[2013] UKFTT 150 (TC)

TC02548

Appeal number TC/2009/13311

VAT—Self-billing- failure to complete a self-billing agreement- HMRC aware of self-billing from various visits over many years - 4 traders deregistered - self-billing regulation 29(2) of VAT Regulations 1995 not apply- no- HMRC failed to consider discretion- appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

G B HOUSLEY LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID S PORTER
SUSAN STOTT

Sitting in public at Alexandra House, Manchester on 22 January 2013

Glyn Edwards, VAT consultant, for the Appellant

Vinesh L Mandalia, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Steven Burkhill (Mr Burkhill), Managing Director of G B Housley Ltd (the Company) appeals on behalf of the Company against the Respondents (HMRC) Notice of Assessment dated 25 March 2009 pursuant to section 73 of the Value Added Tax Act 1994 (the Act) in the sum of £337,381 plus interest representing VAT arrears for the periods 1 March 2006 to 31 August 2008.

2. Mr Burkhill says that the Company has been operating a self-billing system since and prior to 1996 and, although there was no self-billing agreement in place, HMRC carried out inspections over the years and were fully aware of the system. The Company had no reason to believe that four of their suppliers were de-registered during the period of the assessment. HMRC should have exercised their discretion under regulation 29 (2) of the Value Added Tax Regulations 1995, since the Company's invoices contained all the necessary information and HMRC had confirmed that the Company was otherwise compliant. HMRC says that as the Company did not have a self-billing agreement with the suppliers, the invoices were invalid and regulation 20(2) could not assist as the company had not complied with the self-billing conditions.

3. Mr Glyn Edwards (Mr Edwards), a VAT consultant with Wolters Kluwer (UK) Ltd, appeared for the Company and called Mr Burkhill and Mrs Valerie Connoll (Mrs Connoll) as witnesses. Mr Burkhill affirmed and Mrs Connoll gave evidence under oath. He also produced a bundle of authorities.

4. Mr Vinesh L Mandalia (Mr Mandalia), of counsel, appeared for HMRC and called Willam Day (Mr Day), an assurance officer with HMRC, who gave evidence and affirmed. Mr Mandalia also produced an agreed bundle and a bundle of authorities.

5. We were referred to the following cases:

- *Credit Ancillary Services Limited* (VTD 2172).
- *British Teleflower Services Ltd* (VTD 13,756).
- *Boguslaw Juliusz Dankowski v Dyrektor Izby Skarbowej w Lodzi* (Case - 438/09).
- *Best Buys Supplies Ltd v R & C Cmmrs* [2012][2011]UKUT 497 (TCC).
- *John Dee* CA [1995].
- *Shani Fashion Industries Limited* 9789.

- *M J Gleeson Group PLC* 13332.
- *Outis Limited* 14864.
- *John Reisdorf v Finanzamt Koln-West* ECJ C-85/95
- *Kohanzad vs C&E Cmmrs* [1994] STC 967.

The Law

6. The legislation that allows a taxpayer to self-bill is contained within section 29 Value Added T7ax Act 1994 (VATA 1994) and Schedule 11 of that Act. In addition the regulations that relate to VAT invoices and other requirements, and in particular self-billing, are those included in Regulations 13(3) to 13 (3D) of the VAT regulations 1995 (SI 1995,2518)

7. VATA1994 defines "taxable person":

> 3(1) A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act

VAT is chargeable on supplies by a taxable person by virtue of section 4(1)

> 4(1) VAT shall be charged on the supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

8. Section 24(1) defines input tax:

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

9. Regulation 2B(1) This paragraph applies where a taxable person provides to himself a document ("a self-billing invoice") that purports to be a VAT invoice in respect of the supply of goods or services to him by another taxable person

2B(2) Subject to the compliance with such conditions as may be –

(a) Prescribed,
(b) specified in a notice published by the Commissioners, or
(c) imposed in a particular case in accordance with the regulations,

a self-billed invoice shall be treated as the VAT invoice required by the regulations under paragraph 2A to be provided by the supplier.

…….

2B(5) Regulations under this paragraph-

(a) may be framed so as to apply only in prescribed cases or only in relation to supplies made to persons of prescribed descriptions;
(b) may make different provisions for different circumstances.

10. Regulation 13 of VAT Regulations 1994 (the regulations) provides:-

13(1) Save as otherwise provided in these Regulations, where a registered person-

(b) makes a taxable supply in the United Kingdom to a taxable person, or

(c) ……..

(d) ……..

he shall provide such a person as mentioned above with a VAT invoice

13(3) Where a registered person provides a document himself (a self-billed invoice) that purports to be a VAT invoice in respect of a supply of goods or services to him by another registered person, that document shall be treated as the VAT invoice required to be provided the supplier under paragraph (1) (a) if it complies with the conditions set out in paragraph (3A) and with any further conditions that may be contained in a notice published by the Commissioners or may be imposed in a particular case.

11. Regulation 13(3A) The following conditions must be complied with if a self-billed invoice is to be treated as a VAT invoice-

(a) it must have been provided pursuant to a prior agreement ("a self-billing agreement") entered into between the supplier of the goods or services to which it relates and the recipient of the goods or services ("the customer") and which satisfies the requirements in paragraph (3B).

(b) it must contain the particulars required under regulation 14(1) or (2);

(c) it must relate to a supply or supplies made by a supplier who is a taxable person

13(3B) A self-billing agreement must-

(d) authorise the customer to produce self-billed invoices in respect of supplies made by the supplier for a specified period which shall end not later than either-

i. the expiry date of 12 months, or

ii. the expiry of the period of any contract between the customer and the supplier for the supply of the particular goods or services to which the self-billing agreement relates.

(e) specify that the supplier will not issue VAT invoice in respect of supplies covered by the agreement;

(f) specify that the supplier will accept each self-billed invoice created by the customer in respect of the supplies made by him by the supplier;

(g) specify that the supplier will notify the customer if he ceases to be a taxable person or if he changes his registration number.

13(3C) Without prejudice to any term of the self-billing agreement, it shall be treated as having expired when-

……..(b) the supplier ceases to be registered for VAT.

12. Section 29 states:

29 Where:-

(a) a taxable person ("the recipient") provides a document to himself which purports to be an invoice un respect of a taxable supply of goods or services to him by another person; and

(b) that documents understates the VAT chargeable on the supply

The Commissioners may, by notice served on the recipient and on the supplier, elect that the amount of VAT understated by the document shall be regarded for the purposes as VAT due from the recipient and not from the supplier.

29 (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, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct.

13. It appears from the decision of *M J Gleeson Group PLC* 13332 that prior to the 1995 Regulations a customer wishing to use the self-billing system need only to have obtained the consent of the suppliers and the Commissioners. There appears to have been no need for a self-billing agreement.

The facts

14. We found the following facts. Mr Burkhill told us that the Company had been registered for VAT since 1973. He had been employed by the company since 1997 and the VAT returns were completed by Peter Gelsthorpe, an external bookkeeper. He explained that potential suppliers would contact the company by telephone and the Company would offer a price for whatever grade of scrap metal the suppliers wanted to sell. Typically, it would be more than one grade to make up a load. If the suppliers were interested then the Company would ask the supplier for its VAT certificate and the Company would adviser the supplier that it would pay the VAT element of the invoice by cheque. He considered that that at least

meant that the VAT payment could be checked from the Company's bank account and into the suppliers' bank account. The major part of the business was to buy from smaller merchants and to sell to end users.

15. After receiving a copy of the VAT certificate the Company would ring the local VAT office to check that the certificate was correct. No evidence of such telephone calls were produced. Mr Burkhill confirmed, in cross-examination, that the company did not check whether the suppliers paid the VAT to HMRC.

16. The supplier would bring in a load of various scrap materials. The individual buckets, in which they were brought, would be weighed and the weigh bridge record brought to Mr Burkhill, whilst the driver waited for the invoice to be completed and the money paid. The money and cheque were usually put in an envelope and handed to the driver. Mr Burkhill indicated, under cross-examination, that he thought that there was no need to make further enquiries either of the suppliers, or to check whether the suppliers had subsequently paid the right amount of VAT to HMRC. A copy of the invoice would be provided for Mrs Connoll, one would be retained in the books in the yard and the original handed to the driver. Mr Burkhill produced the following documents to the Tribunal:-

- A VAT Certificate for Fiadem Limited dated 24 October 2007 revealing that its trade classification was "metals and metal ores; wholesale of".

- A VAT Certificate for Chapel Town Engineering Services Ltd dated 14 March 2007 revealing that its trade classification was "basic iron, steel and ferro alloys".

- A VAT Certificate for North Linc Drainage Limited dated 30 October 2000 revealing that its trade classification was "other freight transport by road". Mr Mandalia had asked whether the classification had put Mr Burkhill on enquiry. He said no,t as he had been told that they were delivering ground works and he was aware that such work often involved a substantial amount of scrap.

- A VAT Certificate for Tachman UK Limited dated 27 September 2004 revealing that its trade classification was "metals and metal ores; wholesale of".

- An invoice dated 28 March 2007 for North Linc Drainage Ltd for Copper wire, mixed brass and lead scrap to the value of £4,393.20 with VAT due of £786.81. The invoice has the word cash circled and Mr Burkhill indicated that that meant that the supplier had been paid cash for the scrap. The VAT had been paid by cheque.

- A bank statement from HSBC for the period 31 March to 6 April 2007 revealing a debit of the VAT cheque for £768.81 on 4 April 2007. He confirmed to Mr Mandalia that there was no evidence with regard to the payment of the cash save for the circling of the word on the invoice. If the

payment had been made by cheque then that word would have been encircled. Mr Burkhill explained that the Company withdrew cash as and when required, but that it normally received payment from its customers by chaps or bank transfer.

- Similar invoices and bank details for the purchases from Tachman UK Ltd, Chapel Town Engineering Services Ltd, and North Linc Drainage Limited the other three suppliers, the subject of the assessment.

Since the issues raised by HMRC, the Company have instituted proper self-billing agreements.

17. Mr Burkhill said that his memory of the supplies from North Lincs Drainage was very sketchy, other than that they said they were working on a large groundwork's job. They supplied him with their VAT certificate, referred to above, and the material delivered was consistent with ex-groundworks.

18. With regard to Tachman - Jason, who he recalled was a "tall lad with blonde hair", who called to see him and indicated that he wanted to build up a long term relationship with the Company, as he had heard about its good reputation in the trade. The Company has produced the VAT Certificate provide by Tachman in the bundle. The last deal it had with Tachman resulted in a dispute and Jason never returned. Mr Burkhill tried to contact Tachman, but without success.

19. With regard to Chapeltown Engineering – contact was made by John Steel, "a person with a local accent", who gave the Company a mobile phone number to contact him with prices. After several weeks Mr Steel contacted the Company to say he had a large job. Mr Burkhill thought it was a clearance/dismantling job. Deliveries were made of material consistent with the job by the same driver on each occasion. The address on the VAT Certificate was of an old steel works, which had been converted into smaller units. Chapeltown was supplying the Company at the time of Mr Day's visit in October 2007 (referred to below). After the inspection Mr Burkhill had telephoned Mr Steel and asked him to come to see him without explaining why. Mr Burkhill left several telephone messages. The telephone number eventually became unavailable.

20. A man called Steve contacted the Company on behalf of Fiadem, because he said the prices that he had been getting locally were poor. He supplied a VAT Certificate and accepted that the VAT would be paid by cheque. A few weeks later he sent the Company a load of metal with less than 24 hours notice. The address on the VAT certificate was in Huddersfield. Fiadem was also supplying the Company at the time of Mr Day's visit. Mr Burkhill contacted Steve, but was only able to leave a message until Steve's telephone was disconnected.

21. Mr Burkhill said that in the case of all the four suppliers the metals were bought at the current market rates and there was nothing to suggest that anything was out of order. He had been satisfied that the materials had not been stolen as details of stolen metal are usually very quickly circulated around the trade. The

validity of all the VAT Certificates had been checked with the local VAT office. With regard to Chapeltown there was a timing difference between checking its certificate and trading commencing.

22. Mr Burkhill had continued to use the system for self-billing adopted by the Company before he became involved in 1997. In reply to Mr Mandalia's question as to whether he was aware of the need for a self-billing agreement, he said he was not. Mr Stephenson, the Company's contact at HMRC, asked the Company each year to send lists of the current self-billing suppliers over the previous 12 month period. Mr Burkhill produced a copy of the list sent on 19 November 2011 of 59 suppliers, all of which were paid using the self-billing system. We note that the names of the four suppliers, the subject of this appeal, are included on the list.

23. Mrs Connoll confirmed that she used to send the lists to Mr Stephenson at HMRC. She felt sure they might have copies of the lists of earlier years, but that they would possibly difficult to locate. We found both Mr Burkhill and Mrs Connoll to be honest and straight forward in giving evidence. Mr Burkhill did not dissemble and when he did know the answer he said so frankly. We have no reason to suppose that what they both told us was other than the truth.

24. Mr Day, who affirmed, helpfully produced a table of the registration details of the four suppliers and the dates when the Company carried on business with them, as follows:

Name	Date of Registration	Date deregistered	Trade with GBH Commenced	Trade with GBH ceased
Chapeltown Engineering	O1/03/2007	26/11/2007	13/3/2008	29/08/2008
Fiadem Ltd	01/03/2005	25/06/2008	17/7/2008	29/08/2008
North Lincs	01/10/2000	15/05/2006	02/02/2006	28/03/2007
Tachman UK Ltd	01/09/2004	14/02/2008	03/02/2007	27/03/08

25. It will be noted from the above that the Company traded with Chapeltown and Fiadem after they had been deregistered. That it started trading with North Lincs on 2 February 2006 and Fiadem had been deregistered approximately 4 months later. The trade with Tachman appears to have been within their registration period save for the last six weeks.

26. Mr Day advised that he was part of a team investigating scrap metal merchants and, in that capacity, he had personally visited all the sites from which the suppliers purportedly operated:-

- He had visited Unit 3, Birch Road, Sheffield, S9 3XL the address shown on the self-billed invoices for Chapeltown on 17 October 2008. The owner of the address, and two other occupants, stated that that company had not operated from that address. Mr Edwards noted that Chapeltown had been deregistered on 26 November 2007 and asked Mr Day how long, after his visit the previous month, it would have taken for HMRC to decide to deregister Chapeltown. Mr Day was unable to say, but conceded it would have taken longer than the month.

- He visited 288 Coppice Drive, Huddersfield, shown as the address of Fiadem Ltd on the self-billing invoice, on 12 September 2007. he could find no indication that Fiadem traded from that address. Mr Edwards noted that Fiadem Ltd had been deregistered on 26 June 2008 some 10 months after Mr Day's visit.

- Mr Day had visited 3 Kinwel Road, Market Rasen, LN8 shown as the address of North Lincs Drainage Ltd on the self-billing invoice on 11 November 2008. The occupant at that address stated that he had lived there since 2002 and that North Lincs Drainage Ltd had never operated from there. He had been informed that the company actually stopped trading some four years previously. Mr Edwards noted that North Lincs Drainage Ltd had been deregistered from 15 May 2006.

- Mr Day had also visited Wharf Road, Kilnhurst, South Yorkshire the address on the self-billing invoice for Tachman UK Ltd. The brother of the director of Tachman confirmed that Tachman had not traded from that address. It appeared that the brothers had fallen out. Whilst there Mr Day found an invoice for an address in Hull, which he also visited but Tachman were not there either. Mr Edwards noted that Tachman had been deregistered on 14 February 2008.

27. Mr Day was unable to explain why, when there appeared to be a specific investigation into scrap metal merchants, it had appeared to take so long to deregister the suppliers. He conceded that there would have been some enquiries made and that the deregistration might then have been back-dated. In those circumstances, he accepted that it might well have been possible for the Company to ring the local VAT office and receive confirmation that the suppliers were still registered.

28. Hart Shaw had written to HMRC on 23 July 2009 indicating that their research showed that a Mr Howley, who appeared to own Axholme Secretaries Limited and/or Axholme Directors Limited and was also a director of Drummond & Co LLP auditors, was the common link. Mr Day said that he did not know whether that information had been followed up. He also stated that he was unaware whether any VAT had been recovered as a result of any enquires. He considered that he would have known if it had been recovered because it would have been flagged up for him on the electronic folder.

29. The bundle contains details of previous visits to the Company by HMRC:-

- There are two letters dated 29 March 1996 and 13 March 1998 from HMRC both acknowledging receipt of the supplier lists for self-billing purposes.

- 26 March 1997, the inspector reported "From the books and records examined I am satisfied that the business is credible"

- 24 July 2003 which indicated under 'last audit report (matters Outstanding) Self Billed cash to review', and that the annual accounts for 30.04.2002 had been examined.

- A registration Full Premises Visit had taken place on 6 March 2007, which indicated that there was nothing fundamental outstanding. The company had by that time been trading with North Lincs for over 12 months and had recorded approximately £454,000 of self-billed purchases with VAT of £79,000. The audit report stated that:-

    - All input tax claims were traced to supporting evidence for the period 11-06 and 12.06

    - A random sample of self-billed invoices were traced to the self-billing register.

    - That from the books and records examined, the business is credible, and

    - The records of this business are very well kept.

    In the comments section Mr A Payne, the visiting officer, added:

        - Traced self-billed invoices to self-billing register at random

        - Raised a large number of VAT 453's for self billing invoices. Mr Day indicated that form 453 provided details to other officers.

        - Random check of unusual claims in earlier periods.

- There is a letter from Mr Day dated 28 January 2008, during the period of the assessment, in which he advises of a visit in March 2007 in which he says:

    - "The following information relates to a supply recorded as being received by a VAT registered trader. If the supply was made by your company, would you please provide me with a copy of the invoice (conventional or self-billed) held by yourself, relating to the supply.."

- On 22 October 2008 Mr Day advised the Company that he considered the invoices were invalid and in his letter, arising from his refusal to accept the invoices, stated:-

    - "Your first step should be to obtain valid evidence to reclaim the amounts shown on your records. Please ensure that if further evidence of a correct VAT number is obtained, that you forward the information for verification. If you cannot obtain satisfactory evidence, you should follow paragraphs 17 onwards in the Statement of Practice; this should be done if you wish HMRC to consider exercising its discretion in allowing your input tax claim".

    - He attached the statement of practice and in cross-examination Mr Edwards referred him to paragraph 5 and asked if the Company had met all the conditions referred to. He replied that all the conditions had been met. Paragraph 5 states:

        - A business has incurred input tax if the following conditions are met;

            - There has actually been a supply of the goods or services;
            - That supply took place in the UK;
            - It is taxable at a positive rate of tax;
            - The supplier is a taxable person, i.e. someone either registered for VAT in the UK, or required to be registered;
            - The supply is made to the person claiming the deduction;
            - The recipient is a taxable person at the time that the tax was incurred; and
            - The recipient intends to use the goods or services for his business purposes.

- In their letter of 25 June 2008. Hart Shaw, Chartered Accountants for the Company, maintained that there was evidence of a supply taking place. Paragraph 17 of the Statement of Practice indicates:

    "A proper exercise of HMRC's discretion can only be undertaken when there is sufficient evidence to satisfy the commissioners that a supply has taken place. Where a supply has taken place, but the invoice

to support this is invalid, the commissioners may exercise their discretion and allow a claim for input tax credit".

Hart Shaw maintained that there was such evidence as follows:-

(a) financial accounts and gross returns of G B Housley Limited,

(b) cash book records,

(c) bank accounts details,

(d) weigh tickets and self-billing invoices,

(e) suppliers register, and

(f) the regular compliance visits by HMRC.

Mr Day confirmed to Mr Edwards that he had seen all these documents

30. There was some ambivalence expressed by Mr Day as to his view of the exercise of HMRC's discretion. In his letter of 17 July 2009 addressed to Hart Shaw Mr Day wrote:

"I consider that had self-billing been in place that you may be in a position to contend that HMRC should exercise its discretion in allowing the input claims for the two suppliers for some of their trading period with G B Housley Ltd".

On page 2 of the letter he added

"You asked me to consider the HMRC Statement of Practice (Input Tax Deduction) and mentioned a significant volume of goods purchased over a period of 2 years and 7 months. I have not disputed the existence of the goods supplied and accept that your client purchased the goods in connection with the making of his taxable supplies. I accept that all the conditions (para 5- a to g) (see above) have been met.

I have read the complete appendix 2 and consider, that despite the inadequacy in your clients' self-billing system, the information is insufficient for HMRC to exercise discretion.

Further, it should be noted that input tax deduction has been disallowed as your client failed to correctly operate the self-billing procedure. Consequently it would be inappropriate for HMRC to consider applying its discretion under the Statement of Practice".

31. Mr Day indicated at the hearing, and in correspondence with Hart Shaw, that he would have considered exercising the discretion, but that the Company had failed to produce any further information in spite of saying that it was in

possession of the information. Hart Shaw had indicted that they could produce all the appropriate evidence, but that it would be a mammoth task.

32. Mr Mandalia asked Mr Day in re-examining to confirm whether he had received any further evidence at all and Mr Day said he had not. We have conclude from the evidence that Mr Day had seen most of the documentation on his visits but that he had not had any evidence specifically sent to him for the purposes of this appeal. Mr Edwards commented that the omission to provide further evidence was because Mr Day had made it clear, that as there was no self-billing agreement, that HMRC could not consider an application for discretion and that there was therefore little point in going to the trouble of producing it. We are also satisfied that Mr Day did not consider exercising the discretion because he considered all of the appeal invoices were invalid because no self- billing agreement was in place.

Submissions by Mr Mandalia

33. Mr Mandalia submitted that Rule 3.1 of Notice 700/62 (has the force of law and is mandatory) provides that a 'self-billed' invoice can only be issued under an agreement with the supplier. The Company has conceded that no such agreements existed. It follows that the Company had failed to satisfy a material requirement for self-billing and the invoices relied on are not evidence of its entitlement to deduct input tax.

34. The thrust of the Company's case appeared to be that HMRC failed to exercise any discretion and that that failure renders the assessment invalid. Mr Mandalia submitted that although regulation 29(2) of the 1995 Regulations provides that the Commissioners may direct either generally or in relation to particular cases that a claimant shall hold or provide other evidence of the charge to VAT, that is subject to the express requirement under Regulation 29(2) (a) that if a claim is in respect of a supply from another taxable person, the trader shall hold the document which is required to be provided under regulation 13(4). That is a valid self- billed invoice.

35. Mr Mandalia submitted that the exercise of the discretion over-rides the express statutory requirement. In *John Reisdorf v Finanzamt Koln-West* ECJ C-85/95 the ECJ held:

> "Article 22(3) contains mandatory rules for the drawing up of invoices and subparagraph (a) imposes an obligation on every taxable person, in respect of all goods and services provided by him to another taxable person, to 'issue an invoice or other document serving as an invoice'. In addition Article 22(3) (c) allows the Member State to lay down the criteria determining whether a document 'serves as an invoice'. It is apparent from Article 18(1) (a), read in conjunction with Article 22(3), that the exercise of the right to deduct input tax is normally dependent on possession of the original of the invoice or of the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice…[paragraph 25]

It must therefore be concluded that Article 18(1) (a) and Article 22(3) of the Sixth Directive permit the Member States to regard as an invoice not only the original but also any other document serving as an invoice that fulfils the criteria determined by the Member States themselves…;[Paragraph 25]"

36. Article 18 (1) (a) and 22 (3) plainly therefore permit a member state to determine the criteria to be met to support a claim to deduct input tax. In the context of the 'self-billing' regime, the criteria are expressly set out in the legislation. In any event the four suppliers have all been de-registered.

37. In exercising discretion, the Commissioners are reasonably entitled to take account of the fact that;

a. The conditions for 'self-billing' were not met by the Company; and

b. The supplies that are the subject of the assessment are all by suppliers that are deregistered.

c. The Company has failed to provide any other documentary evidence of the transactions.

38. Mr Mandalia submits that it is plain that the necessary conditions for 'self-billing' have not been met by the Company. Furthermore, it is apparent that the purported suppliers were in fact traders that had been deregistered and thus no VAT can have been properly incurred upon the transactions in question. The supply did not take place at the positive rate and was not made to a taxable person. On several occasions the Company's advisers had been given the opportunity to provide any appropriate evidence and had failed to do so. As a result the appeal must be dismissed.

Submissions by Mr Edwards

39. Mr Edwards agreed that it was common ground that the Company did not comply with the formal requirements to operate self-billing, because it did not have self-billing agreements in place with its suppliers. Under Regulation13 (3) (A) this means that the self-billed documents cannot be treated as VAT invoices. It is significant that all the Company's other suppliers were billed on a self-billing basis and HMRC has not chosen to deny the input tax in relation to those other invoices.

40. Regulation 29 gives the Commissioners discretion, both generally or in respect of particular cases, to allow input tax deduction using evidence other than that specified in Regulation 13. Regulation 13 covers both invoices and self-bills such that the Commissioners' discretion is not fettered merely because of a failure to comply with self-billing regulations.

41. Mr Day, in his letter of 17 July 2009, sets this out and asserts that the discretion could not be exercised, because a self-billing agreement was not in place.

" ..it should be noted that input tax deduction has been disallowed as your client failed to operate the self-billing procedure. Consequently it would be inappropriate for HMRC to consider applying its discretion under the 'Statement of Practice'

42. Mr Edwards submits that this is a straightforward matter. Regulation 29 allows the Commissioners discretion to allow input tax deduction using evidence other than that specified in regulation 13. HMRC have referred to the cases of *Credit Ancillary Services Limited* (VTD 2172) and *British Teleflower Services Ltd* (VTD 13,756). Mr Edwards submitted that discretion was not considered or argued in those cases and that they are therefore not persuasive in the current appeal. HMRC have applied the discretion in relation to all of the other self-billed invoices and allowed the Company to reclaim the input tax.

43. HMRC has set out its policy on allowing input tax deduction without a valid VAT invoice in a Statement of Practice dated March 2007 and the Company has satisfied all the conditions. Regulation 29 requires the Commissioners:-

> ".. Where claims are not supported by proper evidence (including claims supported by invalid VAT invoices) officers must always exercise this discretion and consider whether or not satisfactory alternative evidence is available to justify deduction. If the officers simply reject claims without having fairly and reasonably considered the circumstances, their assessment will not be upheld in the courts".

A decision to disallow input tax without considering whether VAT has been properly incurred by a taxpayer in the course or furtherance of his business fails to address the fundamental right of a taxpayer to deduct input tax.

44. In the case of *Boguslaw Juliusz Dankowski v Dyrektor Izby Skarbowej w Lodzi* (Case -438/09) the Polish Authorities sought to disallow input tax claimed by a taxpayer on the grounds that the supplier was not registered for VAT. At paragraph 47 the court held:-

> " 47. It follows from all of the foregoing that Article 17 (6) of the Sixth Directive must be interpreted as precluding national legislation which excludes the right to deduct VAT paid by a taxable person to another taxable person, who has provided services, where the latter has not registered for the purpose of that VAT"

45. As a result of the evidence, Mr Edwards submits that the failure of the officer to consider the discretion renders the assessment invalid *per se.* The Tribunal's jurisdiction is limited to a supervisory role. (see *Kohanzad vs C&E Cmmrs* [1994] STC 967). Mr Edwards submits that the decision not to consider exercise of the discretion was a decision, which no reasonable body of Commissioners could have taken. The Company argues that had it considered discretion, the natural conclusion of any reasonable body of Commissioners would be to allow deduction of the input tax in question.

46. In *Best Buys Supplies Ltd v R & C Cmmrs* [2012][2011]UKUT 497 (TCC) the Upper Tribunal confirmed that :-

> "..it is common ground that the jurisdiction in respect of the decision of HMRC under Regulation 29(2) not to allow the input tax which was covered by a valid invoice was supervisory in that the Tribunal could not substitute its own decision but only decide whether the discretion had been exercised reasonably. The burden of proof was on the taxpayer to satisfy the Tribunal that the decision was incorrect".

47. Mr Edwards submitted that in applying *John Dee* CA [1995] the Tribunal is entitle to dismiss the appeal if they find that HMRC had acted unreasonably. If the Tribunal considers that given the additional information made available at the Tribunal, HMRC would inevitably come to the conclusion that it could not exercise its discretion, then the Tribunal could dismiss the appeal. He submitted that there was no additional information.

The decision

48. We have considered the facts and the law and allow the appeal. Mr Mandalia submitted that the Company's case was untenable because, as it had not had a self-billing agreement in place, Regulation 29 (2) could not be called in aid. Mr Day was of the same opinion. He never, therefore, considered the application of the discretion. He accepted that he had seen much of the documentation and that the Company was in all other respects compliant. He had, in any event, allowed the validity of the other 55 invoices. We have not been told what format those invoices took, but we assume they must have been in the same format as those produced to the Tribunal.

49. If Mr Mandalia's proposition that the failure to have entered into a self-billing agreement is fatal to the Company's claim, then there would appear to have been no need to establish that the four suppliers were deregistered, save that if the discretion was to have been exercised, the lack of registration would inevitably (See *John Dee)* have meant that the invoices could not have been valid. We do not accept on the evidence that the Company could have known that the four suppliers were deregistered. We are satisfied that Mr Burkhill spoke to the local VAT office which confirmed the registration. Mr Day's evidence was inconclusive as to the timing of the deregistration. The dates for the de-registration may have been-back dated following the necessary enquiries.

50. In the case of *Boguslaw Juliusz Dankowski v Dyrektor Izby Skarbowej w Lodzi* (Case -438/09) referred to by Mr Edwards, the court held at paragraph 47:

> " 47. It follows from all of the foregoing that Article 17 (6) of the Sixth Directive must be interpreted as precluding national legislation which excludes the right to deduct VAT paid by a taxable person to another taxable person, who has provided services, where the latter has not registered for the purpose of that VAT"

On the evidence provided, we have decided that the local VAT Office had advised the Company that the VAT registrations were correct and in the light of *Boguslaw Juliusz Dankowski* there was no prospect, on that basis, of HMRC establishing that the invoices were invalid.

51. Regulation 13 of VAT Regulations 1994 requires the Company to provide its suppliers with VAT invoices. Where it provides a self-billed invoice, that purports to be a VAT invoice in respect of a supply of goods to it, that document is treated as the VAT under paragraph (1) (a) **if it complies with the conditions** (our emphasis) set out in paragraph (3A) and with any further conditions that may be contained in a notice published by the Commissioners or may be imposed in a particular case. Regulation 13(3A) provide inter alia that the Company must enter into a self-billing agreement with its suppliers, which satisfies the requirements in paragraph (3B). The Company has agreed that it had no such agreements.

52. We accept that where a customer completes a self-billing invoice he is more likely to complete it correctly. There must, however, be occasions when the mistakes are made. The invoices, the subject of this appeal, were completed correctly as there was no error on the face of them that would take them outside regulation 14. Mr Mandalia contends that the failure to have a self-billing agreement means that the documents cannot qualify as an invoice at all and cannot therefore fall within the ambit of Regulation 29 (2).

53. Regulation 13 deals with two types of invoices; the more common one produced by a supplier and the self-billed invoice. Both types of invoices have to comply with the requirements of Regulation 14 as to their contents and self-billed invoices have, in addition, to be backed up by self-billing agreements. Regulation 2B (2) specifically states:-

> "a self-billed invoice shall be treated as the VAT invoice required by the regulations under paragraph 2A to be provided by the supplier"

If, therefore, either invoice is non-compliant then the taxpayer can ask HMRC to exercise its discretion under regulation 29 (2) and in those circumstances the lack of a self-billing agreement cannot be fatal.

55. We fail to see how an invoice, which is otherwise compliant, cannot be considered an invoice. In this appeal, HMRC has accepted that all the other invoices were compliant and it has not sought to extend the assessment to those invoices. The Regulation anticipates that there will be some irregularity causing even a standard invoice to be invalid. The failure to have a self-billing agreement is clearly irregular. HMRC have discretion to remedy irregular invoices if they are otherwise satisfied from other documentation, that the invoice should be treated as such.

56. Having decided that self-billed invoices come within regulation 13, Regulation 29 (2) must apply as it states:

"29 (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**;…..(our emphasis)

…provided that where the Commissioners so direct, either generally or in relation to particular cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct.

There is no doubt that the company held such other evidence of the charge to VAT. HMRC was fully aware that the Company was self-billing as evidenced by the many visits and the notes arising there from. Further, Mr Day conceded that he had seen most of the necessary documents. In fact, he can not deny the validity of the invoices, other than for the lack of the self-billing agreement, as he appears to have allowed all the other invoices. The invoices contained all the necessary information under regulation 14 and the legislation.

58. Nor can we accept that HMRC's decision would inevitably have been the same because the four suppliers were deregistered. We have decided that the Company was entitled to rely on the advice from the local VAT office. We accept that no evidence, other than verbally from Mr Burkhill, has been produced of those telephone calls. We are not satisfied, however, from the evidence that the dates of the deregistration necessarily confirmed that the four suppliers were so deregistered at the time of the telephone request made by the Company. Mr Day was unable to tell us with any degree of certainty how the dates were arrived at.

59. We are satisfied that HMRC made no attempt to consider the discretion, having decided that the lack of a self-billing agreement was critical. We therefore allow the appeal as HMRC have acted unreasonably in not exercising its discretion and we agree with Mr Edwards' submission that the failure of the officer to consider the discretion renders the assessment invalid *per se*

60. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this 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.

DAVID S PORTER
TRIBUNAL JUDGE

RELEASE DATE: 15 February 2013