) amounted to a separate trade from his project advisory and consulting services. The FTT (at [6-10] of its decision) went on to make a number of general findings about Mr Adelekun's business including that he

had been operating both the consulting trade and the OWS trade for a number of years.

(5) Mr Adelekun also put forward two Project Advisory Services Agreements between himself (using his trading name Hamilton Enterprise Development) and 1) Nitral Ventures Nigeria Ltd dated 14 March 2016 and 2) Perfect Secure Systemz dated 15 March 2016. These are drafted in similar terms. The services provided are stated as advice on the use of an Oil Water Separator and Triplex Pump and any other tasks the parties may agree on. Each agreement states that it "…replaces any previous Agreement with immediate effect" explaining "It has been necessary to replace any previous agreement…as [it] does not reflect the true detailed services of the Contractor [Mr Adelekun]"

19. In advance of the hearing before us Mr Adelekun also sought, by way of an application that was contested by HMRC, to adduce two further documents:

(1) A project advisory agreement between Mr Adelekun (using his trading name Capital Development Consultants) and British Enterprise Development Ltd dated 1 December 2011 under which he was to be remunerated for project advice design and structuring of a new college and university in Port-Harcourt, Nigeria.

(2) A letter dated 27 October 2014 from a South African company submitting a feasibility study to Mr Adelekun for a potential hotel development project in Beira, Mozambique.

20. Whether that application should be granted is a matter of discretion, to be exercised fairly and justly in accordance with the overriding objective, which is guided but not constrained by the criteria suggested in *Ladd v Marshall*[1]. HMRC make no point on the third criterion, that the evidence must be apparently credible, so only the first two are relevant:

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial (in this case that means the FTT hearing). Mr Adelekun did not provide any satisfactory explanation for why the documents could not have been adduced before the FTT hearing in 2018. Given the dates of the documents, and that Mr Adelekun was a party to both, we consider the documents could have been obtained for that hearing with reasonable diligence.

[1] [1954] 1 WLR 1489; see [32] of *Cavendish Green Limited v HMRC*: [2018] UKUT 0066 (TCC) which in turn refers to *Bramley Ferry Supplies Ltd v HMRC* [2017] UKUT 0214 (TCC).

> (2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. We do not accept the evidence would have such an influence. In common with the project advisory agreements it deals with time periods after that relevant to the period for the VAT registration issue (2007-2012). To the extent the new evidence has anything to say about the nature of Mr Adelekun's business in that period then it does not add in any significant way to the evidence that was already before the FTT.

21. Two of the criteria are not therefore met. Taking account of that and also standing back and looking at whether it is fair and just to exercise our discretion to admit the evidence, we consider the evidence should not be admitted.

Discussion

22. The ground upon which Mr Adelekun has permission to appeal is that "the FTT erred in concluding that no significant new evidence had been put forward, that had not already been considered and rejected in the 2014 FTT Decision, and in thus rejecting his appeal in relation to HMRC's decision regarding re-registration". This effectively encompasses two possible errors: 1) Did the FTT overlook the further documents (set out at [18] above and various other matters which we come on to discuss)? 2) If it did consider them, was it right to consider that they were not material?

23. The FTT expressed its reasoning as follows:

> 34. HMRC state that the supporting evidence for these claims is predominantly the same as that considered when they came to the conclusion that the original registration should be deregistered, and that no significant new evidence has been produced. They then point out that the decision to deregister the original registration, based on that evidence, was appealed to the First-tier tribunal and was dismissed. Not surprisingly therefore, when HMRC considered that same evidence again, they came to the same conclusion, which was that the claims should be rejected.
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> 35. In summary, the supporting evidence for input tax claims for the periods up to 20 July 2012 has already been considered and rejected by both HMRC and the First-tier tribunal. We were shown no new evidence of Mr Adelekun's activities prior to 20 July 2012 and we do not therefore see how we can sensibly come to a different conclusion.
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> 36. We would note that if we are wrong as to whether or not the backdating to 1 March 2007 was legally effective then we would come to the same conclusion, ie that HMRC were correct in any case to refuse input tax recovery for periods prior to 20 July 2012.

24. Ms McArdle, for HMRC, argued that the FTT's finding, that the evidence was predominantly or substantially the same in the 2019 FTT Decision as it was before the 2014 FTT, is a finding of fact. Accordingly in order to satisfy the test in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, Mr Adelekun had to show that the finding that no materially new evidence on the issue was before the FTT in 2019, was one which was based on no evidence, or one which no reasonable decision-making body could reach on the evidence. The focus of HMRC's response to the ground of appeal was therefore on the second error (see [22] above). This is because, in HMRC's submission, the FTT must be taken to have considered the additional documents but nevertheless reached the view, as it was open to it to do so, that the additional documents were not material to change the outcome. In summary, none of that evidence, because it was non-contemporaneous and vague, was evidence of specific taxable supplies having been made in the relevant period. Thus, when the FTT recorded (at [35]) that it was "shown no new evidence of Mr Adelekun's activities prior to 20 July 2012", HMRC say this is better understood as meaning the FTT considered it had not been shown any new evidence that was material.

25. We reject HMRC's interpretation of the 2019 FTT Decision. First, we disagree with the suggestion that the FTT made any finding of fact at [35] that the supporting evidence for these claims was predominantly the same as that previously considered by the 2014 FTT when they came to the conclusion that the original registration should be deregistered, and that no new evidence had been produced. It is clear that in that paragraph of the 2019 FTT Decision, the FTT was setting out HMRC's position. (While we note that the FTT had set out earlier (at FTT[7]), in relation to Mr Adelekun's request for repayment, that "*much* of the evidence submitted to support this claim had previously been submitted" (emphasis added), that was in the section of its decision dealing with background findings as derived from those set out in HMRC's Statement of Case and which were not disputed. The crux of the FTT's reasoning on the registration issue however appears later at [34] to [36]).

26. Second, the critical part of the FTT's reasoning, as appears in [35] for why the FTT then agreed with HMRC, was that the FTT considered it had not been shown any new evidence. That statement must, we think, be taken at face value and does not intimate that the FTT considered the additional documents and then dismissed them as immaterial. If the FTT had done that, the lack of any mention of the additional documents post-dating the 2014 FTT Decision is in stark contrast to the level of more detailed analysis on the "composite supply" issue. While it is correct the 2014 FTT was also shown correspondence (from 2012) from Lubbe Construction, as the 2019 FTT was, albeit later correspondence, the 2014 FTT could not, because of the relevant later dates, have been shown the affidavit/witness statement from Mr Adelekun's in-country agents. It is also notable that the FTT's view that it found it "…difficult to understand" why Mr Adelekun had been "unable to obtain copy invoices or similar documentation from his major clients in respect of the period in question" omits any mention of Lubbe's statement in its 4 June 2014 letter that it could not provide the requested copy

invoices. This also, suggests that that letter, which post-dated the 2014 FTT, was not considered, even if it was then dismissed as immaterial.

27. It must be acknowledged that neither party before the FTT appeared, in their written submissions at least, to address in any level of detail the significance or otherwise of the additional documents. Nevertheless, the in-country agent affidavit/witness statement, with dates which post-dated the 2014 FTT Decision, were specifically referred to and cross-referenced to the hearing bundle in Mr Adelekun's five-page witness statement (which the FTT must be taken to have read as it is referred to at FTT 2019 [3]) of 16 October 2018). Those documents were, we consider, fairly referred to the FTT.

28. We consider the FTT therefore erred in law in finding, as it did, that it was not shown any new evidence when that was not a finding which it was open to make in view of the documents exhibited to Mr Adelekun's witness statement.

29. We have circumscribed the error in the narrow terms of the documents exhibited to the witness statement and not the remainder of the additional documents which were not exhibited to that statement. The error in the FTT's finding that no new evidence had been provided did not in our view stem from overlooking the remainder of the documents. Even though those other documents, with the exception of the 2016 FTT decision dealing with Mr Adelekun's appeal against an income tax discovery assessment, were in the document bundle, there is no indication from the parties' written submissions, or from any other material covering what was dealt with at the hearing (there was no transcript and no note of hearing was put before us), that the FTT were specifically taken to the documents in the course of the hearing. As mentioned in the UT's decision refusing permission on the papers, if a tribunal did not consider documents, which it was not specifically taken to, that would not necessarily give rise to an error of law. It cannot be assumed that just because a document appears in a hearing bundle that the tribunal panel will take account of it; if a party wants the tribunal to consider a document then the party should specifically refer the tribunal to it in the course of the hearing (see *Swift & others v Fred Olsen Cruise Lines* [2016] EWCA Civ 785 at [15]). This is not least to give the tribunal adequate opportunity to consider and evaluate the document in the light of the reliance a party seeks to place on it, but also to give the other party the opportunity to make their representations on the document. That is particularly so where, as here, there were several hearing bundles before the FTT relating to the various previous proceedings and the one containing the relevant additional documents was voluminous comprising 434 pages.

30. As to the other aspects of Mr Adelekun's ground of appeal, we are not persuaded, largely for the reasons HMRC submitted, that these disclose any error of law on the FTT's part.

31. Mr Adelekun suggests that as his evidence on the duration and nature of his business was not challenged by HMRC, the FTT were wrong not to accept it as showing he had made taxable supplies during the relevant period. However, in agreement with HMRC, we consider that it would have been sufficiently clear that what HMRC were challenging was the absence of sufficient specificity regarding the taxable supplies said to be made. Mr Adelekun's witness statement only gave a high-level explanation of his activities in the relevant period. In the absence of a transcript or note of hearing, there is nothing to suggest Mr Adelekun addressed the concerns over sufficient evidence of specific taxable supplies in any supplemental oral evidence. As HMRC point out it is highly unlikely that such evidence was given because of the difficulties inherent in any person being able reasonably and reliably to remember such a large volume of detail as would be necessary.

32. The difficulties regarding the absence of sufficient evidence of specific taxable supplies also explain why Mr Adelekun's arguments regarding the different basis of the 2014 FTT Decision do not advance his case. While the 2014 FTT mentioned HMRC's investigation, which was not later pursued before the 2019 FTT that some exempt property rental supplies were being made, reading the 2014 FTT Decision as a whole, what underpinned its decision was its view that insufficient evidence had been put forward of specific taxable supplies in the relevant period. It is also irrelevant to the conclusion regarding insufficiency of such evidence that Mr Adelekun was unrepresented at the 2014 FTT hearing. The evidence Mr Adelekun wished to rely on was clearly put before and in turn considered by the 2014 FTT Tribunal despite any lack of representation at that hearing.

33. Returning to the error of law which we have concluded the FTT did make, in finding that it had not been shown any new evidence, it is plain that that error, in turn, led to the FTT concluding it could not sensibly reach a decision different to the 2014 FTT. We therefore consider the error material to the 2019 FTT Decision so as to require it to be set aside. Before dealing with the question of whether the decision should be remade or remitted to the FTT, we go on to deal with HMRC's late application to amend its Respondents' notice to add a new ground of appeal.

HMRC's late application for new ground of appeal

34. As well as the VAT registration issue, Mr Adelekun had also appealed against HMRC's decision in relation to his input tax in subsequent VAT periods: which reduced Mr Adelekun's repayment claim from £36,973.11 to £394.98 for VAT period 08/15 and reduced his input tax in respect of the VAT accounting periods 11/15 and 03/16 to nil. The FTT considered that, in essence, this part of the appeal raised the following question (FTT [2]): were the supplies of various services, and specifically the supply of the use of cars in the UK, subject to VAT or were they to be treated as being only part of, or ancillary to, his main business services which were predominantly supplied to persons outside the UK?

35. In relation to this, the FTT discussed the relevant European Court case-law in *Card Protection Plan v Commissioners of Customs and Excise* 1998 [1999] STC 270 and *Levob Verzekeringen and OV Bank v Staatssecretaris van Financien* [2006] STC 766, Case C-41/04 ECJ together with the summary principles extracted in *HMRC v The Honourable Society of Middle Temple* [2013] UKUT 0250 (TCC). It noted Mr Adelekun's evidence that the supplies of personal services were: "(1) Not billed separately to his clients, (2) Were not advertised as being available to his clients in accordance with a specified tariff, (3) Were provided with the sole aim of building goodwill with his clients, and as part of normal business relationships in the South African and Nigerian business environments, (4) Were entirely subsidiary in nature to his main supplies of business consultancy services". The personal supplies (which it had described earlier at FTT[14] (set out at [14] above) "… were only available as an adjunct to his normal consultancy services". The FTT was in no doubt from the facts it found that the business consultancy activity and the supply of the personal services were economically a single transaction, that such supplies were supplied only as an adjunct to, and a facilitator for, Mr Adelekun's main consultancy services and that it would be artificial to split them (FTT [39] – [42]).

36. The FTT accordingly concluded (at [51]) that:

> "the personal services supplied, such as the provision of cars in the UK, should be treated as part of a single supply of Mr Adelekun's business consultancy services and should therefore be treated in the same way for VAT purposes as those business consultancy services, and …All input VAT incurred by Mr Adelekun on the provision of the personal services should be recoverable in the normal manner."

37. Neither party before us seeks to appeal against the FTT's conclusion that the personal services supplied and business consultancy services were to be treated as a single supply. However as mentioned above, HMRC consider that conclusion did not dispose of all of the issues before the FTT. They seek permission, in their application of 21 May 2020, to add, out of time, a new ground to the Respondents' notice they filed on 14 November 2019, to argue that the FTT erred in law because it failed to determine the lawfulness of elements of the Respondents' decisions under appeal. In summary, HMRC refused input tax amounts for periods 08/15, 11/15 and 03/16 variously because: 1) many invoices were addressed to a third party, and were not supplies falling within VATA 1994 section 24(1) as they did not evidence supplies *to* Mr Adelekun 2) there was a lack of evidence that the supplies related to Mr Adelekun's business. Following the FTT's decision in Mr Adelekun's favour on the composite supplies issue, with the exception of certain invoices, principally related to car hire, HMRC continue to resist Mr Adelekun's repayment claims.

38. HMRC submit the tribunal should exercise its discretion to extend the time limit. The relevant time limit under Rule 24 of Tribunal Procedure (Upper Tribunal) Rules 2008 expired on 14 November 2019 which meant the delay was just over 6 months

(HMRC filed its application on 21 May 2020). HMRC's explanation for the delay is that they had interpreted the 2019 FTT Decision as making a determination in principle which left open the particular outcome on the input tax amounts. That position was reflected in HMRC's letter of 9 September 2019. However, Mr Adelekun's reply of 7 October 2019 to that letter maintained the FTT had resolved all the disputed invoice issues in his favour. HMRC instructed new counsel in November 2019 and made enquiries in early 2020, further to counsel's request seeking to establish the scope of the original appeal. Counsel was forwarded Mr Adelekun 7 October 2019 letter on 11 March 2020. Taking account of disruption to work schedules caused by COVID-related restrictions and the Easter break, HMRC submit the application to admit a new ground was made a reasonable time thereafter on 21 May 2020.

39. Mr Adelekun opposes the application, because it is unjustifiably late given the legal resources HMRC has at its disposal and not least because, as Ms Bailey submits on his behalf, the ground ought properly to have been raised by way of an application to the FTT for permission to appeal.

40. We structure our consideration by reference to the framework suggested in *Denton v TH White* [2014] EWCA Civ 9106 (summarised in *Martland v HMRC* [2018] UKUT 0178 (TCC) (at [44] to [45]) rather than, as HMRC suggested, the one suggested in *Data Select v HMRC* [2012] STC 2195 at [34] (in summary: the purpose of the time limit, the length of delay, the impact on the parties of respectively granting or refusing the application). Accordingly, we consider 1) whether the breach is serious or significant 2) the reasons for the default 3) all the facts and circumstances taking into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

41. Even if we put aside the question of whether the application ought properly to have been first made to the FTT and assume that the new ground could be dealt with in a Respondents' notice, we consider the delay of 6 months is serious and significant. While we accept that some of the period of delay, that between March and May, is accounted for by disruption related to COVID restrictions, the explanation for the preceding period is without merit. To the extent HMRC thought there was an error of law, it ought to have been apparent to HMRC from the date on which the decision was issued. It was not dependent on the stance the appellant took. To the extent it was not clear whether that error of law might have necessitated an appeal, because it was thought Mr Adelekun agreed with HMRC, then it became clear by 14 October 2019, he did not so agree, given his letter of 7 October 2019 and furthermore that an appeal was on foot, permission having been granted.

42. As to the wider circumstances, HMRC argue it is in both parties' interests that the outstanding matters are resolved given we are already hearing a substantive appeal and that it would not be proportionate in time and costs for Mr Adelekun to have to lodge a new (out of time appeal). However, we note Mr Adelekun does not regard HMRC's

application is in his interest. He argues that the FTT's conclusion dealt with all the input tax claims, and in particular that as there was a composite supply that then resolved all of the disputed input tax claims for period after he was VAT registered in his favour.

43. Taking account of the absence of any good explanation for the serious and significant delay and account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected, we consider HMRC's application must be rejected.

Set-aside and Re-making decision

44. The 2019 FTT's error in law, in incorrectly finding that no new evidence had been put forward to it that had not previously been put forward to the 2014 FTT, was material to the FTT's conclusion on the VAT registration issue. We therefore set aside that decision. As both parties addressed us on the significance of the documents that were overlooked and neither party suggested that we should remit the matter back to the FTT, we consider we should remake the 2019 FTT Decision.

45. The issues under appeal before the 2019 FTT included HMRC's decision to amend Mr Adelekun's effective date of registration to 20 July 2012 notified in a letter dated 17 January 2017. Although this was not considered in any detail by the 2014 FTT or 2019 FTT, as the supplies put forward by Mr Adelekun were to non-UK business customers and there is no suggestion VAT was charged to customers (consistent with the place of supply being the relevant non-UK countries in which the business customers are based), the relevant part of Schedule 1 of the Value Added Tax Act 1994, which deals with liability and entitlement to registration in respect of any such supplies would appear to be paragraph 10. We are reinforced in that view as HMRC takes issue with the lack of specificity of the supplies and do not make any point that the supplies are not taxable because of their non-UK location.

46. Paragraph 10(1) provides, so far as relevant, that if a person, who is not liable to be registered and is not already so registered "satisfies the Commissioners" that the person makes supplies (as further defined in Paragraph 10(2)) the Commissioners "shall, if he so requests, register him with effect from the day on which the request is made or from such earlier date as may be agreed between them and him." Subparagraph (2) provides that "A supply is within this sub-paragraph if— (a) it is made outside the United Kingdom but would be a taxable supply if made in the United Kingdom;…." Thus, even though supplies may take place outside the UK, the supplies may, assuming all the other conditions of paragraph 10 are met, enable a person to be VAT registered. The date of registration Mr Adelekun sought was not ultimately agreed by HMRC. They were not satisfied Mr Adelekun made "taxable supplies" (which we take to mean supplies, that would be taxable supplies if made in the United Kingdom) from the earlier date.

47. Mr Adelekun's position is that, taking account of the new documents he put forward they ought to have been satisfied. Ms Bailey took us through each of the documents emphasising how they confirmed the type and nature of the business activity Mr Adelekun was carrying out and the time at which he did so.

48. We have considered afresh those documents together with the undisputed findings of the 2014 FTT regarding the evidence that was before it. Our view is that the evidence is insufficient to show that the requisite taxable supplies were made in the relevant period. This is essentially for the same reasons the 2014 FTT was not persuaded and for the reasons HMRC advanced before us. In short, there is insufficient contemporaneous and specific evidence that taxable supplies were made in the relevant period. The evidence does not show as regards any specific supply the date the services was supplied, what consideration was paid for such service, and what the services comprised of, in order that it might be confirmed that the supplies were taxable.

> (1) The in-country agents' affidavit and witness statement only serve to confirm what was not in dispute, which is that Mr Adelekun carried out a project advisory business to overseas clients but the affidavit and witness statement do not provide any detail of specific supplies.
>
> (2) The project services agreements and contract concern periods after the relevant period and do not deal with whether taxable supplies were made in 2007-2012.
>
> (3) Lubbe's correspondence again confirms the general nature of what was provided but similarly does not provide any detail as to the specific supplies. Their provision of annual payment figures in the period does not remedy that deficiency.
>
> (4) The background findings in the 2016 FTT Decision on Mr Adelekun's income tax assessment confirm the general nature of Mr Adelekun's business but do not necessitate any finding that taxable supplies were made in the relevant period.

49. Ms Bailey argued that to the extent documents related to later period they were still relevant as they showed the business he was running, when he became registered, was the same as the business he was conducting previously. We have not been required to examine the detailed basis for Mr Adelekun's registration and consider whether that is correct and, in turn, whether it implies anything as regards the earlier period. In any case, to the extent the registration is based on more detailed and contemporaneous invoices having been provided it does not suggest that taxable supplies should be found in the absence of such documentation for the earlier periods.

50. We therefore remake the part of the 2019 FTT Decision which dealt with the registration issue to reach the same result; that HMRC's effective date of registration was correct, but so as to incorporate the reasons set out above.

51. As regards the remainder of the FTT Decision, no appeal was made by HMRC against the FTT's conclusion in Mr Adelekun's favour concerning whether certain personal services he provided together with project advisory services to overseas clients in a later period, when he was registered, comprised a composite supply. We do not consider that we should reopen that issue. Although we have not reviewed, nor were we addressed on the correctness of that conclusion, our remade decision retains the FTT's conclusion. Barring the input tax of certain invoices mostly related to car hire services provided to Mr Adelekun in order for him to provide a car to his overseas client which HMRC have repaid, the parties continue to disagree however as to the scope of the FTT Decision. Despite the fact we refused HMRC's permission to add a new ground late largely because of the inadequate explanation for the delay, we consider we should resolve any ambiguity in our remade decision, especially given both parties had the opportunity to address us on the point. Section 12(1) and (4) Tribunals, Courts and Enforcement Act 2007 enable us, having identified an error on a point of law in the FTT Decision (viz incorrectly finding that no new evidence had been put forward to it that had not previously been put forward to the 2014 FTT), to remake the FTT Decision and to make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision.

52. A schedule of invoices relevant to the particular VAT periods in issue (coming to £8,266.55 in total) appears as an appendix to this decision together with a summary of the reason(s) why HMRC denied the input tax claim.

53. A large number of invoices were refused because they were addressed to a third party rather than Mr Adelekun. HMRC's case before the FTT and before us was that the invoices related to supplies that were supplied to a third party. Even if these were paid by the Mr Adelekun the amounts could not be reclaimed by Mr Adelekun as they were not supplies made *to* him as required by section 24(1) VATA 1994 which provides so far as relevant:

> "24.— Input tax and output tax.
>
> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services;
>
> …
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.
>
> …"

54. Regarding the remainder of the invoices HMRC say: Mr Adelekun did not supply evidence to substantiate that the sums claimed were for services with a direct and immediate link to the business, as had been requested. For example, there was a lack of evidence to explain why two hotel stays were directly and immediately linked to the

business and there were failures to evidence an onward taxable supply in other cases. Two of the invoices dated from 2011, and consequently before Mr Adelekun was registered for VAT on 20 July 2012.

55. Ms Bailey highlights that the FTT were taken to the invoices, which included invoices addressed to third parties, that Mr Adelekun was cross-examined at length and also answered the FTT's detailed questions. She submits the FTT's conclusion that the personal services provided comprised a composite supply conclusively resolves that Mr Adelekun was entitled to his input tax reclaims irrespective of whether the invoices were addressed to third parties. That there was a composite supply including the personal services also meant the issues over evidencing an onward taxable supply fell away. Ms Bailey depicts thus HMRC's position refusing payment of the invoices as backdoor attack on the FTT's conclusion on composite supplies. The FTT must be taken to have accepted the full explanation Mr Adelekun gave and as to the reasons for the hotel stay and it is too late to take issue with those invoices now. She accepts the repayment of the input tax on the 2011 invoices is dependent on the registration issue being resolved in Mr Adelekun's favour.

56. There is no dispute that the amounts of input tax shown on the schedule were before the FTT for determination on whether they should be repaid. We were not referred to the underlying invoices. HMRC say it is sufficient for our purposes to see the basis on which the HMRC officer turned down the repayment requests. While Mr Adelekun has referred to explanations given in the hearing in relation to the invoices, there was no transcript and no note of hearing was put before us. In the context of remaking a decision we consider we can deal with remaining matters in the following way, respecting the scope of the FTT's Decision on composite supplies which has not been challenged by HMRC:

> (1) Regarding the third-party invoices we agree with HMRC that a conclusion that Mr Adelekun was providing a composite supply of advisory services and various personal services (which we acknowledge were found to include providing legal assistance) does not necessitate accepting that a supply of services was made to Mr Adelekun. The majority of the third-party invoices are for legal services provided by a lawyer or firm (Lester Dominic and Legal SGH Martineau LLP) to another person where Mr Adelekun has reimbursed the legal fees. The fact Mr Adelekun has reimbursed those fees does not mean the lawyer/law firm has provided a taxable supply to Mr Adelekun – the supply is provided to the client. We conclude that in each case where the input tax appears on invoices which are addressed to third parties, Mr Adelekun's claim for repayment must be disallowed.
>
> (2) Where HMRC have refused an input tax claim because of lack of evidence as to an onward taxable supply, we note these invoices (from

Taylors, Anderson Wilde Harris and the Aitcheson Rafferty ones addressed to Mr Adelekun as opposed to a third party) relate to property valuations and surveys and that the FTT noted at [14] of its decision that Mr Adelekun's personal services included helping the individuals to find suitable investment properties. We consider the FTT's conclusion on composite supplies must be taken to include that there was the requisite onward taxable supply to which the input tax was directly related. The input tax on those such invoices (provided they are addressed to Mr Adelekun) should therefore be allowed.

(3) The input tax on the remaining invoices fall to be disallowed. Regarding the hotel stays there is no evidence before us from which we can be satisfied as the reasons why the stays were directly linked to Mr Adelekun's business. Mr Adelekun makes no point on the invoice said to be a duplicate invoice and the 2011 dated invoices are not in issue given our conclusion upholding the effective date of registration of 20 July 2012.

Disposition

57. We set aside the 2019 FTT Decision having identified an error of law in the FTT overlooking certain documents and reaching a finding that it was not open to it to make. When we remake the decision to take account of the documents that were overlooked, Mr Adelekun's appeal against HMRC's change to his effective date of registration to July 2012 is nevertheless dismissed. His appeal against refusals of input tax repayment in subsequent periods is allowed in part.

JUDGE SWAMI RAGHAVAN

JUDGE GUY BRANNAN

RELEASE DATE: 7 August 2020

Appendix				
Invoice date	**Invoice Title**	**Return making Claim**	**Refusal Decision Date(s)/ Follow up Letters**	**Reason(s) for Refusal**
		VAT Period **08/15**		
September 12	Lester Dominic	VAT 200.00	HMRC letter 26.05.16 & 09.09.19	Third party invoice
January 13	Lester Dominic	VAT 100.00	HMRC letter 26.05.16& 09.09.19	Third party invoice
April 13	Lester Dominic	VAT 400.00	HMRC letter 26.05.16& 09.09.19	Third party invoice
April 13	Lester Dominic	VAT 403.33	HMRC letter 26.05.16& 09.09.19	Third party invoice
August 13	Lester Dominic	VAT 275.00	HMRC letter 26.05.16& 09.09.19	Third party invoice
December 13	Lester Dominic	VAT 150.00	HMRC letter 26.05.16& 09.09.19	Third party invoice
January 14	Lester Dominic	VAT 200.00	HMRC letter 26.05.16& 09.09.19	Third party invoice

October 14	Lester Dominic	VAT 400.00	HMRC letter 26.05.16& 09.09.19	Third party invoice
		Subtotal 2128.33		
April 14	Prin Hayley	VAT 56.53	HMRC letter 26.05.16& 09.09.19	No evidence of reason for hotel
April 14	Best West	VAT 19.17	HMRC letter 26.05.16& 09.09.19	No evidence of reason for hotel
November 14	Taylors	VAT 130.00	HMRC letter 26.05.16& 09.09.19	No evidence of onward taxable supply
October 14	Aitcheson Rafferty	VAT 400.00	HMRC letter 26.05.16& 09.09.19	No evidence of onward taxable supply
May 15	Aitcheson Rafferty	VAT 130.00	HMRC letter 26.05.16& 09.09.19	No evidence of onward taxable supply
June 15	Aitcheson Rafferty	VAT 250.00	HMRC letter 26.05.16& 09.09.19	No evidence of onward taxable supply and third party

June 15	Aitcheson Rafferty	VAT 250.00	HMRC letter 26.05.16& 09.09.19	No evidence of onward taxable supply and third party invoice
June 15	Aitcheson Rafferty	VAT 125.00	HMRC letter 26.05.16& 09.09.19	No evidence of onward taxable supply and third party invoice
August 15	Anderson Wilde Harris	VAT 110.00	HMRC letter 26.05.16 & 09.09.19	No evidence of onward taxable supply
		Subtotal 1470.70		
		Total 3599.03		
		VAT Period **11/15**		
24.11.11	Crystal Home Improvements	VAT 478.83	HMRC letters 28.08.18 & 10.12.18	2011 therefore before VAT registered
08.10.15	Lester Dominic	VAT 300.00	HMRC letters 28.08.18 & 10.12.18	Third party invoice

September 2011	David Turner	VAT 180.00	HMRC letters 28.08.18 & 10.12.18	2011 therefore before VAT registered No onward taxable supply
	Legal SGH Martineau LLP	VAT 260.00	HMRC letters 28.08.18 & 10.12.18	Third party invoice
	Legal SGH Martineau LLP	VAT 641.69	HMRC letters 28.08.18 & 10.12.18	Third party invoice
	Legal SGH Martineau LLP	VAT 600.00	HMRC letters 28.08.18 & 10.12.18	Third party invoice
	Legal SGH Martineau LLP	VAT 301.00	HMRC letters 28.08.18 & 10.12.18	Third party invoice
	Legal SGH Martineau LLP	VAT 117.00	HMRC letters 28.08.18 & 10.12.18	Third party invoice
	Legal SGH Martineau LLP	VAT 451.00	HMRC letters 28.08.18 & 10.12.18	Third party invoice

	Legal SGH Martineau LLP	VAT 203.00	HMRC letters 28.08.18 & 10.12.18	Third party invoice
	Legal SGH Martineau LLP	VAT 255.00	HMRC letters 28.08.18 & 10.12.18	Third party invoice
		Total 3787.52		
		VAT Period 03/16		
24.03.16	Lester Dominic	VAT 880.00	HMRC letters 28.08.18 & 10.12.18	Duplication of amount and third party invoice
		Total 880.00		