Neutral Citation: [2024] UKFTT 00368 (TC)

Case Number: TC09157

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2013/06922
TC/2014/04218

PROCEDURE – application to strike out appeal under rule 8(3)(c) of the Procedure Rules – test to establish reasonable prospects of success – HMRC v Fairford Group & The First De Sales Ltd Partnership v HMRC considered and applied - appeal against decision to disallow input tax arising from the purchase of Apple iPhones – valid invoices not provided - HMRC's discretion under reg. 29 of the VAT Regulations - Tower Bridge GP v HMRC considered and applied –- nature of FtT's supervisory jurisdiction - Scandico Ltd v HMRC considered and applied – whether the Grounds of Appeal challenge the basis on which the decision refusing input tax had been taken by HMRC - whether HMRC's Skeleton Argument was drafted on a different basis from the Strike Out application and the question of ambush – Application dismissed

Heard on: 25 March 2024
Judgment date: 1 May 2024

Before

JUDGE NATSAI MANYARARA

Between

V-COM (WORLDWIDE) LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Sam Brodsky of Counsel, instructed by Stern & Co

For the Respondents: Mr Sam Way of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION ON PRELIMINARY ISSUE

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video). The documents to which I was referred were (i) the Hearing Bundle consisting of 381 pages; (ii) the Appellant's Supplementary Bundle consisting of 1037 pages; and (iii) HMRC's Skeleton Argument dated 18 March 2024. The Hearing Bundle included the Appellant's Skeleton Argument (in reply to the Strike Out application) dated 17 November 2023.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. The hearing concerns HMRC's application to strike out the Appellant's appeal, pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Procedure Rules") on the grounds that the appeal has no prospects of success.

4. The Appellant appeals against HMRC's decision, dated 20 March 2013 (and amended on 30 January 2014), to disallow input tax claimed in the sum of £506,678.32 for the VAT period 12/10. The claim relates to the purchase of mobile phones (Apple iPhones) by the Appellant - via employees, family and friends - for which Apple till receipts were provided to prove the purchases. It is not disputed that the invoices did not include the Appellant's name.

5. The parties have requested a full decision.

PROCEDURAL MATTERS

6. The appeal was previously stayed behind the decision of the Upper Tribunal ('UT') in *Scandico Ltd v HMRC* [2017] UKUT 0467 (TCC) ('*Scandico*'). The stay was lifted following the Supreme Court decision in *Zipvit Ltd v HMRC* [2022] UKSC 12; [2022] 1 WLR 2670 ('*Zipvit*').

7. By Direction of the Tribunal dated 14 October 2015, V-Com (Worldwide) Limited ('V-WW') was substituted as the Appellant (the Appellant was previously V-Com UK ('V-UK').

FACTUAL BACKGROUND

8. The Appellant (V-WW) was incorporated in 2003 and its business activity is trading in telecommunications products, including mobile phones. The director is Veeraiyan Samandhamurthy ('VS'). V-UK was incorporated in 2005 and began trading in 2007. The sole director is Parameswari Rajamanickam ('PR'). She is VS's wife. V-UK's original business model is the running of a Jet petrol station ('the petrol station'). The petrol station operated a retail store on its premises.

9. On 7 June 2010, Apple launched the iPhone 4, which was subsequently released for sale on 24 June 2010. As the demand for the phone was high, the Appellant made purchases of the phones via employees who purchased one to two handsets at a time on behalf of V-UK or V-WW, for which Apple provided till receipts. The business was initially carried on through V-WW, but from 1 December 2010 it was carried on through V-UK. V-WW had cash available and wanted to minimise the use of cash but did not have debit card facilities with its bank. The preferred method was for VS and PR to charge Apple gift cards with £3,992, using V-UK's debit cards. On some occasions, cash was used - as opposed to Apple gift cards - as it was cheaper to use the cash obtained from the petrol station (instead of banking the cash and then withdrawing it).

10. Staff from V-WW were transferred to V-UK on 1 December 2010. On the same date, VS wrote to HMRC to inform them that V-UK was about to commence trading in mobile phones. In December 2010, cash purchases of the iPhone amounted to £374,250, out of a total of £3,428,430, and gift cards were used for £3,030,926 of purchases. The remaining purchases, in the sum of £23,254, were made directly through debit or credit cards (mostly by family and friends).

11. On 15 March 2011, the Appellant submitted its VAT return for the period ending on 31 December 2010 (12/10). Within its VAT return, the Appellant claimed input tax in the sum of £3,428,430, said to have been paid by the Appellant in purchasing the mobile phones. The return was subsequently selected for verification by HMRC and the Appellant was notified of this in a letter dated 25 May 2011.

12. On 1 February 2012, Officer Worral (of HMRC) requested a full list of information required to complete verification.

13. On 12 July 2012, HMRC wrote to the Appellant's representatives explaining that the till receipts that had been provided by the Appellant to evidence the input tax claim were insufficient to support any claim for deduction of input tax. The Appellant was invited to supply alternative evidence.

14. On 19 July 2012, following examination of the further records provided by the Appellant, and upon further scrutiny of the Appellant's PAYE declarations, HMRC wrote to the Appellant's representatives with more specific requests for information.

15. On 20 March 2013, HMRC notified the Appellant that deduction of input tax in respect of goods totalling £10,978 would be permitted, and that the remainder of the claim would be denied. The amount was permitted under HMRC's discretion to permit alternative evidence where the receipts showed the names of the Appellant's employees - as determined by the Appellant's PAYE records - using funds from the Appellant's business bank account and cash, which could have been sourced from the Appellant's other business operations: Appeal reference TC/2013/06922.

16. On 8 October 2013, the Appellant's representatives sent further information to HMRC. The Appellant's position was that the purchases had been made by employees and the details of 45 individuals were put forward as purchasers behind 6,870 transactions. All transactions related to a particular iPhone, to the value of £499, and all purchases were made from Apple retail stores, with 83% being made from one particular store in Covent Garden. The case officer concluded that the information did not change the decision that had been notified to the Appellant on 20 March 2013.

17. Following examination of the further records provided by the Appellant, and upon further scrutiny of the Appellant's PAYE declarations, HMRC concluded that 12 of the 45 individuals were not employees of the Appellant during the relevant VAT period, nor was there any evidence that the same 12 individuals were agents and VAT registered in their own right. HMRC requested an explanation as to how the Appellant could demonstrate the allocation of each purchase to a named individual when the Apple till receipts bore no information to show this. The Appellant disclosed that some phones had been purchased by family and friends.

18. HMRC reviewed the decision dated 20 March 2013 and, on 30 January 2014, the outcome of HMRC's review was notified to the Appellant. Where there was an identifier on the document, and this could be linked to an employee in the Appellant's PAYE records through purchases made via funds that could be traced back to the Appellant's business account, the officer had accepted the claim to input tax. The review upheld the decision to

deny input tax, but withdrew the output tax element of the decision. Purchases to the value of £26,447 would be allowed where it had been shown that a clear supply was made to the Appellant for consideration, and where the value of the input tax totalled £3,938.91; and purchases to the value of £,3,401.983 where the Appellant could not provide satisfactory evidence of its claim would be disallowed. The value of input tax denied was in the sum of £506,678.32: Appeal reference TC/2014/02128.

19. On 10 March 2014, the Appellant appealed against HMRC's decision.

20. On 15 August 2014, the Appellant provided further details of its position to HMRC.

21. On 14 August 2023, HMRC made the application to strike out the Appellant's appeal on the basis that the appeal had no reasonable prospects of success.

22. On 17 November 2023, the Appellant filed written submissions opposing HMRC's application.

23. On 14 December 2023, a notice of hearing was issued to the parties.

24. On 18 March 2024, HMRC submitted their Skeleton Argument.

ISSUE(S)

25. As this is an application to strike out the Appellant's appeal, the sole issue before me is whether the appeal has no reasonable prospects of success. The issue relating to the substantive tax appeal is only relevant to the extent that it can be established that that issue amounts to a short point of law that can be determined in this preliminary application ("*the Strike Out application*").

26. A further preliminary issue arose during the hearing, concerning whether HMRC have advanced different grounds for the application to strike out the Appellant's appeal within their Skeleton Argument, filed shortly before the hearing and after the Strike Out application ("*the Ambush point*').

THE HEARING

27. The hearing proceeded on the basis of submissions only. Both representatives confirmed that they had the same bundles that were before me. Mr Brodsky indicated that he had provided further authorities in light of a further preliminary matter that had arisen since this application was listed for a hearing. The authorities were: (i) *Netbusters v HMRC* [2020] UKFTT 438 (TC) ('*Netbusters*'); and (ii) *AllPay v HMRC* [2018] UKFTT 273 (TC) ('*AllPay*'). Whilst the authorities had not found their way to me prior to the commencement of the hearing, I was able to locate them before starting the hearing, having been provided with the full citations by Mr Brodsky.

The Ambush point

28. At the commencement of the appeal hearing, Mr Brodsky submitted that the Appellant had been ambushed by the development of HMRC's application from the grounds advanced in the Strike Out application, to the submissions made in the Skeleton Argument submitted shortly before the hearing. I proceeded to hear the substance of the Appellant's position.

Appellant's submissions

29. Mr Brodsky submitted that HMRC's Strike Out application was originally advanced on a technical point in relation to the manner in which the Grounds of Appeal were drafted, yet HMRC's Skeleton Argument seeks a strike out of the appeal on the basis of the alternative evidence relied on by the Appellant in relation to HMRC's exercise of their discretion.

30. In essence, the Appellant's position was that: (i) the Strike Out application was based on a technical pleading point in relation to the failure of the Appellant to mention the reg. 29 alternative evidence point; (ii) HMRC's Skeleton Argument was a departure from the application and launched an attack on the alternative evidence relied on by the Appellant; (iii) HMRC's position about the inability to succeed in the absence of valid invoices is based on a misunderstanding of the relevant law and the authorities in relation to reg. 29; and (iv) HMRC have not been in any doubt that the Appellant was challenging the exercise of HMRC's discretion to accept alternative evidence in the absence of valid invoices.

31. In further amplification of these submissions, Mr Brodsky referred to the opening paragraph of HMRC's Strike Out application, which states:

> *"**TAKE NOTICE** that The Commissioners for HM Revenue and Customs ("the Respondents")*
>
> ***HEREBY APPLY** under Rules 8(3)(c) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") for the following directions:*
>
> *1. That V-Com (UK) Limited's ("the Appellant") appeal be struck out on the basis that there is no reasonable prospect of it succeeding in respect of the Appellant's pleaded Grounds of Appeal.*
>
> *..."*

[Emphasis added]

32. In this respect, Mr Brodsky submits that HMRC's application is misguided because it is formalistic and seeks to strike out the appeal on a technical drafting point which can be cured by an amendment to the Grounds of Appeal, as opposed to a strike out.

33. Further, and alternatively, Mr Brodsky submits that HMRC have never been in any doubt that the Appellant had brought an appeal on the basis that it was challenging the exercise of HMRC's reg. 29 discretion, despite the issue taken in the Strike Out application.

34. Mr Brodsky then referred to HMRC's Skeleton Argument, to shed further light on the departure from what was originally pleaded, which submits that:

> *"2. This is the hearing of the Respondent's application for the Appellant's appeal to be struck out **[112]**. The application **[46-54]** is advanced on the basis that the appeal has no reasonable prospects of success (rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009)*
>
> *...*
>
> *33. The Appellant has at no stage, either in its grounds of appeal, its letter of 15 August 2014, or its response to this strike out application, identified how the further evidence provided establishes such a strong case that the purchases were made by the Appellant such that the Respondent's decisions to adopt and apply the criteria set out above were unreasonable."*

35. In this respect, Mr Brodsky submits that HMRC's case has morphed into an attack on the evidence that the Appellant has relied on in making the claim to input tax, and the exercise of HMRC's discretion, and further disavows the basis on which the appeal is made. He submits that: (i) even if the invoices are defective, case law has established that there may still be a right to deduct tax: *Tower Bridge GP v HMRC* [2022] STC 1324 ('*Tower Bridge GP*'); (ii) even if the invoices are defective, HMRC clearly have a discretion to accept alternative evidence pursuant to reg. 29 of the VAT Regulations 1995, SI 1995/2518 ('the VAT Regulations'); (iii) the Appellant's challenge invokes the supervisory jurisdiction of the First-tier Tribunal ('FtT'); and (iv) there is no requirement for the Appellant to establish a *"strong case"*

36. He, further and alternatively, submits that HMRC have proceeded on a misunderstanding of the law. This is because whilst it is accepted that the invoices did not include the Appellant's name, it would be a *non sequitur* to say that the appeal must therefore fail as that would defeat the object of all of the case law that has arisen concerning defective invoice appeals (up to an including the Supreme Court).

37. He referred to para. 21 and 22 of the Strike Out application to illustrate this point:

> *"21. The Respondents submit that the Appellant has failed to aver that the invoices were valid in its Grounds of Appeal. Therefore it must be implicitly accepting, if not explicitly, that the invoices it holds are not valid. The extent of the challenge in the Grounds of Appeal are: (i) an attack on the Respondents' policy (i.e. the criteria in the policy), and (ii) the reasonableness of requiring the name of the person who purchased the goods the subject of the input tax reclaim.*
>
> *… Therefore, the effect of Tower Bridge is that absent information included on the invoice providing the name and address of the person to whom the goods were supplied to (which is conceded by the Appellant), it cannot have any prospect of success."*

38. Mr Brodsky ultimately submits that the Appellant has been ambushed by the development of HMRC's case. He particularly refers to, and relies on, the case of *Netbusters*, which considered *AllPay*; both of which concerned late amendments to pleadings (and the issue of a fair trial), which I will return to consider later.

HMRC's submissions

39. Mr Way, on the other hand, submits that the Skeleton Argument is not a departure from the Strike Out application, but is an attempt to consolidate matters. In essence, HMRC's position is that: (i) the substantive challenge to the Appellant's case is fully set out within the Strike Out application; (ii) the Skeleton Argument is an elucidation of the Strike Out application; and (iii) the Appellant was given adequate notice of the basis on which HMRC's application was being advanced.

40. In further amplification of these submissions, Mr Way refers to paras. 21 to 22 of the Strike Out application, as follows:

> *"…*
>
> *21…. In this case, the Respondents stated in their decision letter that the prescribed failure in the invoices was one pursuant to regulation 14(1)(e) Value Added Tax Regulations 1995. That being the case, and absent the Appellant stating that the invoices are valid or there is sufficient alternative evidence of that information so that the Regulation 29 Value Added Tax Regulations 1995 may become relevant, the Appellant cannot succeed.*
>
> *22. That is so because of the Court of Appeal's decision in Tower Bridge which found at 61-62 (and by reference to the decision of Polski Trawertyn v Dyrektor Izby Skarbowej w Poznaniu (Case C-280/10), [2012] STC 1085) that the name of the customer was a requirement of a valid invoice. The Appellant, by its second ground, namely that it would be unreasonable to require the name of the individual to be included on the invoice (i.e. the customer), has explicitly conceded that necessary information has not been included…"*

41. He, therefore, submitted that the Skeleton Argument merely amplified HMRC's earlier submissions in respect of the alternative evidence and the reg. 29 issue. Mr Way's ultimate position is that the authorities that are relevant to the question of ambush are not relevant to an application of this nature, and that the Appellant has always been aware of the case that it was required to meet.

42. At the conclusion of the preliminary discussions, I indicated to the representatives that I would reserve my decision and incorporate it into my consideration of the substantive

application to strike out the appeal - given the timing of the further preliminary issue - with the result that I would either issue a final Decision on the strike out application, or Directions for the further case management of this appeal. This was on the basis that Mr Brodsky had indicated that he was ready and able to deal with the Strike Out application, despite the further preliminary issue that he had raised.

43. I then proceeded to hear the substantive application.

The Strike Out application

44. In support of HMRC's application to strike out the appeal on the grounds that it has no reasonable prospects of success, Mr Way submits that:

(1) The FtT's power to strike out an appeal pursuant to rule 8(3)(c) of the Procedure Rules is to be exercised in a manner analogous to CPR r.3.4(2)(a): *HMRC v Fairford Group* [2014] UKUT 329 (TCC); [2015] STC 156 ('*Fairford*'). Guidance as to the application of those principles was given by the UT in *The First De Sales Limited Partnership v HMRC* [2018] UKUT 396 (TCC); [2019] 4 WLR 21 ('*The First De Sales Ltd Partnership*').

(2) A party who advances a positive case on an appeal must set out that case in advance. Where the case involves a challenge to HMRC's case, or any evidence advanced in support of the decision, then that must be made clear in the Grounds of Appeal. It is not sufficient for an appellant to rely on the possibility that new matters will be raised in cross-examination: *Tasca Tankers Ltd v HMRC* [2023] UKFTT 372 (TC) ('*Tasca*').

(3) Where a taxpayer is not in receipt of an invoice which complies with the formalities required to exercise the right to deduct input tax which arises under the Principal VAT Directive, the taxpayer does not have the ability to exercise any right of deduction as of right: *Tower Bridge GP*. Where the taxpayer does not have the ability to exercise the right to deduct as of right, HMRC retain a discretion to permit the right to deduct to be exercised.

(4) The evidence relied on by the Appellant does not establish either that: (i) the criteria that HMRC applied to determining whether or not to permit the Appellant to deduct input tax arising from the transactions was unreasonable, or (ii) that those criteria were unreasonably applied.

(5) The Appellant has not, at any stage, identified how the evidence provided establishes such a strong case that phone purchases were made by the Appellant such that HMRC's decision to adopt, and apply, the criteria set out in the Value Added Tax Act 1994 ('VATA') was unreasonable. Unless the Appellant can demonstrate the strength of the evidence available to HMRC when the decision not to exercise discretion was made, the appeal cannot be said to have any more than a fanciful prospect of success.

(6) For the substantive right to deduct input tax to arise, the taxable supply must have been made to the Appellant. This is a question of fact which must be determined in light of all of the circumstances of the case: *Lennartz* [1991] ECR 1-3795 Case C-97/90 ('*Lennartz*').

(7) An agent may create contractual relations between his principal and third parties, but whether or not an agent is contracting in his own right, or on behalf of his principal, is a question of fact. An agent acting on behalf of an undisclosed principal may, in some circumstances, create binding contractual relations between his principal and third

parties: *Bowstead & Reynolds on Agency, 23rd Ed., para. 8-068*. The terms of the contract may, expressly or impliedly, exclude the principal's right to sue and the principal's liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal. A supply by an agent who contracts in his own name, and who is not a taxable person in his own right, breaks the chain of taxable supplies with the result that the person to whom the agent makes supplies does not have the right to deduct input tax in respect of any supply effected by the agent.

(8) Where the FtT exercises a supervisory jurisdiction, the appeal will only succeed where HMRC's decision is either unlawful, or unreasonable, on the basis of the facts and matters which existed at the time of the challenged decision: *C & E Comrs v Peachtree Enterprises Ltd* [1994] STC 747 ('*Peachtree Enterprises*') and *Scandico*.

(9) Where HMRC have only made a decision as to whether to exercise their discretion to accept alternative evidence, that is the only decision against which an appeal lies. The sole issue is whether HMRC have reasonably exercised their discretion with respect to admitting alternative evidence and determining whether that information allows HMRC to decide that the substantive requirements giving rise to the right to deduct input tax have arisen.

45. Mr Brodsky's submissions in reply can be summarised as follows:

(1) The FtT should reject HMRC's application that the Appellant's case has no reasonable prospects of success. This is because HMRC's application is misguided in the sense that it is formalistic and seeks to strike the appeal on the alleged basis that the Appellant has not used the right form of words in pleading its Grounds of Appeal. Strike out would be a disproportionate response when any alleged defect could be remedied by way of an amendment to the Grounds of Appeal.

(2) The Appellant has always made it clear that its appeal is made on the grounds that HMRC acted unreasonably in the exercise of discretion under reg. 29 of the VAT Regulations.

(3) HMRC have a discretion to admit alternative evidence under reg. 29 of the VAT Regulations. The FtT has supervisory jurisdiction over the exercise of this discretion. Following *Tower Bridge GP*, a challenge to HMRC's exercise of discretion to admit alternative evidence is a valid ground of appeal. The Grounds of Appeal, therefore, clearly invoke the FtT's supervisory jurisdiction in respect of reg. 29.

(4) HMRC have not engaged with the alternative evidence put forward by the Appellant. There is no suggestion in the Strike Out application that the substance of the Appellant's position is so weak as to cause the prospects of success to be merely fanciful. Furthermore, there has been no opportunity for the Appellant to cross-examine HMRC's witnesses on the nature of the decision-making process. Contrary to HMRC's position, the Appellant is not required to show *"such a strong case"*. All that the Appellant is required to show is that the appeal has reasonable prospects of success, applying the appropriate standard of proof.

(5) A proper analysis of the case of *Tower Bridge GP* supports the Appellant's case since the key factors identified by the Court of Appeal in that appeal as justifying the refusal to accept alternative evidence are not present in this case. The Appellant's case can, therefore, be distinguished from the appeal in *Tower Bridge GP* as there is no loss to the public purse and HMRC do not allege fraud. Any missing information from the invoices does exist and can be produced.

(6) HMRC have accepted that the sales to the Appellant did take place, whilst at the same time denying that there was sufficient alternative evidence so as to allow the Appellant's claim for input tax.

46. At the conclusion of the hearing, I reserved my decision, which I now give with reasons.

THE RELEVANT LAW

The provisions of the Sixth VAT Direction (Directive 77/388/EEC of 17 May 1977), as amended by the Invoicing Directive, were replaced by the Principal VAT Directive 2006/112/EC ('PVD'). The PVD is the source of legislation concerning VAT.

The PVD

47. Article 2 of the PVD provides that the supply of goods for consideration within the territory of any Member State by a taxable person acting as such is subject to VAT. A 'taxable person' is defined as any person who carries out, in any place, any economic activity, whatever the purposes. VAT is, therefore, payable by a taxable person carrying out a taxable supply of goods or services: art. 93 PVD.

48. Article 167 provides:

> "A right of deduction shall arise at the time the deductible tax becomes chargeable."

49. Article 168 (a) provides:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person…"

50. Every taxable person who carries out supplies of goods or services in respect of which VAT is deductible must be identified by an individual number: art. 214 PVD.

51. The obligation on suppliers to provide a VAT invoice was imposed by art. 220 of the PVD. The contents of the invoice are laid down by art. 226, which provides that:

> "Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:
>
> …
>
> (3) the VAT identification number referred to in Article 214 under which the taxable person supplied the goods or services;
>
> …
>
> (5) the full name and address of the taxable person and of the customer;
>
> (6) the quantity and nature of the goods supplied or the extent and nature of the services rendered;
>
> (7) the date on which the supply of goods or services was made or completed or the date on which the payment on account referred to in points (4) and (5) of Article 220 was made, in so far as that date can be determined and differs from the date of issue of the invoice;
>
> …
>
> (9) the VAT rate applied;
>
> (10) the VAT amount payable, except where a special arrangement is applied under which, in accordance with this Directive, such a detail is excluded…"

52. Article 228 provides that:

> "Member States in whose territory goods or services are supplied may allow some of the compulsory details to be omitted from documents or messages treated as invoices pursuant to Article 219."

53. The recipient of a taxable supply, if s/he is also a taxable person, is entitled to deduct the amount of VAT s/he paid in relation to that supply.

VATA

54. The PVD has been transposed into domestic law by VATA. Section 24(1)(a) VATA defines "input tax" in relation to a taxable person as:

> "VAT on the supply to him of any goods or services ...being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

55. 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"

56. Section 25(2) VATA provides that a taxable person shall be:

> "... entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him."

57. Section 26 VATA, relevantly, provides as follows:

> "(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—
>
> (a) taxable supplies; ..."

The VAT Regulations

58. Regulations made under VATA are the VAT Regulations. Regulation 13(2) of the VAT Regulations provides that the particulars of the VAT chargeable on a supply of goods must be provided on a document containing the particulars prescribed in reg. 14(1).

59. Regulation 14(1) provides, in so far as is material:

> "(1) Subject to paragraph (2) below and regulation 16 save as the Commissioners may otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars—
>
> …
>
> (d) the name, address and registration number of the supplier,
>
> (e) the name and address of the person to whom the goods or services are supplied,
>
> [...]
>
> (g) a description sufficient to identify the goods or services supplied,
>
> (h) for each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in [any currency]

…

(l) the total amount of VAT chargeable, expressed in sterling,

…"

60. Regulation 29 of the VAT Regulations provides that:

> "(1) Subject to paragraph (2) below, and 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.
>
> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of-
>
> (a) a supply from another taxable person, hold the document, which is required to be provided under regulation 13; …
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a)…above, such other documentary evidence of the charge to VAT as the Commissioners may direct."

61. VATA and the VAT Regulations are EU-derived domestic legislation, as defined by s 1B(7) of the European Union (Withdrawal) Act 2018 ('the Withdrawal Act'). Section 2 of the Withdrawal Act 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.

DISCUSSION

62. This is HMRC's application to strike out the Appellant's appeal on the ground that the appeal has no reasonable prospects of success. The appeal relates to HMRC's decision to disallow input tax, in the sum of £506,678.32, for the VAT period 12/10. The input tax was claimed on the basis of the purchase and sale of mobile phones (Apple iPhones) by the Appellant. HMRC have denied the claim on the basis that the Appellant had failed to provide valid VAT invoices. The conclusion reached was that the evidence was not sufficient to demonstrate that the Appellant was the recipient of the taxable supplies contained in the invoices. The substantive appeal is concerned with the exercise of HMRC's discretion not to accept alternative information in substitution for invoices which identify the Appellant as the recipient of the supply of mobile phones purchased within the VAT period 12/10.

The Ambush point

63. Returning to the "Ambush point", Mr Brodsky submitted, in summary, that the Appellant has been ambushed by the development of HMRC's case since the Strike Out application notice was submitted and that, in any event, HMRC have never been in any doubt that the Appellant was challenging the exercise of HMRC's reg. 29 discretion.

64. Mr Way submitted that the Skeleton argument is merely an elucidation of the arguments raised in Strike Out application, as opposed to a departure from it, and that the question of ambush is not relevant to the application under consideration.

65. I have considered the authorities to which I was referred by Mr Brodsky in support of the ambush point:

66. The case of *Netbusters* concerned the proper classification, for VAT purposes, of the supplies made by the Appellant in that appeal. The activities in question were the organisation by the Appellant of various competitive football and netball leagues, and the supply of pitches for these league matches to be played upon. During the proceedings,

HMRC made a slightly different point in their Skeleton Argument, after the Statement of Case had been filed. It was argued, on behalf of the appellant, that this amounted to ambush. At [42] to [43], Judge Malek said this:

> "42. Mr Firth referred us to this Tribunal's decision in *Allpay Ltd v The Commissioners for HMRC [2018] UKFTT 273TC* in which Judge Mosedale (reciting one of her earlier decisions) opined that there is clear prejudice to the Appellant in not knowing HMRC's case, litigation should not be conducted by ambush and that the Appellants have a right to be put in a position where they can properly prepare their cases. She also referred to the Civil Procedure Rules and the decision of Lord Woolf MR in *McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775, 792J-793A* in support of her judgment.
>
> 43. We would endorse all that Judge Mosedale has said and add the following. It is an important principle of natural justice that every party must have reasonable notice of the case that he has to meet. That is to say there should be no "trial by ambush". The function of the statement of case in this Tribunal, as it is in civil proceedings, is to concisely set out a party's case. This enables the parties to know, in advance, each other's case and to understand the positions adopted. The purpose is to encourage a "cards on the table" approach to litigation. This allows parties to prepare effectively and at proportionate cost."

[Emphasis added]

67. In *AllPay*, to which Judge Malek referred, HMRC had pleaded that they could not usefully plead anything as they did not have the burden of proof and were not leading any evidence, but simply intending to challenge the appellant's evidence. Judge Mosedale said this, at [16] and [18]:

> "16…the proposition that the burden of proof lies on the appellant to prove that its supplies were exempt is not in dispute but it is also not really relevant to the question of what the statement of case must contain.
>
> …
>
> 18. … If the person with the burden of proof was required to prove everything, even those matters which the other party had not clearly disputed, then preparation for, and hearings of, appeals would be much longer and a great deal of time and money would be wasted. Moreover, trial by ambush is not justice: each party should be able to prepare to meet the other party's case in advance of the hearing to increase the likelihood that the outcome of the appeal will be in accordance with the true facts of the case. Each party must therefore state in advance in summary terms what is in dispute and why."

68. At [23], Judge Mosedale said this:

> "23. It may be that the appellant's pleadings in Burgess & Brimheath were defective in not setting out in summary form the key objections to HMRC's allegations, but if so, HMRC had the chance to raise the matter at or before the hearing. Instead they said nothing but proceeded in the hearing on the assumption that the point had been conceded despite the express statement by the appellant that it had not been. Burgess & Brimheath is not about the adequacy of the pleadings, it is about the effect of (inadequate) pleadings being ignored by the other party and the Tribunal; on reflection, it is not relevant here and of no assistance to HMRC's case in this application that not having the burden of proof relieves them from the need to plead their case."

69. As considered in *AllPay*, pleadings are required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identifying 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, in reference to the words of Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 792J-793A.

70. The case of *Shinelock Ltd v HMRC* [2023] UKUT 00107 (TCC) ('*Shinelock*') (Judges Thomas Scott and Greenbank) concerned an application for permission to make a late amendment to a case before the hearing. The appeal was against amendments made by HMRC to Shinelock's self-assessment for the accounting period ended 31 March 2015. The amendments increased the corporation tax payable for that period by £18,854, in respect of a chargeable gain which HMRC considered had arisen to Shinelock following the disposal of a property. The arguments between the parties had changed considerably in the course of their dispute. The UT said this, at [118]:

> "118. Where a party who wishes to raise a new argument has applied to the FTT for permission to make a late amendment to its case before the hearing, then the FTT should consider that application taking into account the principles set out in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm)…"

71. The case of *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) ('*Quah*'), at [37] to [38] also involved an application to make a late amendment to a claim. Carr J (as she then was), summarised the relevant principles, at [37] to [38]. The UT in *Shinelock* also considered the case *Satyam Enterprises v Barton* [2021] EWCA Civ 287, where Nugee LJ set out the position as follows:

> "36. The present case however is not one of a party seeking to depart from his pleaded case, but one where the parties addressed in their evidence and submissions the cases that had been pleaded, but the Judge decided the case on a basis that had neither been pleaded nor canvassed before him. In our system of civil litigation that is impermissible, and a misunderstanding of the judge's function which is to try the issues the parties have raised before him. The relevant principles were stated by this Court in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041...
>
> > "...It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."

72. The differences in *Shinelock* and *Quah*, and the appeal before me, do not negate the need to ensure a fair hearing. The requirement that the pleadings (i.e., the Grounds of Appeal and the Statement of Case) set out a party's position in full is in order to avoid a "trial by ambush" as the next usual step is a substantive appeal hearing. That is because a party's change of position would run the risk that a trial date would be lost in circumstances where the parties, and the court, have a legitimate expectation that trial fixtures will be kept.

73. The Procedure Rules provide a framework for hearings before the FtT, and the overriding objective can be summarised by the requirement to ensure fairness and justice, as follows:

> "**Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> **2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly…"

74. I have considered the submissions made by both representatives, and the pleadings as set out in the Strike Out application and Grounds of Appeal. I am satisfied that the question

of ambush does not arise in the circumstances of this application. I give my reasons for so finding:

75. I find that the decision, dated 20 March 2013, clearly set out the reasons for HMRC's decision. The decision clarified that purchases where the Appellant could not provide satisfactory evidence of its claim would be disallowed. The value of input tax denied was in the sum of £506,678.32 due to HMRC not accepting the alternative evidence provided. I am satisfied that the Appellant would have been under no illusions as to the reasons for the decision, having accepted that valid invoices were not provided. I find that having received HMRC's decision, following the exchange of correspondence, the Appellant was clear about what the full parameters of HMRC's case were.

76. The Appellant subsequently submitted an appeal against that decision. The Procedure Rules provide for the submission of a notice of appeal against a decision, as follows:

> "**Starting appeal proceedings**
>
> 20.—(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—
>
> …
>
> (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."

77. The Appellant will, at this stage, set out the full grounds for the appeal. The requirement to attach a copy of the written decision means that the Appellant would have had an opportunity to address the reasons given in the decision, within its grounds. The requirement to provide a Statement of Case only follows after the appeal proceedings have been started by the filing of a valid notice of appeal, with grounds attaching a copy of the decision appealed against (to show that there is a right of appeal against that decision). The Procedure Rules then require HMRC to provide a Statement of Case in preparation for a substantive hearing, as follows:

> "**Respondent's statement of case**
>
> 25.—(1) A respondent must send or deliver a statement of case to the Tribunal, the appellant and any other respondent so that it is received—
>
> …
>
> (2) A statement of case must—
>
> (a) in an appeal, state the legislative provision under which the decision under appeal was made; and
>
> (b) set out the respondent's position in relation to the case.
>
> …"

78. There is, however, no similar duty to provide a Statement of Case on the Appellant. This is because the Appellant would already have been required to file a Notice of Appeal in response to a decision which is expected to clearly set out the full parameters of HMRC's case, in order to facilitate the provision of the Statement of Case. HMRC's original Statement of Case was filed on 26 March 2014. The Statement of Case set out, at paras. 15 to 19, that the Appellant had not complied with the legal requirements to hold a valid VAT invoice. An application to amend the Statement of Case was made on 6 May 2016, in order for HMRC to

raise what was referred to as "the Employee Issue". This was because a fundamental issue identified in the appeal was the question of whether the Appellant received taxable supplies in respect of the goods which were the subject of the receipts from Apple. Questions that therefore arose were: (i) who the individuals who made the purchases for the Appellant were; and (ii) what their relationship to the Appellant was.

79. The Employee Issue had not formed part of HMRC's decision and first arose as an issue when it was identified that the FtT had raised the matter in various cases, leading up to the decision of the FtT in *Scandico*: [2015] UKFTT 0036 (TC) (and the issue of an undisclosed agent – s 47(2A) VATA). The UT appeal in *Scandico* was listed to be heard in June 2016 and the Appellant's appeal was stayed behind that decision. The UT has since handed down its decision in *Scandico*.

80. The stay was lifted following the decision of the Supreme Court in *Zipvit.* I shall return to *Scandico* and *Zipvit* later.

81. By the time this application was listed for a hearing, further case law had arisen. This does not, however, detract from the fact that the issue has always been that concerning the alternative evidence relied on by HMRC (as clearly set out in the amended Statement of Case). All that has happened is that the parties' positions have become more refined with the passage of time following the stay.

82. The matter before me concerns a preliminary application, and not consideration of the substantive appeal. That does not mean that the principles of fairness and justice do not apply. I nevertheless find that there is some force in Mr Way's submission that this hearing differs from a substantive hearing in that it is an interlocutory application. By the same token, however, the Appellant is still entitled to know the case that must be met in relation to such a hearing and in respect of such an application.

83. HMRC have made the application which is the subject of this hearing. Rule 6 of the Procedure Rules provides that:

> **"Procedure for applying for and giving directions**
>
> 6.—(1) The Tribunal may give a direction on the application of one or more of the parties or on its own initiative.
>
> …
>
> (3) An application for a direction must include the reasons for making that application."

84. This clearly shows that full reasons for making the application must be given at the time that the application is made. I accept that the reasons for the application were that the appeal has no reasonable prospects of success. I am, however, satisfied that the Strike out application did not only make reference to the manner in which the Grounds of Appeal were pleaded, but also to the Appellant's disagreement with the alternative evidence considered by HMRC (at paras. 21 and 22 of the Strike Out application), and this was elaborated upon in the Skeleton Argument.

85. Pursuant to Rule 8 of the Procedure Rules, the Appellant has the opportunity to make representations in response to an application to strike out its appeal, as follows:

> **"Striking out a party's case**
>
> 8.—
>
> …

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

86. The Appellant responded to the Strike Out application in its response dated 17 November 2023.

87. I find that in the application before me, both parties have sought to attack one another's pleadings. The Ambush point has been raised by the Appellant in relation to the development of HMRC's case from the Strike Out application to the Skeleton Argument. Mr Way has similarly attacked the development of the Appellant's case from the Grounds of Appeal to the letter dated 15 August 2014. Mr Way referred to the Grounds of Appeal, which are drafted as follows:

"...

2. The Appellant considers that HMRC have failed to set proper fair or reasonable criteria for deciding whether to accept the evidence put forward to them in support of the claim to input tax. In particular

(a) the criteria set ignore the crucial fact that the Appellant undeniably sold the goods in question on to third parties at a margin and provided evidence to HMRC support [sic] *that fact, making it overwhelmingly likely that the Appellant had purchased the goods.*

(b) it is unreasonable to require a person who bought goods on the Appellant's behalf to be an employee of the Appellant, particularly as HMRC had been informed that the vast majority of individuals who made purchases on the Appellant's behalf were students and/or casuals."

88. He submitted that the Grounds of Appeal had simply challenged the criteria adopted by HMRC as being too restrictive. I find, however, that the Grounds of Appeal also refer to whether HMRC considered all of the relevant information in the exercise of their discretion, as follows:

"3. Further, the level of disclosure by HMRC of the methodology adopted by it to test the evidence provided against the criteria set makes it unclear whether all relevant information provided to HMRC was taken into account."

89. Mr Way then submits that the Appellant's case was set out in starker terms in the letter dated 15 August 2014, which was drafted as follows:

"Further to our email of 11 August we are writing to inform you that our client's case will include matters not currently addressed in your own Statement of Case. We appreciate that you have reserved to [sic] *right to amend or add to your Statement of Case, but consider it important that you are made aware of our client's position at an early stage. Accordingly, would you please note the following:-*

> *1. The Respondents were clearly prepared to exercise their discretion under Regulation 29(2) of the Value Added Tax Regulations 1995 ("the Regulations") in favour of accepting alternative evidence that the Appellant is entitled to credit for the input tax claimed on its 12/10 VAT return. The issue now is the reasonableness of the Respondent's decision not to accept the evidence provided to them."*

90. He submits that the Appellant has failed to amend its Grounds of Appeal. I find, however, that despite attacking the Appellant's letter of 15 August 2014 as being an amplification of the Grounds of Appeal in the absence of an application to amend those grounds, Mr Way has sought to argue that the elucidation of the points raised in the Strike Out application within his Skeleton Argument on behalf of HMRC was merely a consolidation of all of the relevant matters. I find that HMRC cannot have it both ways by attacking the Appellant for doing the very same thing that has been done by HMRC.

Moreover, HMRC's Skeleton Argument was rightly referred to by Mr Brodsky as having been served a mere four days before the hearing, at 5.32pm, and does not form part of HMRC's pleadings. The Appellant's letter of 15 August 2014 made reference to the Grounds of Appeal, which I am satisfied clearly sought to launch an attack on the exercise of HMRC's discretion, and was served many years before the Strike Out application was made by HMRC.

91. Furthermore, whilst attacking the Appellant's failure to amend its Grounds of Appeal, it is clear that the substantive submissions made by HMRC in the Statement of Case and Skeleton Argument acknowledge that the Appellant's position was that HMRC's decision was unreasonable - in respect of the reg. 29 issue. I find that HMRC's position was informed by the Grounds of Appeal, as amplified in the letter dated 15 August 2014, from Mr Stern to HMRC. This much is clear from the Skeleton Argument, which includes the following submissions:

> *"...*
>
> *20. Where the FTT exercises a supervisory jurisdiction, the appeal will only succeed where HMRC's decision is either unlawful or unreasonable, on the basis of the facts and matters which existed at the time of the challenged decision (per Customs and Excise Commissioners v Peachtree Enterprises Ltd [1994] STC 747 at 751; Scandico Ltd v HMRC [2017] UKUT 0467 (TCC) at paras 18-21).*
>
> *21. Where HMRC have only made a decision as to whether to exercise their discretion to accept alternative evidence, that is the only decision against which an appeal lies (per Scandico at paras 39-40). The sole issue in such a case is therefore whether HMRC have reasonably exercised their discretion with respect to admitting alternative evidence and determining whether that information allows HMRC to decide that the substantive requirements giving rise to the right to deduct input tax have arisen"*

92. I have found that the decision has always clearly set out the reasons for refusing the Appellant's claim and the Appellant was not taken by surprise when the time came for the appeal proceedings to be commenced by the lodging of a valid notice of appeal, at which point the Appellant was required to state the grounds of appeal and why the decision was wrong. Having considered all of the evidence and submissions, cumulatively, and in light of my findings above, I am satisfied that the question of ambush does not arise in the circumstances of this appeal. My conclusions on the question of ambush are not, however, determinative of the substantive application, which I now proceed to consider.

The Strike Out application

93. In support of the strike out application, Mr Way submits, in summary, that the Appellant accepts that the invoices are not valid and, therefore, there is a limitation on the challenge that can be brought to against the decision to refuse the claim. He further submits that in order for the substantive right to deduct input tax to arise, the taxable supply must have been made to the Appellant and the Appellant has failed to show this. Ultimately, he submits that there is no basis on which the FtT could conclude that the criteria adopted by HMRC in the exercise of its discretion was unreasonably applied.

94. Mr Brodsky submits that case law establishes that the Appellant's grounds for appealing against the decision invoke the supervisory jurisdiction of the FtT, and that there has been little reference to the underlying alternative evidence submitted to HMRC in respect of the reg. 29 discretion. Furthermore, he submits that there is no requirement for the Appellant to present *"such a strong case*", as this is the wrong test. He adds that HMRC issued a winding up petition on the basis of the supplies made, which was wholly inconsistent with the Strike Out application now being made.

95. I now turn to the circumstances of this application:

96. Returning to the Procedure Rules, the case management powers of the FtT are provided for at Rule 5, as follows:

> "**Case management powers**
>
> **5.**—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> …
>
> (e) deal with an issue in the proceedings as a preliminary issue;
>
> …"

97. Rule 8(3)(c) of the Procedure Rules, which forms the basis of this application, provides that:

> "8(3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> […]
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

98. The UT formulated the following test for assessing the reasonable prospects of success in *Fairford* (Simon J and Judge Bishopp). In *Fairford*, the UT was considering the issue as to the jurisdiction of the FtT under rule 8(3)(c). The appeal related to 36 transactions and more than £13,000,000 of input tax. The appeal was against HMRC's decision to deny input tax for the periods 03/06 and 06/06 on the basis that the taxpayer's transactions were connected with the fraudulent evasion of VAT, and that they knew, or should have known, of the connection. The alleged connection forming the basis of HMRC's decision was the Missing Trader Intra-Community ('MTIC') fraud. The fraud in that appeal involved both the "vanilla" version, where transactions carried out by the taxpayers can be traced directly to a fraudulent tax loss, and the "contra-trading" version, where the transactions carried out by the taxpayers can be traced through a "clean" chain to a trader involved in covering up the tax losses of fraudulent, defaulting traders in a linked dirty chain. At [30], the UT held that:

> "30. ... The FTT has the power to strike out a part of the proceedings if it concludes that there is no reasonable prospect of all or part of an appellant's case succeeding... The Court's powers may be exercised if a defence is vague, evasive, incoherent or obviously ill-founded, although in such cases the objectionable nature of the party's case can often be cured by amendment or further particulars."

[Emphasis added]

99. At [41], the UT held that the FtT should consider a strike out application under rule 8(3)(c) in a similar way to the approach to an application under CPR rule 3.4:

> "41... The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see Swain v Hillman [2001] 2 All ER 91 and Three Rivers (see above) Lord Hope at [95]. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see ED & F Man Liquid Products v Patel [2003] EWCA Civ 472.

> The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in Three Rivers, the strike out procedure is to deal with cases that are not fit for a full hearing at all."

100. At [48], the UT then referred to what it described as a "*practical and legitimate*" procedure for dealing with applications of the nature in this appeal. The UT concluded that:

> "48. …An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users."

101. And, at [49]:

> "49. In our view the FTT should also direct that if an appellant raises no positive case, serves no evidence challenging the evidence of HMRC's witnesses, and does not identify the respects in which the statements of those of HMRC's witnesses who deal only with the questions set out at para 47 above are disputed, then their evidence can be given, and will be accepted by the tribunal, in the form of a written statement under FTT Rule 15(1) (see also Rule 5(3)(f)), and that cross-examination of that witness will not be permitted."

102. The UT amplified the guidance previously given in *British Telecommunications Plc v R & C Comrs* [2023] UKUT 00122 (TCC), at [68] and [69] (Leech J and Judge Aleksander), in *The First de Sales Ltd Partnership* (Henry Carr J and Judge Sinfield), where the UT cited the judgment of Lewison J (as he then was) in *Easyair Limited v Opal Telecom* [2009] EWHC 339 and held, at [33], that:

> "33. Although the summary in Fairford Group plc is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in AC Ward & Son v Caitlin Five Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final

> decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it..."

103. At [74], the UT said this:

> "74. …The FTT, correctly in our judgment, was satisfied that it had before it all the evidence necessary for the proper determination of the question and that the parties had an adequate opportunity to address it in argument. The Appellants' evidential case was, in our view, hopeless, based on the evidence before the FTT. The FTT was right to conclude it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

104. Three points that stand out from the decision in *The First de Sales Ltd Partnership* are (and I paraphrase) that: (i) it is necessary to consider whether the Appellant has a "realistic" as opposed to a "fanciful" prospect of success; (ii) it is not appropriate to conduct a mini-trial; and (iii) if I am satisfied that I have before me all the evidence necessary for the proper determination of the question, and the parties have had an adequate opportunity to address it in argument, I should decide the issue. This would require the point in issue to be a short point of law.

105. Turning to the circumstances of this appeal:

106. HMRC have disallowed the Appellant's claim to input tax due to the evidence submitted in support of the claim. The primary means by which a taxable person may exercise the right to deduction is by possession of a valid VAT invoice whose contents are prescribed by reg. 13 of the VAT Regulations (supra). This is the general rule. In this respect, the invalidity of the invoices submitted is not in issue between the parties. It is accepted that the invoices do not meet the requirements of reg. 14(1)(e) of the VAT Regulations. However, even if the invoices are defective, case law has established that there may be a right to deduct input tax.

107. There is, further, no dispute as to the legislative provisions governing the exercise of the right to deduct input tax. The relevant legislative provisions in respect of the right to deduct input tax were set out by the Court of Appeal in *Tower Bridge GP*, where the issue was whether a taxable person is entitled to exercise a right to deduct input tax despite the fact that they held no VAT invoice in respect of the supply. The appellant argued that it was entitled to make the deduction either as of right, or because HMRC unlawfully exercised their discretion to refuse to allow the deduction to be made. HMRC denied the recovery of input tax on the basis that the invoices did not meet the formal legal requirements to be valid VAT invoices. One of the defects in the invoices was that they failed to name the customer.

108. The court accepted that possession of a valid VAT invoice is HMRC's "*first line of defence against fraud in the system*": at [126]. This is because if the customer's name is missing, that raises the possibility that the invoice may be used more than once to make duplicate claims: *HMRC v Boyce* [2017] UKUT 0177 (TCC) (Arnold J). Therefore, where a taxpayer is not in receipt of an invoice which complies with the formalities required to exercise the right to deduct input tax, the taxpayer does not have the ability to exercise any right of deduction as of right.

109. Of relevance in *Tower Bridge GP* was reg. 29 of the VAT Regulations. HMRC however refused to exercise their discretion to allow recovery of the input tax on the basis that: (i) the supplier (Stratex) was not VAT registered, (ii) the transactions were connected with fraud, and (iii) Tower Bridge failed to conduct reasonable due diligence in relation to the transactions. In respect of the exercise of discretion by HMRC, the court found that there were two exercises of discretion embedded within the operation of reg. 29 of the VAT Regulations. In this respect, Lewison LJ held, at [123], that:

> "123. In my judgment, however, there are in fact two exercises of discretion embedded within the proviso. The first is whether to entertain an application to establish the right to deduct otherwise than by a compliant invoice ("where the Commissioners so direct"). The second, if the first discretion is exercised in the taxable person's favour, is the discretion to specify the documentary evidence that HMRC require in order to prove that the input tax has been incurred ("such other documentary evidence of the charge to VAT as the Commissioners may direct")."

110. And at [125]:

> "125. As we have seen from the EU case law the court has held that national tax authorities should 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. That is the primary purpose of HMRC's discretion under regulation 29."

111. At [131], Lewison LJ said this:

> "131. …Since the exercise of discretion was a matter of national law, it was not among the questions referred to the CJEU; and the Supreme Court did not need to deal with it, since Zipvit's claim fell at the first fence. Nevertheless, Henderson LJ did deal with it. I have already quoted paragraph [114] of his judgment which sets out part of his reasoning on that issue. It needs to be supplemented by a further extract from paragraph [117] in which he said:
>
> > "Whether the situation is described as one in which HMRC have no discretion, because the requirements of article 226(9) and (10) cannot be dispensed with, or as one where there is in law a discretion but on the facts of the present case it can only be exercised in one way, does not seem to me to matter. The important point is that the inability of Zipvit to produce a compliant VAT invoice in support of its claim to deduct input tax is in my judgment fatal."

112. The court was satisfied that the case was not a case in which a defective invoice can be corrected by evidence subsequently supplied. The court, nevertheless, considered that although it would be possible for the customer name to be supplied, the VAT Registration Number ('VRN') could not, because it did not exist. The court, ultimately, held that the purpose for which Tower Bridge sought to impugn HMRC's exercise of discretion fell outside of the primary purpose of the proviso to reg. 29. The question of discretion also came up in *Zipvit*, which was handed down before the stay in the Appellant's appeal was lifted.

113. In *Zipvit*, Royal Mail had supplied services to Zipvit under the mistaken belief that they were exempt supplies. Consequently, the invoices did not specify any VAT as payable. The Court of Justice of the European Union ('CJEU') decided that the United Kingdom had not correctly transposed the PVD and that, in fact, the supplies were not exempt and should have been subject to VAT. The question before the court was whether Zipvit could exercise the right to deduct on the basis that the price paid for supplies had to be treated as inclusive of VAT. The Supreme Court referred two questions to the CJEU, namely:

(1) Whether VAT had been due or paid; and

(2) Whether an invoice stating the amount of VAT was necessary in order to exercise the right to deduct.

114. The CJEU considered that it was only necessary to answer the first question. Advocate-General Kokott nevertheless considered both questions and summarised her view, at [48] to [50], and examined the previous caselaw of the court, at [79] to [82]. The Advocate-General did not regard the inclusion of the VRN in the invoice itself as one of the essential items of information, provided that its omission could be, and is, corrected. The Advocate-General further concluded that one of the items that was essential was the recipient of the supply. The court ruled that Zipvit could not exercise the right to deduct because there was no VAT "due or payable", for the purposes of art. 168 of the PVD (supra). It, therefore, did not need to answer the question about the form of the invoice. When the case returned to the Supreme Court, the Supreme Court also found it unnecessary to rule on that question. The name of the customer was, however held to be "essential" in *Zipvit*.

115. The case of *Scandico* (Rose J and Judge Helier), behind which the Appellant's appeal was previously stayed, concerned the purchase of Apple iPhones and valid invoices. Scandico purchased export iPhones that were not available in certain countries and Apple did not generally sell to phone traders from its retail stores. Scandico, therefore, employed 80 individuals whom they called "runners". Employees would purchase iPhones under their own names, false names or without providing names. Cash, or gift cards, were given to the runners to pay for the phones, though sometimes the individuals used debit or credit cards. VAT was reclaimed by the company on the iPhones and HMRC enquired into the reclaims and disallowed input VAT recovery as only simplified VAT invoices were provided. HMRC had invited Scandico to provide further secondary evidence, but were not satisfied that this was provided as there was no audit trail confirming how the phones had been purchased and delivered to the company.

116. Scandico argued that HMRC should have allowed the appellant the right to deduct on the basis of the invoices which were produced, together with the other evidence which had been produced. The FtT had earlier decided that the employees clearly purchased iPhones on behalf of the company, but that this was irrelevant. The FtT concluded that HMRC was reasonable in its conclusion, and that there were gaps and uncertainties which meant that HMRC was within its rights to refuse the claim.

117. When the appeal came before the UT, the UT also concluded that HMRC were within their rights to refuse a VAT reclaim due to insufficient evidence on the purchase of the iPhones, and agreed that a simple invoice for the purchase of an iPhone costing more than £250 was insufficient to enable VAT recovery. The UT considered that it was apparent from how the case was presented before the FtT that a practice had grown whereby a tribunal seized with an appeal was invited by both parties to approach its task in two stages. The first stage was for the FtT to consider whether, in fact, the taxpayer made taxable supplies. If s/he did not, then the appeal would fail because the exercise of HMRC's discretion whether to accept alternative evidence was irrelevant if there was no entitlement to deduct the input tax. If the FtT held that there was a taxable supply, then it would go on to consider the second stage; namely whether HMRC acted unreasonably in refusing to accept the alternative evidence.

118. The UT disapproved of the two-stage approach and regarded the two-stage approach as "*seriously flawed both in juridical and practical terms*". The UT held, at [43] to [44], that:

> "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...
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> 44. We therefore decline to express any view on whether there was a taxable supply in this case. There has been no decision one way or the other by HMRC and it is not the task of

either the First-tier Tribunal or the Upper Tribunal to arrive at a decision on that point, however much the parties may ask it to do so or however useful such a decision would be. The task of the tribunal is not as Mr Pickup variously put it 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."

119. At [39] to [40], of the decision in *Scandico*, the UT held that:

> "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... We agree with the conclusion arrived at by the FTT in paragraph 117 of its judgment that in this case HMRC have not taken a decision about whether there was a taxable supply of the phones to Scandico. 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.

120. The UT further held that it was appropriate for the appellant to raise the question as to whether HMRC's exercise of discretion had been reasonable, and said this, at [50] and [53]:

> "50. …We understand that Scandico went back to Apple to ask for VAT invoices to be provided to it for the phones but that request was refused. The provision of additional, alternative evidence is not the same as the correction or completion of a VAT invoice. We do not accept that the Advocate General's emphasis on the importance of fiscal neutrality means that the FTT was either required to consider if there had been a taxable supply in this case or to allow Scandico's appeal if it found on the facts that there had been. Nor, even though the Court described the holding of an invoice as a formal rather than a substantive requirement of the right to deduct, does it set at nought a condition for the exercise of that right that in the absence of an invoice the taxpayer must satisfy the national authorities of the existence of the right to deduct.
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> …
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> 53. 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."

121. The supervisory nature of HMRC's discretion was also considered in *Tower Bridge GP* and in *Best Buys Supplies Ltd v HMRC* [2011] UKUT 497 (TCC). In Tower Bridge GP, Lord Justice Lewison said this:

> "122. It is common ground that the proviso gives discretion to HMRC. Where HMRC exercise a discretion entrusted to them, the role of the FTT is supervisory only: Customs and

> Excise Commissioners v Peachtree Enterprises Ltd [1994] STC 747. It is also common ground that where the proviso refers to "the charge to VAT" what it is referring to is the input tax which the taxable person claims to be entitled to deduct. That paved the way for Ms Shaw's submission that all that HMRC were entitled to require was evidence that the person claiming the right was a taxable person; the goods or services supplied to him were supplied for the purposes of his own taxable transactions and supplied by him to another taxable person; and that the input tax had actually been incurred and paid. There was no other discretion to exercise."

122. It is clear from the authorities that in relation to the exercise of discretion by HMRC, all that the FtT is required to consider in any substantive appeal against the refusal by HMRC to exercise discretion favourably is whether the conclusion reached by HMRC in the exercise of its discretion is reasonable.

123. It is not suggested that Apple has not accounted for the VAT included in the invoices. It is submitted, on behalf of the Appellant, that the phones were purchased via a method that could be traced back to the Appellant. Mr Brodsky submitted that on the reasoning adopted by HMRC in respect of the claims that were accepted, the reasons for rejecting other claims needs to be tested as those other claims relied on the same evidence. In this appeal, following review of the decision, the review officer acknowledged that the Appellant had provided bank statements, which showed large sums of expenditure to Apple, as well as evidence which purported to show that cash amounts had been made available from the Appellant's retail fuel sales to fund other purchases of individual iPhones.

124. Due to the significant number of purchases of iPhones, V-UK had to maintain records as to the number of handsets purchased, and by whom they were purchased. The records were cross-referenced to the gift cards given to employees, and the amount of those gift cards. On receipt of handsets, V-UK would scan the phones received, record the unique IMEI number and cross-check this number with the box and the Apple till receipt. The original working sheets were not retained but consolidated versions were prepared, extracting the bulk of the information and converting it into spreadsheet format. These records were then provided to HMRC.

125. When the Appellant was invited to provide alternative evidence by HMRC on 12 July 2012. The Appellant provided spreadsheets to show the purchases made using funds which originated from the Appellant's bank account. The evidence also provided to HMRC included: (i) bank statements showing the purchase of all gift cards; (ii) Unique IMEI and unique serial numbers for each iPhone; (iii) all original Apple till receipts; (iv) PAYE records and other evidence of the "runners" employed; and (v) evidence of the onward sale of the phones by reference to the IMEI numbers and unique serial numbers. I find that a significant amount of evidence will need to be explored during a substantive hearing.

126. I am satisfied that the issues raised in the substantive appeal, and the evidence relied on by both parties, are such that they require detailed consideration in a substantive hearing. In the circumstances, a strike out would not be appropriate. The authorities on the question of whether an appeal has no reasonable prospects of success establish that an application of this nature is relevant if the tribunal is only concerned with a short point of law. It is not appropriate to conduct a mini-trial of the issues, which is what I find would be required in the circumstances of this application, in light of the evidence relied on by the parties and the line of authorities referred to above. I give my reasons for so finding:

127. In respect of the challenge to the Grounds of Appeal as pleaded, I have found that the Appellant's case was always based on the reasonableness of the exercise of HMRC's discretion. The letter dated 15 August 2014 provided further and better particulars in the same manner that Mr Way sought to consolidate all matters on behalf of HMRC. I further

find that there is considerable force in Mr Brodsky's submission that the sphere of litigation concerning the exercise of HMRC's discretion would not have arisen if the FtT could not consider the manner in which HMRC's discretion had been exercised in the absence of valid VAT invoices. Furthermore, a two-stage approach has been disapproved by the UT.

128. Whilst HMRC have referred to the exercise of their discretion and have relied on the statements of a number of witnesses whose evidence was to be relied on during an appeal, I am satisfied that the Appellant's desire to test HMRC's evidence does not translate into a finding that the Appellant is attempting to "put the cart before the horse" by putting HMRC to strict proof first, as strongly discouraged by the UT in *Fairford*. I further find that this is not a case where the Appellant has not placed its cards on the table "face up" in light of my findings on the pleadings submitted by the Appellant, and the development of the issues (and the parties' positions) after this matter was stayed behind relevant case law.

129. I find that the issues in this appeal do not amount to a short point of law that can be dealt with summarily. I am further satisfied that HMRC have failed to show that the appeal has no reasonable prospects of success. As correctly submitted by Mr Brodsky, the Appellant is not required to show *"such a strong case"*. My findings on the preliminary issue should not be taken to mean that the Appellant's appeal will succeed, but are a balanced appraisal of the information that is before me in this application, in light of the authorities.

CONCLUSIONS

130. I hold that:

(1) the Strike Out application does not concern a short point of law and requires determination of substantial issues and evidence. There is every risk that this could lead to a mini-trial;

(2) the initial objectionable nature of the Appellant's case could be cured by an amendment to the Grounds of Appeal but, in any event, I am satisfied that the Appellant has provided further and better particulars in its letter dated 15 August 2014;

(3) the differences between the Appellant's appeal and the appeal in *Scandico* are that Scandico could not show an audit trail confirming how the phones were purchased;

(4) HMRC have not established that the Appellant has no reasonable prospects of success and there is no requirement for the Appellant to show a strong case; and

(5) the Appellant's appeal invokes the supervisory jurisdiction of the FtT.

131. Accordingly, therefore, the application is dismissed.

132. For completeness, I was invited to consider the issue of costs by Mr Brodsky. I have decided not to make a decision as to costs in light of my findings on the refinement of both parties' cases following the previous stay (the Ambush point). I am satisfied that there has not been any unreasonable conduct by HMRC in this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

133. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 1st MAY 2024