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UT (Tax & Chancery) Case Number: UT/2023/00099

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

Hearing venue: The Rolls Building
London EC4A 1NL

*VAT – scope of grounds of appeal to the FTT – whether FTT jurisdiction supervisory or appellate – appeal dismissed*

**Heard on 22 October 2024**
**Judgment given on 14 January 2025**

**Before**

**JUDGE RUPERT JONES**
**JUDGE ANNE REDSTON**

**Between**

**FS COMMERCIAL LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Tim Brown, Counsel, instructed by Jurit LLP

For the Respondents: Howard Watkinson, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

## DECISION

### INTRODUCTION

1. This appeal concerns the decision of the Commissioners for His Majesty's Revenue and Customs ("HMRC" or "the Respondents") notified to FS Commercial Ltd ("the Appellant") on 6 February 2019 to assess it under s.73 Value Added Tax Act 1994 ("VATA") as follows:

    (1) a preferred assessment for £19,064,622 for periods 05/16 – 11/18 inclusive, on the basis of there being insufficient evidence to support the claims to input tax; and

    (2) an alternative assessment for £15,036,031 for periods 11/16 – 11/18 inclusive, on the basis of inadequate evidence of payment of consideration.

2. In the course of preparing for the substantive hearing of the Appellant's appeal before the First-tier Tribunal ("FTT") against the preferred assessment, the Appellant sought to include tens of thousands of invoices in its List of Documents. HMRC objected on the basis that the FTT's jurisdiction was supervisory, and that as those documents had not been before the HMRC decision maker, they were irrelevant to the substantive issue the FTT had to decide.

3. On 5 September 2022, the FTT held a preliminary hearing to decide the following two issues:

    (1) whether the FTT's jurisdiction in the appeal against the preferred assessment was appellate or supervisory; and

    (2) whether the Appellant was entitled to rely, at the substantive hearing, on invoices it did not provide to the HMRC decision-maker.

4. On 12 July 2023 the FTT issued a decision ("the FTT Decision") by which it determined both issues in HMRC's favour, holding that:

    (1) its jurisdiction as regards the input tax appeal was supervisory; and

    (2) the Appellant could not rely on invoices not provided to the HMRC decision-maker.

5. The Appellant was granted permission to appeal by the FTT on the following two grounds, in the alternative:

    (1) The FTT erred in law when it held that the Grounds of Appeal to the FTT ("the FTT Grounds") did not include, as one of the Grounds, that the Appellant had held valid VAT invoices at the time of HMRC's decision ("First Ground of Appeal").

    (2) The FTT erred in law when it decided that in the absence of a reference in the FTT Grounds by the Appellant to it holding valid invoices, the jurisdiction was supervisory ("Second Ground of Appeal").

6. In this Decision, references in square brackets ([]) are to paragraphs of the FTT Decision unless the context indicates that they refer to internal paragraphs of other documents. All legislation and case law is cited only so far as relevant to the issues we have to decide.

### BACKGROUND

7. The FTT set out the background to the appeal at [4]-[15]. In the following paragraphs we have also made reference to the correspondence between the parties which was provided in the Bundles for both hearings.

#### The period before the assessments

8. The facts about the period before the assessments can be summarised as follows:

(1) On 21 September 2018 the Appellant submitted its 08/18 VAT return ([4]). On 2 October 2018 HMRC Officer Steve Mills requested records from the Appellant in order to clear the repayment claimed by it for that VAT period, including any purchase invoices with over £1,000 input tax ([5]).

(2) On 8 October 2018, Mr Dave Clarke, director of the Appellant, replied by sending Officer Mills bank statements, a "VAT report (detailed)"; a supplier/ customer list ([6]) and eight supplier invoices, including one from Aspire Partnership Limited ("Aspire"), the Appellant's representative at the time. The bank statements showed numerous large transfers to an account "Ref: Verity", for example: £560,000 on 2 August 2018. Verity Ltd appeared as a supplier on the supplier list but no invoices had been produced from Verity Ltd ([6]).

(3) On 10 October 2018 Officer Mills asked the Appellant for the Verity invoices ([7]). The Appellant replied on 11 October 2018, saying that there were no invoices from Verity Ltd; these amounts related to a consolidated amount of invoices/VAT charged by its supplier, and there could be "between 800 and 1000 invoices from different suppliers" in relation to each of the Verity amounts ([8]).

(4) On 18 October 2018, Officer Mills emailed the Appellant saying that he needed to see the invoices making up the Verity supplies and asking for them to be provided ([9]).

**HMRC's letter of 7 January 2019**

9. On 7 January 2019, HMRC Officer Mills wrote to the Appellant as follows:

> "… Although I have requested information regarding your records, as yet I hold insufficient information to evidence the input tax deducted or payments made against those purchases.
>
> …
>
> At this stage I do not hold the basic records for FS Commercial since commencement. The bank statements provided only related to the one period and do not represent the full bank statements for the business. I will require the full business records and bank statements since commencement. With regard to those statements, although payment is shown as made to Verity, this cannot represent the actual evidence of payment. Verity you have clarified is a number of companies. A single payment therefore cannot represent payment to the individual companies that make up Verity.
>
> …
>
> Can I also repeat my request for a full account listing for Verity showing payments made since commencement of the business? I will also require a detailed makeup of the subsidiary companies that make up each Verity transaction and supporting invoices…
>
> …
>
> At present in the absence of records to substantiate the input tax claimed I will have to disallow all input tax claimed since the commencement of the business
>
> …
>
> If you would like to comment or give me any more information, please contact me by 29 January 2019 …If I do not hear from you by then, I will take this to mean that you agree with my calculations. I will then make assessments of the amount due and send you notice of those assessments…"

**Subsequent correspondence regarding provision of evidence**

10. On 21 January 2019, Aspire wrote to Officer Mills as follows:

> "3. I can confirm information pertinent to the August return is available. Please provide a schedule of records you wish to see in order to check the return and process the repayment.
>
> …
>
> 6. I am not able to accept your point that an entry on a bank statement cannot be accepted as actual evidence of payment. In terms of "Verity", Mr Clarke explained the rationale behind the consolidation of invoices for a variety of suppliers. It is not a single payment, rather a bank file uploaded to meet multiple suppliers - for administrative convenience.
>
> 7. For the purpose of checking the August return, I cannot see any reason why HMRC should request a full account listing for "Verity" since the commencement of the business in 2010.
>
> 8. There are no "subsidiary companies" that make up each Verity transaction, as FSC does not have any subsidiary companies.
>
> 9. What is meant by "a listing of all subsidiary companies made up by Verity"?
>
> 10. It is wholly unreasonable, unwarranted and indeed provocative to threaten my client with a disallowance of its input tax deduction under these circumstances. At the present time my client is having to deal with a prolonged PAYE/NIC enquiry (started in 2011 and subject to complex tribunal proceedings). These proceedings involve significant record production in terms of expenses records - the timeframe given for production of these records is June 2019. It is envisaged that many of the staff, including Mr Clarke, will be engaged in some capacity on locating records in an off-site storage facility. I would add that FSC is also the subject of a National Minimum Wage enquiry. The director is trying to run a business. It is unlikely that the records can be produced much before July 2019. Should you require confirmation of the directions in this case, please let me know."

11. Officer Mills responded on 25 January 2019; his letter included the following paragraphs:

> "6. As indicated within my letter of the 7th I would require evidence that a payment against a supply was made to the corresponding supplier. To date this has not been evidenced.
>
> 7. This would be covered with the evidence of payment as above.
>
> 8. And 9 [sic]. On 26th October 2018 Dave Clarke stated that Verity isn't a company but lots of individuals. I would require evidence of the invoices that make up these individuals and a full listing of them all.
>
> 10. Whilst I note your point that there is a further case that is time consuming, these are enquiries on the VAT situation with regard to FS Commercial. You will be aware that my initial approach regarding the records for this business commenced in October 2018. That timeframe strikes me as more than reasonable."

**The assessments**

12. On 6 February 2019, Officer Mills issued the notice of assessment. This stated:

> "I believe that you have not declared the correct amount of VAT due for the period shown on the enclosed schedule. I explained this in my letter dated 7 January 2019…As a result of these assessments, the total VAT due is £34,185,989."

13. In the course of the UT hearing we noted that this was incorrect, and the parties agreed. The total VAT due was *either* £19,064,622 under the preferred assessment, *or* £15,036,031 under the alternative assessment. However, nothing turns on that for the purposes of this appeal.

**Further correspondence**

14. Aspire wrote to HMRC on 8 February 2019 saying:

> "I can confirm that the records which you have requested are available. However, in view of the interest shown by HMRC into businesses under the common directorship of Mr Clarke, I would respectfully request that we arrange a suitable date and time when all the records relating to the above-named companies can be produced and reviewed."

15. Officer Mills replied on 14 February 2019 as follows:

> "I note the suggestion of a visit to see the records at the premises.
>
> As you are aware I initially enquired regarding a combined visit and the records in October. As such I would not wish to delay the production of the records any further. In the case of FS Commercial you will be aware assessments have been raised.
>
> On any assessments issued, I would be happy to look at the evidence again should it be produced within the normal assessment time limits."

16. The Appellant challenged the assessments by way of an email to HMRC dated 2 March 2019, attaching the following grounds of appeal:

> "The Assessment is overstated because the Appellant is entitled to claim a deduction for the input tax associated with its transactions in accordance with Section 24 - 26 of the VAT Act 1994. Accordingly, the Assessment plus interest accrued should be set aside. The Appellant's transactions for which input tax has been claimed are predominantly in relation to supplies of labour services from its UK suppliers and so, an input tax deduction is applicable in these circumstances as B2B services are being supplied for consideration. HMRC's grounds for making the assessment is based on its contention that no evidence of input tax deducted and payment has been provided to support the claim.
>
> *Schedule 11 of the VAT Act 1994 sets out the requirement to keep records, and to make those records available on request to an officer of HMRC.*
>
> The Appellant has made these records available.
>
> *Paragraph 6, Schedule 36 of Finance Act 2008 requires the Appellant to produce information at a place agreed by the Appellant and HMRC.*
>
> The Appellant has attempted to reach an agreement to produce the records on a reasonable basis by making them available at the Principle [sic] Place of Business.
>
> **Additional Information**
>
> …
>
> The case officer was invited to attend the Principle [sic] Place of Business on 13th February 2019 to inspect the business records. This meeting date was declined, and the Case Officer demanded that the records be sent to him directly.
>
> This request is wholly unreasonable, unrealistic and unjustified as the business records run into many hundreds of thousands of transactions and would have

taken a significant amount of time to produce. It is also doubtful if HMRC's Drop-box facility would have been able to cope with such a large volume of records.

The Appellant is willing to produce its records albeit on a reasonably required basis having regard to the objective of HMRC's enquiry which is to check the validity of the VAT re-claim.

On 8th February the Case Officer was offered alternative dates for a meeting during the week commencing 20th March 2019 at which time the records would be produced for inspection at the Principle [sic] Place of Business.

On the same date, the VAT assessments were received by the Appellant (dated 6th February 2019) to which this appeal relates."

**Review decision**

17. Officer Mills' decision to assess was upheld by statutory review dated 7 June 2019 ([14]); the statutory review letter included the following passages:

"**Introduction**

I refer to your representative's, Aspire Partnership, letter of 04 March 2019, which requested a statutory review be carried out in relation to HMRC officer Mills' decision that the input tax recovered by the company should be repaid to HMRC as the company does not hold sufficient evidence to support the recovery of the input tax claimed.

…

**Matters under dispute**

A decision has been issued that determines the input tax claimed by the company cannot be recovered as sufficient evidence has not been presented to demonstrate an entitlement to recover input tax. Also there has not been evidence of payment provided to show that any input tax incurred has been paid by the company.

Your representatives have stated that sufficient alternative evidence has been presented to allow recovery of the input tax. Your representatives have also stated that evidence of payment by the company for supplies received has been provided.

…

**The facts**

…

The records provided showed bulk payment details for the account "Verity" which you advised Officer Mills is a variety of labour providers and your representatives have stated is used for administrative purposes. Officer Mills has advised that the actual invoices that make up the "Verity" payments have not been provided meaning that the input tax relating to these supplies cannot be verified.

…

No further information or detail regarding the input tax claimed has been presented since the request for the review was received.

**What I have considered in my review**

…

> Your representatives consider that there has been sufficient evidence presented in the form of alternative evidence for the input tax claimed to be allowed and that the assessments raised should be withdrawn.
>
> …
>
> **Input tax**
>
> …
>
> Regulation 29(2) allows for a claim to be made for input tax despite not having an invoice if other evidence, as allowed by the Commissioners, is held to show VAT was charged.
>
> It is considered that the company does not hold a VAT invoice that is required to be provided as per Regulation 13 and that the information provided to date does not amount to sufficient alternative evidence to support any claim for VAT to be recovered as input tax of the company.
>
> …
>
> The lack of evidence to support the input tax claimed is sufficient to deny the claims that have been made. The decision made here is that HMRC does not have sufficient alternative evidence that can allow a claim to input tax to be made by the company.
>
> As HMRC has not been provided with such evidence I am satisfied that Officer Mills is correct to deny the input tax claimed.
>
> **VAT assessment**
>
> I am satisfied that Officer Mills was correct to raise an assessment as the company has not produced satisfactory evidence to support the input tax that has been claimed.
>
> …
>
> **The evidence I have seen**
>
> As noted above, I have considered the evidence that has been provided by representatives and I have also considered the various correspondences [sic] between your representatives and Officer Mills…"

## The Appellant's grounds of appeal to the FTT

18. The Appellant's Notice of Appeal to the FTT, dated 24 June 2019, said that the "desired outcome" was that "we would like the Tribunal to vacate the assessment". The FTT Grounds were attached and read as follows:

> "1. These are the grounds on which the Appellant notifies its appeal to the Tribunal against the decision made by the Respondent on 7th January 2019.
>
> 2. By that decision, the Respondent disallowed the Appellant's input tax claimed since commencement of the business. The decision did not reference the legislative basis on which it was made.
>
> 3. The Appellant appeals to the Tribunal on the grounds that the claim for input tax is valid and correctly due.
>
> 4. The Respondent's decision was issued on 7th January 2019 based on the Investigating Officer's view that he had not been supplied with enough evidence of the input tax deducted for the entire trading history of the Appellant.
>
> 5. The Assessment relevant to this decision is dated 6th February 2019 which related to periods 05/16 to 11/18.

6. The Respondent has been invited to inspect the business records at the Principal Place of Business. This invitation was declined on the same day that the assessment for £34,185,989 was received in the post by the Appellant and again on 14th February 2019.

7. It is the Appellant's stated position that the Respondent's decision to deny a VAT input tax claim is incorrect because there is evidence to demonstrate that:

a. The Appellant correctly charges VAT on its supply made to customers. This charge meets the definition of output tax at Section 25 of the VAT Act 1994.

b. The supply included VAT which meets the definition of input tax at Section 24 of the VAT Act 1994 and, therefore, the claim for a deduction should be allowed in full.

c. The Appellant holds evidence to demonstrate that it receives payment for the supply that it makes to customers in the form of a bank account into which payments are deposited and has made this evidence available to the Respondent.

d. The Appellant holds evidence that its supply chain is valid and has correctly been charged VAT relevant to the supply of labour services and has made this evidence available to the Respondent.

e. The Appellant holds evidence that it received a supply of taxable services for which it made payment which included an element associated with VAT and has made this evidence available to the Respondent.

f. The Respondent incorrectly states that "no evidence" has been provided which is absolutely not the case. The Appellant cooperated with providing information, however due to an unreasonable amount of records being requested the Appellant requested that evidence be reviewed at the Principle [sic] Place of Business.

g. Having regard to these facts there are no valid grounds for the Respondent to deny the reclaim of VAT input tax.

8. The Appellant requests the Tribunal to quash the Respondents' decision for the reasons set out in these grounds of appeal."

**The FTT's findings and conclusions**

19. The FTT Decision included the following findings:

(1) The FTT Grounds did not state that valid invoices were held by the Appellant at the time of submitting the relevant VAT return; they were instead "entirely predicated on the absence of such invoice". Reliance on invoices as a ground of appeal was first raised in a letter dated 13 December 2020, after the Appellant had changed its advisers from Aspire to Duncan Lewis Solicitors ([40]-[44]).

(2) The decision made by Officer Mills refusing the right to deduct VAT was made on the basis that the Appellant had not provided VAT invoices. In the absence of valid VAT invoices, Officer Mills exercised the discretion conferred on him by Reg.29 VATR and did not accept that the Appellant had provided HMRC with sufficient alternative evidence ([45]).

(3) The correct approach to be followed was that in *Scandico Ltd v HMRC* [2017] UKUT 0467 (TCC) ("*Scandico*"), which was binding on the FTT, not the two-stage test in *London Wiper Limited v HMRC* [2011] UKFTT 445 TC ([46] – [47]).

(4) The Tribunal should only address the HMRC decision that was before it, viz. the decision that, in the absence of VAT invoices, HMRC were not prepared to exercise their discretion to accept the alternative evidence provided by the taxpayer, and the test the FTT applies in reviewing that decision is that set out in *Kohanzad v Customs & Excise Commissioners* [1994] STC 967 ("*Kohanzad*"), namely whether the officer in question had acted as no reasonable officer could have acted. The FTT's jurisdiction in the appeal was therefore supervisory ([48]).

(5) The Appellant had accepted that if this was the position, it could only rely on evidence that was before Officer Mills when he made his decision. In consequence, the Appellant could not rely on the Verity invoices as these were not provided to Officer Mills before he issued the assessment ([49]).

20. Both preliminary issues were therefore determined in HMRC's favour ([50]).

**THE LAW**

21. The FTT set out the relevant legislation, which was not in dispute, at [16] – [26]. We summarise the relevant provisions below, together with related case law. The case law relevant to Ground 2 is at §81ff below.

**European law**

22. The European source of VAT legislation is the Principal VAT Directive 2006/112/EC ("PVD"). Under Article 2(1), supplies of goods and services by a taxable person acting as such are chargeable to VAT.

23. A supplier charges "output tax" on the supplies it makes and can then deduct the "input tax" on the supplies it receives under Articles 167-168; other Articles govern how the right to deduct is to be exercised.

24. Article 178 provides:

> "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 Articles 220 to 236 and Articles 238, 239 and 240; …"

25. Article 180 provides that Member States may authorise a taxable person to make a deduction which he has not made in accordance with e.g. Article 178, and under Article 182 Member States are to determine the conditions and detailed rules for applying Article 180.

26. Chapter 3 of the PVD sets down the invoicing requirements for the VAT system. Article 220 requires that a taxable person making a taxable supply must (subject to specific exceptions) ensure that an invoice is issued in respect of it. Article 226 then sets out the mandatory contents of invoices issued pursuant to Article 220. Under Article 242 every taxable person "shall keep accounts in sufficient detail for VAT to be applied and its application checked by the tax authorities".

**Domestic statute and secondary legislation**

27. The PVD is given effect domestically by VATA and the VAT Regulations 1995 ("VATR"). VATA and the VATR are EU-derived domestic legislation, as defined by s.1B(7) of the European Union (Withdrawal) Act 2018 ("EUWA"). Section 2 of EUWA provides that EU-derived domestic legislation, as it had effect in domestic law immediately before IP completion day (i.e., 31 December 2020) continues to have effect in domestic law on and after that day.

28. Section 4 VATA provides for the general charge to VAT on supplies of goods and services. Section 24 VATA defines "input tax" and "output tax". Section 24(6)(a) VATA provides that regulations may provide for VAT to be treated as input tax:

> "...only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;"

29. Sections 25 and 26 VATA then provide for "input tax" to be deducted from "output tax" for each VAT accounting period. Section 25(6) provides that a deduction for allowable input tax under s.25(2) and payment of a VAT credit shall not be made or paid except on a claim made in such manner and at such time as may be determined by or under regulations. The relevant regulations are the VATR.

30. Paragraph 2A of Sch.11 to VATA provides the power to make the regulations in respect of VAT invoices. Paragraph 4(1) of Sch. 11 provides that HMRC may as a condition of allowing or repaying input tax to any person, require the production of such evidence relating to VAT as they may specify.

31. Regulation 13(1) VATR requires that where a registered person makes a taxable supply in the UK to a taxable person it must provide a VAT invoice. Regulation 14(1) VATR then sets out the required contents of a VAT invoice (such that it will be valid) with a number of particulars specified in (1)(a)-(p).

32. Regulation 29 VATR provides:

> "(1) …save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim on the return for the first prescribed accounting period in which he holds that document or invoice.
>
> …
>
> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of-
>
> (a) a supply from another taxable person, hold the document, which is required to be provided under regulation 13;…
>
> …
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, or provide, such other evidence of the charge to VAT as the Commissioners may direct."

33. Regulation 29(2)(a) VATR therefore requires that in order to make a claim for a deduction of input tax, the taxpayer must hold a valid VAT invoice (which is to be provided to its customer in compliance with Regulation 13(1) and in a form compliant with Regulations 13(2) and 14) or, where HMRC so direct, hold or provide such "other evidence of the charge to VAT as the Commissioners may direct" (usually referred to as "alternative evidence").

34. Regulation 31 VATR imposes record keeping requirements on taxable persons.

**Appeal rights against HMRC's assessments**

35. This appeal concerns HMRC's decision to deny input tax claimed under section 25 VATA and Regulation 29 VATR and the issuance of assessments under s.73(1) VATA. Section 73(1) VATA reads:

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

36. The appeal to the FTT was made pursuant to s.83(1) VATA, which provides:

> "(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters
>
> …
>
> (c) the amount of any input tax which may be credited to a person;
>
> …
>
> (p) an assessment—
>
> (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act;…
>
> or the amount of such an assessment;"

**Relevant case law**

37. Possession of a valid VAT invoice which contains the specified particulars is a necessary pre-condition to exercise the right to deduct. This is established by numerous authorities, conveniently summarised in *Tower Bridge GP v HMRC* [2022] EWCA Civ 998, [2022] STC 1324 ("*Tower Bridge*").

38. The effect of Reg. 29(2) VATR is that HMRC has a discretion to allow a credit for input tax notwithstanding that the taxable person does not have a valid VAT invoice (*Kohanzad* p.969 per Schiemann, J.).

39. There are two exercises of discretion embedded within Reg. 29(2) VATR: the first is whether to entertain an application to establish the right to deduct otherwise than by a compliant invoice, the second, if the first discretion is exercised in the taxable person's favour, is the discretion to specify the evidence that HMRC require in order to prove that the input tax has been incurred (*Tower Bridge*, [123]).

40. The primary purpose of HMRC's discretion under Reg.29(2) VATR is to allow defective invoices to be corrected by the subsequent supply of information which ought to have been in the invoices in the first place but was not (*Tower Bridge*, [125]).

41. In relation to the discretion, HMRC are being asked to make an exception to the general rule that the right to deduct cannot be exercised without a valid VAT invoice and it is therefore for the taxable person to demonstrate why an exception should be made (*Tower Bridge*, [126]).

42. The exercise of HMRC's discretions under Reg.29(2) VATR can only be challenged by the taxpayer on the ground that it was a decision that no reasonable body of Commissioners could have reached. 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 jurisdiction is strictly supervisory, not appellate or "substitutionary" (*Tower Bridge*, [122], *Scandico*, [43], *Kohanzad* p.969).

43. In summary:

(1) where a taxable person incurs input tax, the right to deduct it arises,

(2) however, to exercise the right to deduct as of right the taxable person must hold a valid VAT invoice;

(3) in the absence of a valid VAT invoice, whether the claim to input tax should be permitted is at the discretion of HMRC under Reg.29 VATR; and

(4) the FTT's jurisdiction on an appeal against HMRC's exercise of its discretion is supervisory only.

## FIRST GROUND OF APPEAL

44. As set out at the beginning of this Decision, the First Ground of Appeal was that the FTT erred in law when it held that the FTT Grounds did not include, as one of the grounds, that the Appellant held valid VAT invoices at the time of HMRC's decision.

### Appellant's submissions

45. Mr Brown, for the Appellant, accepted that the FTT Grounds could have been drafted at greater length and in a different style. Nevertheless, in his submission, the FTT Grounds should be understood as engaging both the following:

(1) that as a question of fact, the Appellant held appropriate invoices at the time of deduction, and

(2) HMRC should have exercised their discretion to accept that they had received sufficient evidence to support the input tax claimed.

46. Mr Brown submitted that construing the FTT Grounds as only engaging HMRC's discretion to accept alternative evidence not only ignores the words used in those Grounds, it was contrary to the established principles of construction, and was precisely the "narrow and formalistic" way of reading grounds of appeal that was deprecated in *R (Rodriguez-Torres) v SoS for the Home Department* [2005] EWCA Civ 1328 ("*Rodriguez-Torres*") at [17]. We set out the relevant paragraph from that case at §67.

47. Turning to the detail of the FTT Grounds, Mr Brown made the following submissions. He contended that they were framed by the "crisp, all-encompassing statement" that the Appellant's "claim for input tax is valid and correctly due". He said that since a person must hold a valid VAT invoice for a claim for input tax to be valid (see reg. 29(2) VAT Regs 1995) the existence of the invoices was thus implied.

48. He went on to say that the Appellant then identified the key issue as being Officer Mills' decision as to whether "enough evidence of the input tax deducted" had been provided. He said that Officer Mills had decided as a matter of fact the Appellant did not hold the relevant invoices when making the input tax deduction, and this reference too showed that the Appellant was including as one of its grounds, that it did hold those invoices.

49. In relation to the list at paragraph 7 of the FTT Grounds, Mr Brown submitted that the Appellant was pleading, succinctly and concisely, that:

(1) entitlement to input tax deduction follows from the proper attribution of inputs to taxable outputs;

(2) inputs were paid for in good time; and

(3) the Appellant holds the proper evidence.

50. He emphasised paragraph 7(d), which said that the Appellant "holds evidence that its supply chain is valid", and "has correctly been charged VAT [to its suppliers]", and paragraph 7(g), which said that as a result of the other points made in paragraph 7, HMRC had "no valid grounds" for rejecting the input tax deduction.

51. Mr Brown submitted that had the Appellant only been engaging HMRC's discretion to accept alternative evidence, different words would have been used, such as "based on the documents and information the Appellant has been able to provide to HMRC, HMRC should accept that the Appellant was entitled to deduct VAT input tax". Moreover, nowhere in the FTT Grounds does the Appellant refer to HMRC's residual discretion under reg. 29(2) to accept alternative evidence.

52. Mr Brown additionally relied on the fact that the Appellant's Notice of Appeal, to which its separate grounds were attached, stated clearly and unequivocally that the "Desired outcome" was "we would like the Tribunal to vacate the assessment".

53. He also submitted that the "invoice ground" should have been clear from the history of the matter, which provided the context to the FTT Grounds and made "the central issue" clear. He added that the FTT's failure properly to understand the history and context was compounded by [42], which stated:

> "The response from Aspire dated 21 January 2019 referred to Officer Mills having been previously provided with "a list of invoices relating to Week 10 (8th June 2018)…10 sample invoices from week 10" and proceeded to state "I can confirm that information pertinent to the August return is available". I consider it is of note that the response from Aspire referred to "information pertinent to the August return" and not "invoices". As noted, there is reference to "invoices" in the preceding part of Aspire's letter indicating that a distinction was being made between "information pertinent to the August return" and "invoices". Officer Mills responded on 25 January 2019 stating that in respect of Verity supplies he "would require evidence of the invoices that make up these individuals and a full listing of them all." That response made clear that the documents previously provided by Aspire was not sufficient evidence. Accordingly, I reject Mr Brown's submission that "information pertinent to the August return" was intended to confirm that valid invoices were in the Appellant's possession. In my view, the response was clear and without ambiguity and I do not accept that such an intention can be ascribed to the clear wording used."

54. Mr Brown submitted that the FTT here had misunderstood the Appellant's letter of 21 January 2019 which had stated that "information pertinent to the August return is available. Please provide a schedule of records you wish to see in order to check the return and release the repayment". Mr Brown said that this letter should have been construed in the context of HMRC's request for all of the Appellant's business records, and that there was no proper basis to read it as a formal acceptance that the Appellant did not hold purchase VAT invoices for VAT returns filed. He emphasised that HMRC were informed on 8 February 2019 that "the records which you have requested are available" and HMRC had been invited to propose dates to come and inspect them.

55. Mr Brown also criticised the FTT for referring at [43] to the statutory review letter, saying that this was "HMRC's document using HMRC's words", and the Appellant had never suggested or stated it was relying on "sufficient alternative evidence".

56. He also submitted that para [44] was plainly wrong. This reads:

> "The suggestion that the Appellant was in possession of valid invoices at the time of the claim was made for the first time in a letter to HMRC dated 13

> December 2020 by the Appellant's newly appointed legal representatives, Duncan Lewis…"

57. In making that submission, Mr Brown relied on the provision of invoices on 8 October 2018, and also the fact that on 11 October 2018 the Appellant had told HMRC that each Verity amount was made up of between 800 and 1000 invoices from different suppliers.

58. Finally, Mr Brown criticised the FTT for having carried out "an impermissible 'mini-trial' of issues of fact in the course of the hearing.

**HMRC's submissions**

59. Mr Watkinson, on behalf of HMRC, submitted that the FTT did not err when it held that the FTT Grounds did not include, as one of the grounds, that the Appellant held valid VAT invoices at the time of HMRC's decision.

60. He said that the purpose of pleadings is to mark out the parameters of the case advanced and identify the issues and extent of the dispute between the parties with sufficient clarity. It was manifestly insufficient simply to assert as a ground of appeal that "my claim for input tax was valid" without explaining why. If the Appellant had meant to appeal on the basis that it held valid VAT invoices, it both would and should have said so; instead, such a ground was conspicuous by its absence, and the FTT did not have to dig behind the FTT Grounds, which were never amended, to try to catch some faint echo of a ground that had obviously not been pleaded.

61. He went on to say that the wording of the FTT Grounds further supported that conclusion. If the Appellant had sought to rely on the invoices, there would have been no need to include the detailed points in paragraph 7, namely that the Appellant held evidence that its supply chain was valid and that it had correctly been charged VAT by its suppliers. If the Appellant *had* asserted that it held the relevant invoices, almost the entirety of the FTT Grounds would be otiose.

62. Mr Watkinson also argued that the context of what led up to the decision, including that referred to by the FTT at [42], reinforced the FTT's conclusion. In his submission, the FTT was correct, for the reasons it gave at [40]-[45], to conclude that the FTT Grounds were entirely predicated on the absence of such invoices. The FTT was therefore entitled to reach the conclusion that it did on the evidence before it and as a matter of construction of the FTT Grounds.

**DISCUSSION AND ANALYSIS**

63. We begin by making some overall points about drafting and construing grounds of appeal.

**The FTT Rules and the case law**

64. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") is headed "Starting appeal proceedings" and it includes the following provisions:

> "(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
>
> (2) The notice of appeal must include—
>
> (a)-(c) …
>
> (d) details of the decision appealed against;
>
> (e) the result the appellant is seeking; and
>
> (f) the grounds for making the appeal.

> (3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain."

65. The FTT Rules therefore give no guidance on what is required to be included in grounds of appeal. However, authorities on the Civil Procedure Rules ("CPR"), which apply in the courts, are also relevant, although not determinative (*Allpay v HMRC* [2018] UKFTT 273 (TC) at [14]. Those authorities do give guidance on the proper basis for drafting grounds of appeal and how the parties and the adjudicating court or tribunal should construe them, so as to deal with the appeal fairly and justly in accordance with the overriding objective.

66. In *McPhilemy v Times Newspapers* [1999] 3 All ER 775 at p.792, the purpose of pleadings was set out as being:

> "... to mark out the parameters of the case that is being advanced by each party. In particular they are...critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."

67. In making clear the general nature of an appellant's case, the grounds of appeal to the FTT (Tax Chamber) must, by necessity, include the reasons for making the appeal. They should be clear in stating: i) the nature of the decision by HMRC or other public body (the details of that decision are required to be included in the notice of appeal by Rule 20(2)(d)); and ii) the matters of fact and law which are in issue or which the taxpayer disputes. Rule 20(2)(e) requires that a notice of appeal should include the result the appellant is seeking.

68. In *Rodriguez-Torres* at [17], on which Mr Brown relied, the appellant had appealed to the Court of Appeal against a decision of the Immigration and Appeal Tribunal. Moore-Bick LJ gave the only judgment with which Sir Peter Gibson and Auld LJ both agreed. He cautioned as follows:

> "…I would strongly deprecate any attempt to construe grounds of appeal in these cases in a narrow and formalistic way. What is important is to ensure that the question of law which the applicant seeks to raise is identified with sufficient clarity to enable both the respondent and the Tribunal to understand what it is."

69. The FTT is under a duty to deal with cases fairly and justly by virtue of the overriding objective in Rule 2(1). The duty includes by virtue of Rule 2(2): (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings. This may mean that in appropriate cases, particularly with unrepresented litigants or those unfamiliar with the procedures, the FTT may demonstrate flexibility in interpreting or refining grounds of appeal provided by appellants or taxpayers. This does not detract from the general principle that appellants should provide grounds of appeal of sufficient clarity to enable both the respondents (typically, HMRC) and the Tribunal to understand their case.

70. In *Rasheed and others v SoS Home Department* [2014] EWCA Civ 1493, the Court of Appeal held at [12]:

> "Grounds of appeal are intended to be short, succinct documents which identify as briefly as possible the respects in which it is said that the court below (in this case the Upper Tribunal) erred. If drafted as the rules intend and require, they provide the court and the parties with a clear and concise statement of the issues that will arise on the appeal and to which argument will

> be directed. They are not intended to be a vehicle for describing in general terms the circumstances giving rise to the appeal; nor are they intended to serve as a vehicle for setting out the appellant's arguments or submissions. That is the function of the skeleton argument..."

71. Taking those authorities into account in the context of an appeal before the FTT, we find that the grounds:

(1) must identify the issues of fact and law on which an appellant challenges the HMRC decision (which an appellant is required to provide by virtue of Rule 20(3)); and

(2) must be comprehensible either as a self-standing document, or by making explicit reference to HMRC's decision. The FTT and HMRC should not be required to read other submissions, representations or correspondence in order to understand the points of fact and law which are in issue.

**Discussion and conclusion**

72. The issue before us is whether the FTT Grounds included the ground that Appellant held valid VAT invoices. In short, we agree with Mr Watkinson. Had the Appellant been appealing on the basis that it held the VAT invoices to support its returns, this would have been explicitly stated, and this was not the position. It is beyond dispute that the FTT Grounds made no explicit reference to the Appellant holding valid, or otherwise, VAT invoices.

73. Mr Brown argued that the FTT Grounds included this ground by necessary implication. In summary, his case was that:

(1) Read broadly, the FTT Grounds attempted to answer HMRC's assessment dated 6 February 2019 for the reasons set out in the letter of 7 January 2019 by asserting that the Appellant did hold the necessary and sufficient evidence of its right to deduct input tax (see [4]).

(2) The assertion was that the evidence the Appellant held included all business records made available to HMRC (see [6] and [7(f)]);

(3) The reference to "business records" implied that the Appellant held both valid invoices and other or alternative evidence of both the charge to VAT [7(d)] and the payment of VAT [7(e)].

(4) This reading would not have required the FTT to draw upon the details or language of the correspondence passing between HMRC and the Appellant between October 2018 and June 2019, but was instead based upon a plain reading of HMRC's assessment dated 6 February 2019 (issued for the reasons set out in the letter dated 7 January 2019) together with the FTT Grounds.

(5) The FTT was therefore wrong to find at [40] of the Decision that the FTT Grounds "were entirely predicated on the absence of such [valid VAT] invoices".

74. We agree only to the extent that it might have been a step too far for the FTT to state that the FTT Grounds "were entirely predicated on the absence of such [valid VAT] invoices". It may be that HMRC's decision to assess for insufficient evidence *was* predicated on the absence of such invoices being produced to HMRC. However, it is important to distinguish between parsing or interpreting the nature of HMRC's decision of 6 February 2019 and the nature of the FTT Grounds.

75. We are satisfied that the FTT did not err in finding that the FTT Grounds did not state that the Appellant held valid VAT invoices nor that they made it clear by implication that this was a ground of challenge. In other words, the FTT Grounds did not make it sufficiently clear

or reasonably apparent that the Appellant relied on holding valid VAT invoices such that the Tribunal and HMRC would understand this to be in issue in the appeal.

76. We disagree with the specific points made on behalf of the Appellant by Mr Brown, in the order set out earlier in this Decision:

(1) We reject his submission that this "invoice" ground was implied from the statement that the Appellant's "claim for input tax is valid and correctly due". Almost any input tax VAT appeal could use the same wording: it fails to explain *why* the claim is considered to be valid. Moreover, a claim can also be valid if HMRC unreasonably refused to accept alternative evidence.

(2) Mr Brown referred to the fact that (a) the FTT Grounds refer to Officer Mills' decision, and (b) that decision was made because no invoices had been provided, and went on to submit that the FTT Grounds are therefore to be read as including a ground that the Appellant has the necessary invoices. However, it is not enough for grounds of appeal to make a generic reference to the decision under appeal, they must say *why* the appellant disagree with that decision. Moreover, the invoice ground cannot be implied simply by referring to Officer Mills' letter of 7 January 2019, because that letter said that "insufficient evidence had been provided" and it referred more generally to "an absence of records", including the lack of "a full account listing for Verity showing payments made" as well as "the full business records and bank statements since commencement".

(3) Paragraph 7 of the FTT Grounds set out a list of specific points, including that the Appellant held evidence (a) to demonstrate that it received payments; (b) that its supply chain was valid and (c) that it had offered to show HMRC the business records on site. The Appellant then said at (g) that "*having regard to these facts* there are no valid grounds for the Respondent to deny the reclaim of VAT input tax". The "facts" set out in paragraph 7 do not include that the Appellant was holding evidence in the form of Verity invoices.

(4) Although Mr Brown is right that the FTT Grounds do not refer to Regulation 29(2) or to reliance on alternative evidence, that does not change the position: the FTT Grounds do not state that the Appellant's appeal is made on the basis that it holds valid VAT invoices.

(5) We reject Mr Brown's submission that the invoice ground can be inferred from the fact that the "Desired outcome" box on the Notice of Appeal was completed with the words "we would like the Tribunal to vacate the assessment". The grounds must say *why* the Appellant wants the assessment set aside.

(6) Mr Brown also relied on the history and context of the FTT Grounds, saying these make clear that the Appellant was appealing on the basis that it held the invoices, and he criticised the FTT's Decision at [42] and [43] for misconstruing the context and background. We disagree, and instead endorse and accept the summary set out by the FTT in those two paragraphs, for the reasons there given.

(7) Mr Brown also criticised the FTT for saying at [44] that the invoice ground was raised for the first time by Duncan Lewis in December 2020. Mr Brown made two points:

(a) He referred to the letter sent by the Appellant on 8 October 2018, which says that invoices were provided. However, as the FTT found at [6], those did not include any invoices from or relating to Verity, and this was confirmed by the Appellant on 11 October 2018.

(b) He relied on the fact that in the same letter of 11 October 2018, HMRC had been told that "between 800 and 1000 invoices from different suppliers" underpinned each of the Verity amounts, and HMRC thus knew that the invoices existed. But that does not assist the Appellant, because the FTT Grounds made no reference to the existence of those invoices; in short, the point was not pleaded. The FTT was thus correct to find at [44] that the first time the Appellant sought to argue that the invoice ground formed part of the FTT Grounds was in the letter from Duncan Lewis of December 2020. The half-sentence on which reliance is now placed was instead one of numerous points made in earlier correspondence between the parties, and it is the purpose of grounds of appeal to identify the points on which an appellant wishes to rely.

(8) Mr Brown did not expand the point made in his skeleton about the FTT having carried out "an impermissible 'mini-trial' of issues of fact, but we have taken this to be a criticism of the detailed findings made about the communications between the parties. However, Mr Brown had also submitted that in order to understand the FTT Grounds "the previous correspondence between the parties must be taken in account and the [FTT Grounds] interpreted in context", see [32]. The Appellant's case thus rested in part on what should be implied from the inter-partes correspondence, and the FTT had to make findings of fact. There was no "mini-trial".

77. It follows from the above that we find that the FTT made no error of law when it decided that the FTT Grounds did not include a ground that the Appellant held the invoices to support its claims. We thus reject the First Ground of Appeal.

78. Even if we were wrong in relation to the First Ground of Appeal, we agree with Mr Watkinson that there would still be no material error in the FTT's decision on the preliminary issues. For the reasons we set out below, even if the FTT Grounds had included a ground that the Appellant held valid VAT invoices, and even if that continues to form one of its grounds of appeal against the preferred assessment, that would not be determinative of the FTT's jurisdiction in the appeal.

79. It is instead the nature and scope of the decision under challenge which defines the FTT's jurisdiction. HMRC's decision to issue the assessment on 6 February 2019 denied the Appellant input tax deductions because insufficient evidence had been produced. It is that decision which may be challenged by the Appellant on the appeal, but, for the reasons explained in the next part of this Decision, that appeal may only be pursued on the basis that HMRC had unreasonably exercised its discretion not to accept the evidence: in short the FTT's jurisdiction is supervisory only.

## SECOND GROUND OF APPEAL

80. As set out at the beginning of this Decision, the Second Ground of Appeal was that the FTT erred in law when it decided that the absence of a reference in the Appellant's Grounds to it holding valid invoices meant that the Tribunal's jurisdiction is supervisory.

### THE CASE LAW ON JURISDICTION

81. The key cases referred to by the parties were *Petroma Transport SA & Others v Belgium* (Case C-271/12) [2013] STC 1466 ("*Petroma*"); *HMRC v Boyce* [2017] UKUT 177 (TCC) ("*Boyce*") and *Scandico.*

*Petroma*

82. In *Petroma* the CJEU set out the background as follows:

> "12. During inspections conducted as from 1997, the Belgian tax authority questioned, both as regards direct taxes and VAT, the intercompany invoices

> and resulting deductions since the 1994 year of assessment, the main reason being that those invoices were incomplete and could not be shown to correspond to actual services. Most of those invoices included an overall amount, with no indication of the unit price or the number of hours worked by the staff of the service-providing companies, thereby making it impossible for the tax authority to determine the exact amount of tax collected.
>
> 13. That tax authority therefore disallowed the deductions made by the companies receiving services on the ground, in particular, of non-compliance with the requirements laid down in Article 5(1)(6) of Royal Decree No 1 and Article 3(1)(1) of Royal Decree No 3 of 10 December 1969 on deductions for the application of VAT.
>
> 14. Subsequently, additional information was provided by those companies but was not accepted by the tax authority as a sufficient basis to allow the deduction of the various VAT amounts. That authority took the view that that information concerned either private contracts for services submitted late, after completion of the tax audits and after communication of the adjustments that that authority intended to make, and therefore of no certain date and not binding on third parties, or invoices that were supplemented after they had been issued, at the stage of the administrative procedure, by handwritten references to the number of hours worked by staff, the hourly rate for work and the nature of the services provided and which, therefore, according to the tax authority, lacked any probative value."

83. The first question for reference was set out at [21]:

> "By its first question the national court seeks in substance to ascertain whether the provisions of the Sixth Directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which the right to deduct VAT may be refused to taxable persons who are recipients of services and are in possession of invoices which are incomplete, in the case where those invoices are then supplemented by the provision of information seeking to prove the occurrence, nature and amount of the transactions invoiced."

84. The CJEU answered that question at [36]:

> "…the answer to the first question is that the provisions of the Sixth Directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which the right to deduct VAT may be refused to taxable persons who are recipients of services and are in possession of invoices which are incomplete, even if those invoices are supplemented by the provision of information seeking to prove the occurrence, nature and amount of the transactions invoiced after such a refusal decision was adopted."

*Boyce*

85. The appellant in *Boyce* had appealed to the FTT against a decision made under Regulation 29(2) to disallow the repayment of input tax in the absence of satisfactory purchase invoices. In allowing Mr Boyce's appeal, the FTT had considered "the totality of the evidence before it, which included evidence provided by Mr Boyce in the context of the appeal", see [8] and [10] of the UT judgment.

86. Arnold J said at [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."

87. At [23] he endorsed the following proposition put forward by Counsel for HMRC, which set out in the preceding paragraph (italics in original):

> "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."

*Scandico*

88. The case of *Scandico* concerned the appellant's appeal against three decisions made by HMRC, the first of which was set out at [4] of the judgment:

> "As discussed at my visit to your premises on 10th May 2011, Apple till receipts which you have provided to support the claimed input tax do not constitute proper tax invoices because they do not contain all of the required information, each iPhone purchased is in excess of £250 (inclusive of VAT), which is the limit for which a simplified VAT invoice can be used in relation to [a claim for] input tax deduction; so proper documentary evidence in relation to the supplies is not held by [Scandico]. However, as [Scandico] has not produced any records or documentation that enables HMRC to examine an audit trail to confirm that it had received the taxable supplies as described on the till receipts it has not incurred the right to deduct in the first place."

89. The two subsequent HMRC decisions were in similar terms, see [9] of the judgment. The UT summarised the statutory provisions and the FTT decision, and then said at [39]:

> "The role of the First-tier tribunal is to examine a decision that HMRC have taken and decide whether that decision was right or wrong. Sometimes the test that is applied in examining HMRC's decision is a full merits appeal. Sometimes it is a review as to whether the decision fell within the reasonable bounds of HMRC's discretion."

90. The UT continued at [40]:

> "What the case officer decided is that, in the absence of VAT invoices from Apple to Scandico, there was not enough information provided by Scandico for HMRC to decide whether there has been a taxable supply or not. HMRC has therefore exercised the discretion conferred on it by regulation 29(2) of the VAT Regulations 1995 by declining to direct that the alternative evidence that Scandico provided should be treated as sufficient evidence of the supply of the iPhones to Scandico. That is the decision which has been taken by HMRC and hence it is the decision that can be appealed and it is the decision that the tribunal should address."

91. A similar point was made at [43]:

> "In appeals of this kind, the First-tier tribunal should address only the decision which is before it, namely HMRC's decision that, in the absence of the VAT receipts, they were not prepared to exercise their discretion to accept the alternative evidence provided by the taxpayer as to whether there had been a

> taxable supply. The test that the First-tier tribunal applies in reviewing that decision is the test set out in *Kohanzad*."

92. As we noted earlier in this Decision, the test set out *Kohanzad* is whether the officer in question had acted as no reasonable officer could have acted.

93. The UT then added at [44] that the task of FTT is "not to 'fill in the gaps' or 'complete the picture' in order to come to a conclusion, for the first time, as to whether all the substantive requirements for deduction are met". At [53] the UT considered the principles of EU law, saying:

> "We do not consider that there is an inconsistency between the obligation on Member States to allow input tax deduction when the substantive requirements have been satisfied on the one hand and the discretion conferred on HMRC by regulation 29(2) to decline to accept alternative evidence in a particular case on the other hand. It is true that the European Court and the Advocates General have emphasised in the cases we have cited that the Member State must not place additional obstacles in the taxpayer's path when the substantive requirements for deduction have been fulfilled. But that discretion on the part of the tax authority where the taxpayer cannot produce a compliant VAT invoice is clearly contemplated by the Directives. Provided that HMRC focus on the relevant question, namely has the taxpayer established that the substantive conditions for deduction are in place, the exercise of that discretion does not, in our judgment, amount to the imposition of an additional formal requirement. In a case where HMRC have taken a decision that they are or are not satisfied, the tribunal will examine that decision and decide whether that decision was reasonable."

94. At [56], the UT said this about *Petroma*:

> "In our judgment *Petroma* is authority for the proposition that where the Member State tax authority adopts a decision refusing the right to deduct VAT because the information provided by the taxpayer is incomplete or irregular, the Sixth VAT Directive did not require the tax authority to revisit that decision when further information was provided after the decision has been taken. The position should be no different where the further information is provided to a tribunal in the context of an appeal against the initial refusal. This must apply equally to the PVD as to the Sixth VAT Directive. The fact that the FTT did, despite its misgivings about the relevance of the exercise, actually examine the facts in detail and conclude that there was a supply does not allow Scandico to side step the exercise of HMRC's discretion, or to require that discretion to be exercised by reference to the later information before the FTT."

**THE APPELLANT'S SUBMISSIONS**

95. Mr Brown submitted that the FTT should have decided that the Appellant could rely on invoices, whether or not they had been provided to HMRC prior to them issuing assessments. This was because the legal test is whether the Appellant *held the invoices* at the time it filed its VAT returns in which the input tax deduction was exercised, not whether they had been *provided* to HMRC. The FTT's jurisdiction was therefore appellate and not supervisory.

96. Mr Brown contended that the FTT was wrong to conclude at [46]-[47] of the Decision that the UT decisions in *Scandico* and *Boyce* "set out the approach to be followed in appeals of this kind". In both, it had been accepted by both parties that the taxpayer did not hold valid VAT invoices at the time of making the claim, so the issue in dispute was about alternative evidence and the exercise of HMRC's discretion. Here, the Appellant *did* hold valid VAT

invoices. Mr Brown referred to *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 42 at [68], where Lord Reid stated:

> "It is also important to bear in mind that decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another."

97. In his submission, the fact that the Appellant held valid VAT invoices at the time it submitted its VAT return meant that there was significantly more than "a small modification of the facts" as between the Appellant's case and that of the appellants in *Boyce* and *Scandico.*

**DISCUSSION AND ANALYSIS**

98. We are not satisfied that the FTT materially erred in law in making its Decision, for many of the reasons put forward by Mr Watkinson, which we address in our discussion below. We begin with the facts which are not in dispute and then apply the law to those facts.

### The facts

99. All relevant invoices had first been requested by HMRC in the email from Officer Mills dated 18 October 2018; he repeated that request in formal letters dated 7 and 25 January 2019.

100. In its correspondence with HMRC between October 2018 and 4 March 2019, the Appellant did not provide HMRC with the Verity invoices, although it had asserted that it held "between 800 and 1000 invoices from different suppliers" in relation to each of the Verity amounts, and it had offered to make its business records available to HMRC to inspect.

101. Thus, at the time Officer Mills issued the assessments, the Appellant had not provided the Verity invoices, and he made his decision on the basis that the Appellant had provided "insufficient information to evidence the input tax deducted".

### Application of the law to the facts

102. We accept that there are differences between the facts of this case and those considered in *Boyce, Petroma* and *Scandico.* In *Boyce* and *Scandico,* the appellants did not hold valid VAT invoices, while in *Petroma,* the invoices were incomplete. Here, the Appellant asserts that valid invoices existed, albeit they had not been produced to HMRC.

103. However, we nevertheless find the case law summarised above to be of assistance. In *Scandico* at [40], the UT held as follows:

> "What the case officer decided is that, in the absence of VAT invoices from Apple to Scandico, there was not enough information provided by Scandico for HMRC to decide whether there has been a taxable supply or not. HMRC has therefore exercised the discretion conferred on it by regulation 29(2) of the VAT Regulations 1995 by declining to direct that the alternative evidence that Scandico provided should be treated as sufficient evidence of the supply of the iPhones to Scandico. That is the decision which has been taken by HMRC and hence it is the decision that can be appealed and it is the decision that the tribunal should address."

104. That passage is relevant to this appeal for three reasons:

(1) The case officer in *Scandico* decided that "in the absence of VAT invoices from Apple to Scandico there was not enough information provided by Scandico for HMRC to decide whether there has been a taxable supply or not". The position in the Appellant's case is the same: Officer Mills made the decision because he had received "insufficient information to evidence the input tax deducted". The reasoning in *Scandico* does not

turn on whether the invoices did or did not exist, but on the evidence provided by the appellant to HMRC in the period leading up to the decision.

(2) As a result of that lack of evidence, the case officer "exercised the discretion conferred on it by regulation 29(2) of the VAT Regulations 1995 by declining to direct that the alternative evidence that Scandico provided should be treated as sufficient evidence of the supply". Similarly, in this case, in the absence of the Verity invoices, Officer Mills exercised his discretion under regulation 29(2).

(3) The UT held in *Scandico* that the jurisdiction of the FTT was limited to deciding whether to uphold or set aside that decision. In the Appellant's case, for the same reasons, the FTT's jurisdiction was limited to deciding whether or not to uphold Officer Mills' decision not to exercise the discretion.

105. In both *Petroma* and *Scandico,* the appellant provided further material after the tax authority had made its decisions. At [56], the UT relied on *Petroma* to find that:

> "where the Member State tax authority adopts a decision refusing the right to deduct VAT because the information provided by the taxpayer is incomplete or irregular, the Sixth VAT Directive did not require the tax authority to revisit that decision when further information was provided after the decision has been taken."

106. The UT went on to find that "[t]his must apply equally to the PVD as to the Sixth VAT Directive" and "the position should be no different where the further information is provided to a tribunal in the context of an appeal against the initial refusal". Here, the Appellant did not provide the invoices to HMRC before Officer Mills made his decision.

107. It is clear from *Boyce* that the FTT's jurisdiction when hearing an appeal against a Regulation 29(2) decision is supervisory: Arnold J said "[t]he 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." The same point is made in *Scandico* at [43] by reference to *Kohanzad.*

108. We also accept, of course, that Article 178 of the PVD only requires that the Appellant *hold* valid VAT invoices at the time of supply in order to have the right to deduct. However, as set out earlier in this Decision, paragraph 4(1) of Sch. 11 to VATA additionally provides that HMRC may as a condition of allowing or repaying input tax to any person, require the production of such evidence relating to VAT as they may specify. Mr Brown did not submit that this provision was overridden by, or otherwise inconsistent with, Article 178, and was plainly correct not to do so. In *Petroma,* the CJEU upheld national legislation which refused the right to deduct where (a) an invoice was incomplete at the time of the tax authority's decision, but (b) the taxpayer later provided the missing information. Similarly in this case, HMRC had the statutory power to require the Appellant to provide the Verity invoices, and as that information was not supplied, the Appellant could not rely on Article 178.

109. Officer Mills exercised his discretion under Regulation 29(2) and decided that the evidence which had been made available was insufficient to support the input tax claims made. It is clear from *Boyce* and *Scandico* that the FTT's jurisdiction is limited to considering that decision, and that this is a supervisory jurisdiction. In other words, the FTT must decide whether the officer in question had acted as no reasonable officer could have acted.

110. In making the preliminary decision, the FTT came to the same conclusion, and this was not an error of law. We thus reject the Second Ground of appeal.

## OBSERVATIONS AND CONCLUSION

### OBSERVATIONS

111. Before concluding, we make a small number of observations about other matters raised by the parties.

### The *Gora* principle

112. In deciding whether or not to restore goods seized by HMRC or the Border Force, the FTT has the power to take into account all the facts, including those not before the decision maker, see *Gora v HMRC* [2003] EWCA Civ 525. This is often referred to as "the *Gora* principle".

113. In his skeleton argument for the FTT, Mr Brown had accepted that the *Gora* principle did not apply to the Appellant's case. He said that "if the FTT decides its jurisdiction is supervisory, the Appellant can only rely upon evidence that was before Officer Mills when he made his decision". The *Gora* principle was thus not considered by the FTT, see [49].

114. When the Appellant applied to the FTT for permission, it did so on three grounds, one of which read:

> "In respect of the decision that the Appellant cannot rely upon invoices not 'produced' to HMRC, this conflicts with *CNM Estates (Tolworth) Ltd v Revenue and Customs* [2019] UKFTT 45 (TC) ["*CNM Estates*"], which is accepted was not brought to the attention of the FTT."

115. The case of *CNM Estates* concerned an appeal against security for VAT. At [31] the FTT summarised the law as follows (our emphasis):

> "…it is well established that we can only consider the facts as they were at the time the decision was taken. We cannot take into account subsequent events. *We can consider facts which existed at the time the decision was taken but which were ignored by HMRC*, either at the time of the decision or at the time of the subsequent review, but we cannot take into account new facts."

116. Permission to appeal on that ground was refused by the FTT and it was not pursued at the UT. Nevertheless, in his skeleton argument, Mr Brown submitted that:

> "the Appellant will rely upon *Bluechipworld Sales & Marketing Ltd v. HMRC* [2019] UKFTT 0705 (TC) ["*Bluechipworld*"] at para. 31 as authority that in exercising its supervisory jurisdiction, the FTT can take into account all the facts that existed at the date of the assessment regardless of whether or not they were known to the decision maker i.e. that the Appellant had in its possession valid VAT invoices when it submitted its VAT returns."

117. In *Bluechipworld* at [20], the FTT referred to *CNM Estates*, and said at [31]:

> "We reject HMRC's submission that in exercising its supervisory function, the Tribunal is able to take into account only those facts known to the decision maker. In our view, the Tribunal can take into account all facts that existed as at the date of the decision under appeal (regardless of whether or not they were known to the decision maker)."

118. That passage is, in terms, a restatement of the *Gora* principle. However:

(1) the Appellant had conceded before the FTT that this principle did not apply, and had not asked for, or received, permission to withdraw that concession, see *FII Group v HMRC* [2020] UKSC 47, [2020] 3 WLR 1369 at [85]-[90]; and

(2) the Appellant had been refused permission to appeal to the UT on the ground that *Bluechipworld* should be followed.

119. We agree with Mr Watkinson that as the Appellant did not have permission to put forward this ground, we have no jurisdiction to consider it. We also observe that Mr Brown's attempted submission on the *Gora* principle conflicts with the *ratio* of both *Boyce* and *Scandico.*

**The substantive appeal**

120. Mr Brown said in his skeleton argument that the Appellant would seek to rely on the thousands of VAT invoices which it holds, even were it to lose this appeal. However, he did not press this point at the hearing, and he was right not to do so. That is because we have decided as follows:

(1) The Appellant's Grounds did not include a ground which stated that it was relying on the fact that it held the invoices to support its input tax claims.

(2) The FTT's jurisdiction when hearing the substantive appeal is supervisory, so the FTT can only consider whether Officer Mills' decision was reasonable.

(3) In exercising that jurisdiction, the only facts which can be considered by the FTT are those which were before Officer Mills at that time he made the decision.

121. Since the invoices were not provided to Officer Mills, the FTT cannot make findings of fact about them, and they therefore cannot form part of the evidence at the substantive hearing. The Appellant can only rely on evidence that was before Officer Mills when he made his decision. As the FTT said at [2], the invoices are "not relevant to the issues that the Tribunal must determine". Therefore, there was no error in the FTT's conclusion at [49] that the asserted invoices are not admissible on the appeal to the FTT.

**Implications**

122. Mr Watkinson expressed concerns about the wider consequences were the Appellant to succeed in this appeal. Although we did not rely on those submissions in coming to our Decision, we nevertheless agree with them. Mr Watkinson said that:

(1) Admitting evidence which was not before the HMRC decision-maker would allow appellants:

(a) to provide all kinds of evidence for the first time to the FTT;

(b) to *refuse* to provide evidence to HMRC which they would otherwise be required to provide only for it to be produced on appeal to the FTT; and

(c) to delay or withhold the payment of VAT properly due.

(2) Permitting taxpayers to side-step the effect of HMRC exercising a discretion over the sufficiency of evidence provided in support of a VAT claim would permit tactical avoidance and delay, and result in wasteful litigation.

(3) It would also undermine HMRC's ability to manage the VAT system, by signalling that lawful and reasonable requests for the production of valid VAT invoices can be either ignored or delayed.

123. We agree with Mr Watkinson that the operation of the VAT system is not a game to be played by taxpayers. When HMRC requests or requires that a taxpayer produces a valid VAT invoice in support of its claim to input tax deduction, it is doing nothing more than enforcing the European and domestic law that requires that such an invoice be held at the time of the exercise of the right to deduct. Where the taxpayer refuses a lawful and reasonable request, it puts itself in a position whereby the claim to input tax deduction is then a matter for the discretion of HMRC. If HMRC exercises that discretion against the taxpayer, the taxpayer

cannot then, on appeal to the FTT, produce the invoice, as a surprise or ambush, even if it truly held the invoice all along, and so side-step the exercise of HMRC's discretion.

124. We also observe that in exercising its statutory jurisdiction, the FTT is well able to decide whether or not the HMRC Officer acted unreasonably, for instance by requesting information which was irrelevant, or by refusing to accept an invoice was valid. However, that was not this case.

**CONCLUSION**

125. For the reasons set out above we are satisfied that there was no error of law in the FTT Decision. Its conclusions on the preliminary issues in the preferred assessment appeal are confirmed. This appeal is dismissed.

**JUDGE RUPERT JONES**
**JUDGE ANNE REDSTON**

**Release date: 14 January 2025**