



UT Neutral citation number: [2022] UKUT 252 (TCC)

UT (Tax & Chancery) Case Number: UT/2021/000172

**Upper Tribunal
(Tax and Chancery Chamber)**

Hearing venue: Video hearing on 25 July 2022

Judgment given on 16 September 2022

Before

**UPPER TRIBUNAL JUDGE ANDREW SCOTT
UPPER TRIBUNAL JUDGE JENNIFER DEAN**

Between

**THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE AND CUSTOMS**

Appellants

and

MOHAMMED ZAMAN

Respondent

Representation:

For the Respondent: Mr M. Zaman represented himself.

For the Appellants: Mr R. MacLeod, Advocate for the Office of the Advocate General.

DECISION

Introduction

1. This is an appeal by HM Revenue and Customs (“the appellants”) against a decision of the First-tier Tribunal (Tax Chamber) (the “FTT”) released on 24 June 2021 (the “Decision”).
2. By the Decision, the FTT allowed Mr Zaman’s appeal against a Personal Liability Notice (“PLN”) issued to him by HMRC on 26 October 2018 following an assessment to VAT (“the assessment”) against Zamco Limited (“Zamco”) of which Mr Zaman was the sole director.
3. The assessment for £1,929,592 to Zamco was issued on 30 May 2018 in respect of under-declared VAT in the periods 02/16 to 08/17 on the basis that Zamco’s supplies of alcoholic goods in the relevant period took place in the UK and were therefore subject to VAT. Zamco did not appeal against the assessment.
4. On 23 October 2018 HMRC charged a penalty to Zamco, in the sum of £1,736,632.80, under paragraph 1 of Schedule 24 to the Finance Act 2007, for the inaccuracies in its VAT returns in the relevant period. The penalty was not appealed.
5. The appellants appeal with the permission of the FTT. References to numbers in square brackets are to paragraphs of the Decision unless otherwise specified.

The decision of the FTT

6. The FTT (at [10]) recorded the agreed issues before the Tribunal as:

“(1) whether Zamco’s VAT returns in the relevant period contained inaccuracies amounting or leading to understatement of liability to VAT (the “‘inaccuracy’ issue”); the issue was essentially whether all of Zamco’s supplies in the relevant period were in the UK for VAT purposes - if so, its VAT returns contained such inaccuracies; if not, they did not;

(2) if Zamco’s VAT returns did contain such inaccuracies, whether the inaccuracies were deliberate on Zamco’s part (the “‘deliberate’ issue”); and

(3) if they were, whether the inaccuracies were attributable to Mr Zaman.

11. The Tribunal considered whether a fourth issue was also before it, namely whether the amount of the penalty (and so of the PLN) was correct.”

7. It noted (at [79]):

“Mr Zaman’s position was:

(1) Zamco was trading bond to bond abroad

(2) Zamco did not charge VAT to its customers; nor did its suppliers charge VAT to it

(3) Since there was no VAT involved, there should be no assessments

(4) Mr Zaman did nothing deliberately wrong

(5) HMRC have failed to show that Zamco was trading in the UK; all they have showed is that cash was deposited with Zamco at bank branches in the UK

(6) Officer Begg could not say where in any detail Zamco was trading in the UK.”

8. At [81] the FTT identified the evidence to be considered in determining the place of supply of Zamco's alcohol sales for VAT purposes as including:

- “(1) Mr Zaman's evidence that the goods were in warehouses in France and Germany at the point of sale;
- (2) the documentation, which broadly supports the conclusion that the goods were in warehouses in France and Germany at the point of sale;
- (3) the fact that Zamco did not appeal the assessment, which was raised on the basis that the place of supply was the UK;
- (4) the fact that payment for Zamco's sales was made by deposit of Sterling cash at bank branches in the UK;
- (5) the fact that one of the warehouses, and two of Zamco's counterparties, had UK connections e.g. a director resident in the UK (see [25(3)], [26(6)] and [27(1)(d)] above);
- (6) text messages from Mr Ahmed's phone that HMRC alleged (before the magistrates court) were indicative of his involvement in the illicit alcohol market.”

9. The FTT also recognised that relevant inferences could be drawn from all the circumstances.

Findings of fact

10. The FTT found that Mr Zaman's evidence was inconsistent, lacked detail and it concluded (at [83] and [85]):

“We would be wary of putting significant weight on Mr Zaman's evidence about the place of supply (or indeed other matters) unless (i) corroborated by evidence we consider credible or (ii) clearly in line with “common sense” and what we consider inherently likely...Our impression was that we were being given “minimum” information; questions were not being answered fully...

we did not have confidence that Mr Zaman was always telling the “whole” truth to the best of his recollection.”

11. The FTT placed no weight on the fact that Zamco did not appeal the assessment ([88] & [89]).

12. At [91] the FTT concluded it was likely that there was illicit activity in Zamco's supply chains. The FTT took the view that the purpose of Zamco's involvement in the supply chains was to obscure illicit activity in the supply chain, but that Zamco itself was not the initiating or driving force in the illicit activity.

13. At [96] the FTT concluded that, as a matter of law:

“We thus find that it has not been proven, on the balance of probabilities, that the alcoholic goods in question were removed to the UK by Zamco or under its directions; and so, for the same reason, it is not proved that the place of supply of all of Zamco's supplies in the relevant period was the UK, such that its VAT returns in that period contained inaccuracies. Given the burden of proof on HMRC, this means that we have to allow the appeal - and, strictly speaking, need not consider the other issues in this appeal.”

14. The FTT's conclusion on the place of supply issue was sufficient to determine the proceedings in Mr Zaman's favour, but the FTT went on to consider the other arguments that had been advanced in relation to the “deliberate” issue.

The grounds of appeal and appellants' notice

15. Permission to appeal was granted on two grounds:

- (1) Ground 1 – whether the FTT erred in its approach to the burden of proof because it held that the burden rested solely with HMRC; or, in the alternative
- (2) Ground 2 – whether the FTT erred in its evaluation of the evidence because it failed to draw the correct inference from its findings of fact.

16. Neither the appellants nor the respondent make any challenge to the FTT's underlying factual findings.

Ground 1

Authorities and principles

17. The UT and Court of Appeal judgments in *Award Drinks Ltd v HMRC* [2020] UKUT 0201 (TCC) and [2021] EWCA Civ 1235 concerned the distinction between a legal and an evidential burden of proof in the context of a disputed VAT assessment.

18. In so far as is relevant, the UT made the following comments at [30] and [36] (cited with approval by the Court of Appeal), referring to *Brady v Group Lotus Car Companies PLC* [1987] 3 All ER 1050 and *Ingenious Games and others v HMRC* [2015] UKUT 0105 (TCC):

“The critical point was that the legal burden of proof and the evidentiary burden of proof were distinct...

Two principles emerge from *Ingenious* and *Brady*: (1) The burden of showing an assessment is incorrect remains on the taxpayer throughout the appeal. This is so even if the circumstances of the case are such that there either must, or may, have been some fraudulent conduct on the part of the taxpayer which is relevant to the tax liability...”

19. In *Award Drinks*, the Court of Appeal stated at [37]:

“*Brady* was a case about direct taxation, not VAT, but I can see no reason why the same principles should not apply to a "best of judgment" assessment to VAT made under section 73 of VATA 1994. The guidance given by Carnwath LJ in the *Khan* case may have been technically obiter on this point, but he regarded the position on an appeal against such an assessment as "well-established" and cited *Brady* with apparent approval. In my respectful view, he was clearly right to do so.”

20. It is, therefore, well-established law that on an appeal from an assessment to VAT the assessment stands good unless the appellant is able to produce evidence to show that it is wrong.

The error of the FTT

21. HMRC have always maintained that they bore the burden of proof in relation to the validity of issuing the PLN. They also accepted that Mr Zaman could appeal the PLN on the basis that the underlying assessment and penalty were wrongfully issued (see *Bell v Revenue and Customs Commissioners* [2018] UKFTT 225 (TC)).

22. However, HMRC submitted that the FTT erred in its failure to apply a shift in the evidential onus of proof in circumstances where Mr Zaman positively asserted before the FTT that there were no “vatable supplies”. At that point, HMRC submitted, Mr Zaman assumed the evidential burden of displacing the assessment, and, if he failed to discharge that evidential burden, the penalty would, accordingly, stand. The challenging of the VAT assessment in the context of an appeal against a PLN

did not, and sensibly could not, affect the applicability in the PLN proceedings of the rules governing the way in which assessments to VAT are challenged. Whether an assessment to VAT was challenged directly (which, as we note above, did not happen in this case as Zamco brought no such appeal) or whether it was challenged as a defence to the bringing of penalty proceedings relating to the original assessment could not affect who bears the evidential proof in relation to any challenge brought to the VAT assessment.

23. HMRC submitted that the FTT erred in treating the appeal as a penalty appeal in which the legal and evidential burden of proof remained with HMRC throughout in relation to all issues. Once Mr Zaman challenged the issuing of the PLN on the sole ground that the assessment to VAT on Zamco was wrong, the FTT should have approached the appeal by considering firstly whether HMRC had established that the PLN was validly issued and, if that burden was discharged, by then considering whether Mr Zaman had established that the assessment to VAT on Zamco was wrong. In relation to that latter issue, the evidential burden was on Mr Zaman to establish that the assessment should be discharged in the same way as it would have been on Zamco to establish that it had been overcharged by the assessment if it had decided to bring an appeal against that assessment.

Ground 2

24. The arguments advanced in support of the second ground of appeal can be summarised shortly.

25. Relying on *Advocate General for Scotland v Murray Group Holdings Limited* 2016 S.C. 201, HMRC submitted that no reasonable tribunal could have failed to conclude, as a matter of inference based on primary findings of fact and evaluating the whole circumstances, that the place of Zamco's supplies was in the UK: (emphasis added)

“where the First-tier Tribunal has made a fundamental error in its approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by **arriving at a decision that no reasonable tax tribunal could properly reach**. In such cases we conceive that the Court of Session and the Upper Tribunal have power to interfere with the decision of the First-tier Tribunal as disclosing an error on a point of law (*Edwards v Bairstow*, per Lord Radcliffe, p 36).”

26. We were taken to a number of passages within the Decision which, HMRC submitted, support its submission that the FTT erred in its evaluation of the evidence. By way of example, the FTT having found that: (i) Zamco was involved in illicit activity; (ii) the illicit activity involved supply chains which operated (partly) in the UK; and (iii) the Appellant knew about this, the FTT nonetheless went on to infer that Zamco did not make supplies in the UK despite its concerns about the truthfulness of Mr Zaman's evidence and its finding that there were unusual features present in the business.

27. HMRC submitted that the FTT erred in failing to give sufficient weight to factual issues and erred by postulating on what did or did not happen to certain goods and Zamco's role in the supply chain at [95]:

“The facts that (i) payment was made by delivery of cash to the UK, and (ii) a few counterparties had UK connections, are in themselves insufficient to persuade us, on the balance of probabilities, that the goods made their way from French and German warehouses to the UK at, or before, Zamco on-sold them - they are not facts relating to the location of the goods. Similarly, our finding, by inference from the circumstances, that there was illicit activity somewhere in the supply chains, is not specific enough to persuade us of the likelihood that the illicit activity was smuggling into the UK at or before the point of Zamco's sale. Rather, given the insubstantial role of Zamco in the supply chain, we find it more likely that “nothing at all” happened to the goods during the very short period of Zamco's ownership: and so, given that Zamco acquired them in French and German warehouses, the likelihood is that they remained there up to and at the point of Zamco's onward sale. As found at [91] above, we think it likely that Zamco's role in the supply chain was one of

“covering up” or obscuring illicit activity, rather than itself doing something more active such as organising smuggling into the UK.”

28. In those circumstances, HMRC submitted, the FTT erred in reaching its findings based on evidence which it had held to be unreliable.

Submissions of the Respondent

29. Mr Zaman maintained that Zamco was trading outwith the scope of UK VAT and no VAT was involved in the company’s transactions. On this basis the assessments were wrong, and the PLN unlawfully issued. The burden of proof was put on HMRC who could not prove their case. There was no evidence of fraudulent or deliberate conduct and the FTT reached the correct decision by a reasonable evaluation of the evidence and taking all facts into consideration.

30. Mr Zaman distinguished *Award Drinks* on the basis that there was no allegation of smuggling in the present appeal nor was there any evidence of wrongdoing.

The correct interpretation

Ground 1

31. The FTT performed a careful analysis of a number of transactions including the documentation pertaining to those transactions, cash movements, Zamco’s customers and suppliers and warehousing. Neither party made any criticism of this analysis.

32. At [63], the FTT identified that:

“Prior tribunals have decided that, on an appeal against a PLN, arguments can be brought against the underlying penalty, where that penalty has not been appealed by the company:

(1) In *Bell v HMRC*, the Tribunal agreed with Judge Kempster’s analysis in *Jason Andrew v HMRC* [2016] UKFTT 295 (TC) “and the conclusion that it cannot have been the intention behind the legislation to leave an unchallengeable company penalty” (at [160]).

(2) The Tribunal in *Hussain v HMRC* also agreed with this approach (at [12]), as did the Tribunal in *Jarvis v HMRC* [2020] UKFTT 54 (TC) at [24].”

33. At [75] the FTT directed itself:

“As this is a penalty appeal, HMRC bear the burden of proof to show that the PLN was validly issued. The standard of proof is the ordinary civil standard, being the balance of probabilities.”

34. However, in our judgment, HMRC are plainly right that, as per their submissions that we have set out above, if the challenge to the PLN was brought on the basis that the assessment to VAT on Zamco was wrong, the legal rules relating to the way in which the assessment could have been challenged by Zamco if it had appealed the assessment remain in play in any appeal against the PLN. As we set out above, it is well-established law that it is for the taxpayer to prove, by evidence, that an assessment to VAT issued by HMRC is incorrect. HMRC do not have that evidential burden and that cannot sensibly be affected by the fact that the challenge to the assessment occurs in satellite litigation where, as in this case, a penalty charged on Mr Zaman is sought to be defended on the basis that the assessment to VAT on Zamco was wrong. In our judgment, it is clear that the FTT lost sight of the fact that after establishing whether the PLN was validly issued, the evidential burden in relation to the assessment to VAT on Zamco shifted to Mr Zaman when he sought to positively challenge the

assessment as the sole basis on which the PLN was invalidly issued: see the FTT’s overall conclusion at [96] as to whether HMRC had discharged the burden of proof: (emphasis added)

“We thus find that it has not been proven, on the balance of probabilities, that the alcoholic goods in question were removed to the UK by Zamco or under its directions; and so, for the same reason, it is not proved that the place of supply of all of Zamco’s supplies in the relevant period was the UK, such that its VAT returns in that period contained inaccuracies. Given the burden of proof on HMRC, this means that we have to allow the appeal...”

35. Read together with the FTT’s other findings, we consider that [96] discloses an error of law in relation to the burden of proof. We also consider that this affected the way in which the FTT approached the appeal against the PLN in a materially relevant way.

Ground 2

36. For the reasons that we have given, HMRC’s appeal in relation to the burden of proof issue succeeds. In those circumstances, there is no need for us to address in any detail HMRC’s alternative *Edwards v Bairstow* challenge to the FTT’s evaluation of its factual conclusions.

37. We simply note, in considering the evaluation of the facts in the light of the conclusion we have just expressed, the relevant question for the FTT was whether Mr Zaman had discharged the evidential burden of proof in relation to the assessment. The problem with the FTT’s conclusion was not that its factual findings were wrong. Rather, it answered the question by reference to whether HMRC had discharged the burden of proof which, despite the FTT having expressed significant reservations about the reliability of Mr Zaman’s evidence, led it to find in his favour.

Disposition

38. For the reasons that we have given, the appellants have succeeded on Ground 1. The FTT erred in law by misdirecting itself and failing to recognise that the evidential burden lay with Mr Zaman in relation to his challenge to the assessment on Zamco. We consider that the error was material, and it follows, therefore, that we must set the Decision aside.

39. HMRC invited us to remake the Decision in such a way that Mr Zaman’s appeal against the PLN is dismissed. The FTT heard substantial evidence over the course of three days. We have not heard, or considered in detail, any of that evidence and in circumstances where the key issue is whether, on the basis of that evidence, Mr Zaman has discharged the evidential burden of challenging the assessment to VAT on Zamco, we consider it would be inappropriate for us to remake the Decision. In our view the proper course is to remit the case back to the same panel of the FTT for reconsideration in light of the conclusion we have reached. As we record above, neither party challenged any of the FTT’s underlying (or primary) factual findings and we should make it clear that the reconsideration of the appeal by the FTT is not an opportunity to ask the FTT to disturb those findings of primary fact or make new findings of primary fact.

Signed on Original

**UPPER TRIBUNAL JUDGE ANDREW SCOTT
UPPER TRIBUNAL JUDGE JENNIFER DEAN**

RELEASE DATE: 20 September 2022