TC02739

Appeal number: LON/2009/0687

VAT–input tax-self-billing-whether self-billing agreement used compliant with conditions-no-whether right to deduct input tax in any event-no-whether discretion not to accept alternative evidence exercised unreasonably by HMRC-no-Regulations 13,14 and 29 VAT Regulations 1995-appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAYGROUP LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MRS CATHERINE FARQUHARSON

Sitting in public at 45 Bedford Square, London WC1 on 8 November 2012

Mr Leslie Allen of DLA Piper UK LLP, Solicitors for the Appellant

Mr Matthew Donmall of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ("Taygroup") operates a business of road transport, warehousing and container hire. It has been registered for VAT since 1 January 2002. In late 2004 the Appellant determined that small local haulage businesses were essential to the continued growth and success of its business. It decided that in order to be able to create a weekly payment schedule for what turned out to be a large number of such businesses and retain these supplies it was necessary to introduce a self-billing system for small local haulage companies and owner drivers.

2. This appeal arises out of two VAT assessments ("the Assessments") issued by the Respondents ("HMRC") in respect of the period from 09/2005 to 06/2008 where input tax has not been allowed by HMRC as initially claimed by Taygroup under self-billing invoices that it had issued during that period.

3. The amount of VAT at issue is not itself in dispute, being £214,446.88. This amount relates to input tax claimed on self-billing invoices in relation to supplies made by eighteen different suppliers, none of which were registered for VAT at the material time ("the unregistered suppliers" or "an unregistered supplier")

4. Taygroup claims an entitlement to the VAT in question on grounds as follows:

> (1) The requirements of Regulation 13 of the VAT Regulations 1995(" the Regulations") in respect of self-billing were, contrary to HMRC's position, fulfilled ("the domestic legislation ground");
>
> (2) Alternatively, Taygroup is entitled to input tax paid in respect of such supplies as were made within the first twelve months of any self-billing arrangement ("the 12 month ground");
>
> (3) Having paid VAT on the supplies, it would be contrary to European law to disallow Taygroup the input tax ("the European law ground"); and
>
> (4) In any event, HMRC should have exercised its discretion to accept, in the absence of a valid VAT invoice relating to the relevant supply, alternative evidence provided by Taygroup pursuant to the discretion given to HMRC in Regulation 29 of the Regulations ("the alternative evidence ground").

5. We consider below the relevant law and guidance in relation to input tax credit in the context of self-billing arrangements insofar as it affects the issues on this appeal. We then make findings of fact based on the evidence before us before setting out our decision and the reasons for it on each of the grounds advanced by Taygroup.

Relevant legislation, guidance and authorities

6. Section 4(1) of the Value Added Tax Act 1994 ("VATA 1994") provides:

> "VAT shall be charged on any 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."

7. For these purposes a "taxable person" is defined by section 3(1) VATA 1994 as a person who is or is required to be registered under that Act.

8. Section 24(1) VATA 1994 defines input tax in the following terms:

> "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;
>
> (b) …
>
> (c) …,
>
> being (in each case) goods or services used or to be used for the purposes of any business carried on or to be carried on by him."

9. Section 24(6)(a) VATA 1994 makes provision for regulations to determine how input tax is to be evidenced:

> "Regulations may provide –
>
> (a) for VAT on the supply of goods or services to a taxable person … to be treated as his 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 …"

10. Section 25(2) VATA 1994 provides that a person is entitled to credit for so much of his input tax as is allowable under section 26 as follows:

> "Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26 …"

11. The Regulations, which have been made under section 24(6) (a) VATA 1994, make provision for the documents which will evidence and quantify input tax. Regulation 29 is the relevant provision:

> "(1) Subject to paragraph (1A) 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 save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim on the return for the first prescribed accounting period in which he holds that document or invoice.
>
> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of -

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13

…

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

12. Regulation 13 provides that where a registered person makes a taxable supply to a taxable person he shall provide a VAT invoice to that person.

13. Regulation 14 stipulates what particulars must be stated in a VAT invoice. The particulars required by the following sub-paragraphs of Regulation 14(1) are relevant in this case:

(b) the time of supply;

(d) the name, address and registration number of the supplier;

(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 …".

14. A person to whom goods or services are provides has the right to produce a self-billed invoice in relation to supplies made to him instead of receiving a VAT invoice from the supplier.

15. Regulation 13 also sets out the conditions that must be complied with for self-billing:

"(3) Where a registered person provides a document to 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 by the supplier under paragraph (1)(a) if it complied 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.

(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);

(3B) A self-billing agreement must –

(a) 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 of a period 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 they self-billing agreement relates;

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

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

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

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

(a) the business of the supplier is transferred as a going concern;

(b) the business of the customer is transferred as a going concern;

(c) the supplier ceases to be registered for VAT."

16. It can be seen from the above provisions that input tax credit is only available where there has been a taxable supply of goods or services. In these circumstances the obligation to issue a valid VAT invoice arises under Regulation 13. In this case the supplies that were the subject of the Assessments were the subject of self-billing invoices issued by Taygroup which, if they met the requirements sent out in paragraph 15 above, would be treated as the VAT invoice required under Regulation 13. If the self-billing invoices concerned did not so comply, no valid VAT invoice would have been issued and accordingly, under domestic law at least, Taygroup would have no right to claim input tax in relation to the supply concerned pursuant to Regulation 29 and would only receive credit for the same if HMRC accepted alternative evidence "of the charge to VAT" pursuant to the exercise of its discretionary power under Regulation 29(2).

17. It follows that there are, in respect of the current case, two distinct requirements that must be met before a purported self-billing invoice is compliant with regulation 13 such as to give an entitlement to deduction of input tax under Regulation 29:

(1) The self-billing invoice must have been provided pursuant to a valid self-billing agreement, which requires that the supplier was registered for VAT at the time. If the supplier was not so registered, then there can be no valid self-billing (Regulation 13(3C);

(2) The self-billing agreement must authorise the customer to produce self-billing invoices for a specified period of time, and that period of time must either end no later than twelve months after the agreement commences or upon the expiry of the period of any underlying contract between the customer and the supplier (Regulation 13(3B).

18. HMRC have published guidance on self-billing arrangements; it is to be found in Notice 700/62 and is consistent with the statutory provisions referred to above. In so far as relevant to this case the guidance provides as follows:

"2.2 Points to watch

Before you begin self-billing, you should consider the following points:

- You can only recover the VAT shown if you meet the conditions explained in this notice.

… "a self-billed invoice cannot evidence your entitlement to input tax if the supplier is not VAT registered"

3.3

A self-billing agreement will usually last for 12 months. At the end of that period, you will need to review the agreement so that you can provide us with evidence to show that your supplier has agreed to accept the invoices you raise on his behalf.

However, if you have a business contract with a supplier, you may not need to make a separate self-billing agreement. In these circumstances the self-billing agreement would last until the end date of the contract, and you would not need to review the self-billing agreement until the contract had expired.

3.4 What if I fail to set up an agreement?

Without an agreement the self-billed invoices you have issued are not evidence of your entitlement to input tax, and you may be assessed for tax and a penalty if you have claimed input tax on them.

4.1 Main rules for self-billers

If you are a self-biller you must:

- raise self-billed invoices for all transactions with the supplier named on the document for a period of up to 12 months; or, if you have a contract with your supplier, for the duration of that contract;

…

- keep the names, addresses and VAT registration numbers of the suppliers who have agreed to you self-billing them, and be able to produce them for our inspection if we ask you to. We recommend that you review these details regularly so that you can be sure that you are only claiming VAT on invoices you have issued to suppliers who have valid VAT registration numbers. The simplest way of doing this is to keep a list of the suppliers you self-bill.

You must **not** issue self-billed VAT invoices:

- on behalf of suppliers who are not registered, or who have deregistered;

- to your supplier if he changes his VAT registration number until you have drawn up a new self-billing agreement with him.

…

4.7 Claiming input tax incorrectly

Claiming input tax incorrectly can result in an assessment, which may carry a penalty and interest.

To help avoid this, please remember that you cannot claim input tax:

- When your supplier is not registered for VAT, or has deregistered;

…"

19. The guidance ends with a draft self-billing agreement, the material parts of which reads:

> "The self-biller (the customer) agrees:
>
> 1. to issue self-billed invoices for all supplies made to them by the self-billee (the supplier) until __/__/__ (insert **either** an end date for the agreement **or** the date your contract ends)"
>
> "The self-billee agrees:
>
> 1. to accept invoices raised by the self-billee on heir behalf until __/__/__ (insert **either** an end date for the agreement **or** the date your contract ends."

20. Mr Allen observes in relation to the provisions of paragraph 4.1 of the Notice quoted above that it does not state that the customer should check the validity of a supplier's VAT number or that a customer should check directly with HMRC whether a customer is registered for VAT or the VAT number it has given is valid. He submits that the only explicit guidance is that contained in the last sentence of the fourth bullet point of this paragraph, which is to the effect that the simplest way of ensuring that invoices are only issued to suppliers who have valid VAT registration number is to keep a list of the suppliers who are self-billed.

21. In our view the guidance is not as limited as Mr Allen suggests. The second sentence of the second bullet point under paragraph 4.1 of the Notice states that HMRC recommend that customers review details of VAT registration numbers regularly; it is implicit that a review must go beyond keeping a list of suppliers; the information is of little assistance if it is not kept up to date by regular reviews.

22. In March 2007 HMC issued a statement of practice in relation to invalid invoices entitled "*VAT Strategy: Input Tax Deduction without a Valid VAT Invoice*". This has a section headed "Invalid Invoice and HMRC's discretion" and although this section does not deal specifically with a situation where a self-billing invoice is invalid it provides the following general guidance:

"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.

For suppliers/transactions involving goods stated in Appendix 3 HMRC will need to be satisfied that:

- The supply as stated on the invoice did take place
- There is other evidence to show that the supply/transaction occurred
- The supply made is in furtherance of the trader's business
- The trader has undertaken normal commercial checks to establish the bona fide of the supply and supplier
- Normal commercial arrangements are in place – this can include payment arrangements and how the relationship between the supplier/buyer was established."

23. We were also referred to some internal guidance available to HMRC staff which has a section on non-compliance with self-billing which so far as relevant provides as follows:

"**15.4 Non compliance with self-billing rules**

In the first instance, minor instances of non-compliance can usually be addressed by explaining the regulatory position to the trader (see paragraph 15.3) as well as the difficulties which their failure to comply might present for their customer or supplier.

When faced with persistent non-compliance or with cases where the non-compliance is likely to result in assessment or investigation, your action must be based on the correct legal position and you will have no alternative but to unpick periods where the conditions of self-billing have not been met. Options will include:

(a) **Requiring further evidence of input tax at the customer (self-biller).** If the conditions of self-billing have not been met, the self-billed invoice is not sufficient evidence for claiming input tax and you will have to consider whether acceptable alternative evidence exists.

(b) **Disallowing input tax at the customer (self-biller)**. If alternative evidence is not available or self-billed invoices for supplies have been raised on behalf of suppliers who are not VAT registered, the VAT shown is not input tax and cannot be recovered. The self-biller's responsibility to ensure that his suppliers are VAT registered means that the extra statutory concession on misdirection or VAT charged by unregistered person are unlikely to be applicable."

24. It is clear from this guidance that HMRC does envisage the discretion being exercised in self-billing cases where appropriate: see sub-paragraph (a) quoted in paragraph 23 above.

25. Mr Donmall submitted that the Tribunal has no jurisdiction to review the exercise by HMRC of the discretion given to them in Regulation 29(2). He relies on *Master and Fellows of St Mary Magdalene College v. HMRC* [2011] UKFTT 680 (TC) where the tribunal stated at paragraph 43:

> "In our view we do not have the jurisdiction to consider legitimate expectation issues. Our jurisdiction is prescribed by section 83 VATA. The language used in that section cannot, we think, be extended so as to enable this Tribunal to consider HMRC's conduct and review whether HMRC are precluded from collecting tax which is due as a matter of tax law."

26. Mr Donmall also relies on *Customs and Excise Commissioners v. JH Corbett (Numismatists) Ltd* [1980] STC 231 where the House of Lords held that the Tribunal had no power to review the Commissioners' exercise of their discretion as to whether to recognise records actually kept by the company as being sufficient (the company having failed to keep the records required).

27. In our view it is clear that the Tribunal does have jurisdiction to consider the exercise of HMRC's discretion under Regulation 29. Section 83(1) (c) VATA 1994 gives a right of appeal in respect of the amount of any input tax which may be credited to a person. Regulation 29 is clearly relevant to any such appeal and therefore the question of whether sufficient evidence has been provided to HMRC as to the amount charged to VAT and which consequently may be claimed as input tax is within the scope of the Tribunal's jurisdiction.

28. Indeed this has been specifically established in a number of cases, although it is accepted that the Tribunal only has a supervisory jurisdiction. The Tribunal's jurisdiction in relation to the discretion of HMRC to allow input tax credit in the absence of any VAT invoices was described by Schiemann J in *Kohanzad v C & E Commissioners* [1994] STC 968 in the following terms at page 969d:

> "It is established that the tribunal, when it is considering a case where the commissioners have a discretion, exercises a supervisory jurisdiction over the exercise by the commissioners of that discretion. It is not an original discretion of the tribunal; it is one where it sees whether the commissioners have exercised their discretion in a defensible manner. That is the accepted law in this branch of the court's jurisdiction, and indeed it has recently been decided that the supervisory jurisdiction is to be exercised in relation to materials which were before the commissioners, rather than in relation to later material …
>
> It is, of course, well established that in this type of case, the burden of proof lies on an appellant to satisfy the tribunal that the decision of the commissioners were incorrect."

29. The supervisory jurisdiction in cases such as this involves consideration as to whether the Commissioners took into account all relevant matters, whether they took into account any irrelevant matter and whether the decision was within the bounds of reasonableness.

30. This approach has been followed in two recent decision of the Tribunal: See *McAndrew Utilities Limited v HMRC* [2012] UKFTT 749 (TC) and *GB Housley Ltd v HMRC* [2013] UKFTT 150 (TC). We therefore proceed on the basis that we have jurisdiction to consider the exercise by HMRC of its discretion under Regulation 29 but such jurisdiction is supervisory in that we cannot substitute our own decision but only decide whether the discretion has been exercised reasonably.

31. We must of course interpret the relevant provisions of VATA 1994 and the Regulations referred to above as far as possible in a way that reflects the jurisprudence of the European Court of Justice (ECJ) and the United Kingdom's obligations under the Sixth Directive 77/388/EEC and the 2006 VAT Directive 206/112/EC ("the Principal Directive"). It is necessary for us to consider the relevant provisions of both Directives as the period in question in this appeal includes a period before the Principal Directive replaced the Sixth Directive.

32. Under the Sixth Directive:

> "(1) Under Article 17(2)(a), a taxable person shall be entitled to deduct VAT due or paid in respect of goods or services supplied to him by another taxable person;
>
> (2) Under Article 18(1)(a), to exercise his right of deduction under 17(2)(a):
>
> > "a taxable person must … hold an invoice drawn up in accordance with Article 22(3)";
>
> (3) Article 18(3) provided that Member States shall determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with Article 18(1)(a);
>
> (4) Article 22(3) made provision for self-billing and provided, among other things:
>
> > "Invoices may be drawn up by the customer of a taxable person in respect of goods or services supplied or rendered to him by that taxable person, on condition that there is at the outset an agreement between the two parties, and on condition that a procedure exists for the acceptance of each invoice by the taxable person supplying the goods or services. The Member State in whose territory the goods or services are supplied or rendered shall determine the terms and conditions of the agreement and of the acceptance procedures between the taxable person and his customer.
> >
> > Member States may impose further conditions on the issue of invoices by the customers of taxable persons supplying goods or services on their territory."

33. The situation is not materially different under the Principal Directive:

(1) Article 168 provides that a taxable person shall be entitled to a deduction in respect of VAT paid in respect of supplies to him by another taxable person;

(2) Article 178(a) provides that in order to exercise that right of deduction:

> "he must hold an invoice drawn up in accordance with Articles 220 to 236 and Article 238, 239 and 240";

(3) Article 180 provides that Member States may authorise a taxable person to make a deduction which he has not made in accordance with Article 178.

(4) Article 224 makes provision for self-billing and provides:

> "1. Invoices may be drawn up by the customer in respect of the supply to him by a taxable person, of goods or services, if there is a prior agreement between the two parties and provided that a procedure exists for the acceptance of each invoice by the taxable person supplying the goods or services.
>
> 2. The Member State in whose territory the goods or services are supplied shall determine the terms and conditions of such prior agreements and of the acceptance procedures between the taxable person and the customer.
>
> 3. Member States may impose further conditions on taxable persons supplying goods or services in their territory concerning the issue of invoices by the customer. They may, in particular, require that such invoices be issued in the name and on behalf of the taxable person."

34. We were referred to a number of domestic and ECJ authorities concerning self-billing and the extent of the right to deduct input tax more generally.

35. In an early case the VAT and Duties Tribunal took a strict approach to the conditions that had to be fulfilled to allow deduction on the basis of a self-billing invoice. In *Credit Ancillary Services Limited v Commissioners of Customs and Excise* (VTD 2172) the Tribunal dismissed an appeal where input tax credit had been denied where the supplier had no VAT registration at the time of supply, finding as follows:

> "In our opinion Mr Lister succeeds in his submission that the conditions of the Commissioners' letter of approval not having in fact been satisfied there is no tax invoice and therefore no entitlement to set off input against output tax. He is not entitled, in our opinion, to a verdict in favour of the Scheme".

It does not appear that the question of alternative evidence to show a right to make a deduction was considered in that case.

36. In *UDL Construction Plc v. Commissioners of Customs and Excise* [1995] V & DR 396 the Tribunal expressed its concerns as to the implications of self-billing in the following terms:

> "Let me say at the outset that I approach this case on the basis that I regard the self-billing procedure as a gross violation of the integrity of the VAT system. It permits a customer to originate a document which

> enables him to recover input tax and obliges his supplier to account for output tax. It goes without saying that such a dangerous procedure should be strictly controlled and policed."

37. In *Deeds Limited v The Commissioners of Customs and Excise VTD 1500* the Tribunal took a more liberal approach where the conditions necessary for self-billing had not been met because the supplier concerned had never been registered as a taxable person and consequently did not account to the Commissioners for the VAT that *Deeds* had claimed as input tax credit. The Tribunal nevertheless approached the issue on the basis that if it were satisfied that at the relevant time the supplier was required to be registered as a taxable person then it should allow the appeal in relation to the claims made for input tax deduction. It duly found this to be the case and the appeal was allowed.

38. In *Maliha Group Limited v HMRC* [2011] UKFTT 10 (TC), which was not a case of self-billing, the Tribunal held that where the customer held valid invoices it was not open to HMRC to make a direction for further evidence under Regulation 29, in circumstances where the right to deduct had arisen because the Tribunal was satisfied that the supplies in question had taken place. The Tribunal relied on the following general principle set out in paragraph 47 of the decision as follows:

> "The EU law principle of legal certainty (see ECJ case 169/80 *Gondrand* and subsequent authorities) requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly. If a taxpayer's right to deduct input VAT crystallises at the time when the input tax becomes chargeable, then it follows from the principle of legal certainty that the taxpayer is entitled to know at that time precisely what evidence he must hold or provide in order to avail himself of that right. Any attempt on the part of the authorities to impose extra evidential obligations after that time is inconsistent with this entitlement and must fail."

39. In *University of Sussex v. Customs and Excise Commissioners* [2004] STC 1, a case which concerned the right of the University to claim input tax which it had deliberately not claimed for many years, the question arose as to whether the discretion under Regulation 29 should be exercised to allow a claim for the input tax in question. Auld LJ referred to the interplay between Regulation 29 and the domestic and European law right to repayment in paragraph 158 of his judgment as follows:

> "In normal circumstances the commissioners, having properly identified the claim as falling within reg 29 should, either generally or specially, consider whether they wish to exercise that discretion and, if so, in what circumstances and in respect of what period not statutorily capped. The fact that a late input claim is, for the reasons I have given, the exercise of a domestic and Community law right to repayment does not, it seems to me, override as a matter of Community law, that undoubted discretion. But the discretion is a narrow one, clearly given in the interests of good administration as well as fairness to the taxpayer. It seems to me that it should be exercised reasonably in the

> circumstances with both those considerations in mind. I am of the view that s 25(2) and/or reg 29(1), to the extent that they could be read or misapplied so as to render ineffective the right to deduct in art 17 or going beyond the administrative and procedural provisions by a member state for its exercise envisaged by art 18(3), would contravene the Directive."

This demonstrates that there is scope for the exercise of discretion, albeit narrowly, in cases where the appellant is seeking to exercise his European law right to repayment of input tax.

40. The ECJ has considered the extent to which the failure to comply with formal requirements in order to exercise a right to an exemption can justify a refusal of that right. In Case C-146/05 *Collée v. Finanzamt Limburg an der Lahn* [2007] ECR I-7880, where a claim was denied on the basis that the necessary accounting entries for the transactions concerned had not been properly completed, the ECJ held in paragraphs 29 and 31 of its judgment as follows:

> "29. As regards, first, the question whether the tax authority can refuse to allow an intra-Community supply to be exempt from VAT solely on the ground that the accounting evidence of that supply was belatedly produced, it should be noted that a national measure which, in essence, makes the right of exemption in respect of an intra-Community supply subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied, goes further than is necessary to ensure the correct levying and collection of the tax.
>
> …
>
> 31. In the main case, therefore, since it is apparent from the order for reference that there is no dispute about the fact that an intra-Community supply was made, the principle of fiscal neutrality requires – as the Commission of the European Communities also correctly submits – that an exemption from VAT be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. The only exception is if non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied. However, that does not appear to be so in the main case."

41. We observe from this decision that formal administrative provisions can justify refusal of a substantive right where they are needed to prove that the substantive right exists. Anything beyond that would be disproportionate.

42. This case was followed recently by the ECJ in C-587 *Staben and Another v Finanzamt Plauen* (2012) where exemption from VAT on an intra-Community supply was refused because of a failure to provide a VAT identification number of the person acquiring the goods. The question for the court therefore concerned the rules of evidence liable to be imposed on the supplier to demonstrate that the condition relating to the capacity as a taxable person of the person acquiring the goods in the

transaction at issue is met. After expressly approving *Collée* the Court held that provision of the number was not necessary where other information is provided which is such as to demonstrate sufficiently that the person acquiring the goods is a taxable person. The reasoning of the court was set out at paragraphs 47 to 52 of its judgment as follows:

> "47. It follows from the foregoing that the Member States have the option of requiring the supplier of goods to provide evidence that the person acquiring the goods is a taxable person acting as such in a Member State other than that of the departure of the dispatch or transport of the goods provided that the general principles of law and, in particular, the requirement of proportionality are observed.
>
> 48. As to whether those requirements are respected where, as in the case in the main proceedings, a Member State requires a supplier to provide the VAT identification number of the person acquiring the goods, it cannot be disputed that that identification number is closely connected with capacity as a taxable person in the system set up by the Sixth Directive. Thus, the first and third indents of Article 22(1) (c) of the Sixth Directive, in the version resulting from Article 28h therefore, require Member States to take the measures necessary to identify a taxable person by means of an individual number.
>
> 49. However, that evidence cannot, in every case, depend exclusively on the provision of that number given that the definition of 'taxable person' set out in Article 4(1) of the Sixth Directive simply covers a person who independently carries out in any place any economic activity specified in paragraph 2 of that article, whatever the purpose or results of that activity, and does not make the capacity of taxable person subject to the possession by that person of a VAT identification number. It follows, moreover, from the case-law that a taxable person acts in that capacity where he carries out transactions in the course of his taxable activity …
>
> 50. Nor can it be ruled out that a supplier may, for one reason or another, not have that number, particularly as fulfilment of that requirement by the supplier depends on information received from the person acquiring the goods.
>
> 51. Thus, although a VAT identification number provides proof of the tax status of the taxable person and facilitates a tax audit of intra-Community transactions, it constitutes only a formal requirement which cannot undermine the right of exemption from VAT where the substantive conditions for an intra-community supply are satisfied …
>
> 52. Consequently, although it is legitimate to require that the supplier act in good faith and take every measure which can reasonably be required of him to ensure that the transaction that he effects does not lead to his participation in tax evasion (see *Euro Tyre Holding*, paragraph 38), the Member State would be going further than the measures strictly necessary for the correct collection of tax if they refuse to grant the VAT exemption for an intra-Community supply on the sole ground that the VAT identification number was not provided by the supplier, where that supplier, acting in good faith and having

> taken all the measures which can reasonably be required of him, is unable to provide that number but provides other information which is such as to demonstrate sufficiently that the person acquiring the goods is a taxable person acting as such in the transaction at issue."

We observe the reference to the need for the requirement for evidence of the supply to be proportionate.

43. Finally, we were referred to Case C-438/09 *Dankowski v Dyrektor Izby Skarbowej w Łodzi* (2010) where the appellant had been refused a deduction of input tax where the supplier who issued the relevant invoices was not registered as a taxable person for VAT so that under national law those invoices did not give rise to a right of deduction. The ECJ held that the failure to register was not an impediment to the right to deduct input tax. Its reasoning is set out in paragraphs 33 to 36 of its judgment as follows:

> "33. However, notwithstanding the importance of such registration if the VAT system is to operate properly, a failure on the part of a taxable person to meet that requirement cannot impinge on the right of deduction conferred on another taxable person by Article 17(2) of the sixth Directive.
>
> 34. Article 22(1) of the Sixth Directive provides only that there is an obligation on taxable persons to state when their activity commences, changes or ceases, but that provision in no way authorises Member States, in the event of such a declaration not being submitted, to defer the exercise of the right to deduct until the time at which taxable transactions actually begin to be carried out on a regular basis, or to deprive the taxable person of that right.
>
> 35. Therefore, where the competent tax authority has the information necessary to establish that the taxable person is, as the recipient of marketing services, liable to VAT, it cannot impose, in relation to the right of that taxable person to deduct input tax, additional conditions which may have the effect of rendering that right ineffective for practical purposes.
>
> 36. Accordingly, any failure by the service provider to meet the requirement stated in Article 22(1) of the Sixth Directive cannot call in question the right of deduction to which the recipient of those services is entitled under Article 17(2) of that directive."

The Court therefore concluded at paragraph 47 as follows:

> "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 purposes of that tax."

We observe that the essence of this decision is that the substantive right to deduct cannot be impeded due to the absence of the formal requirement that the supplier should be registered for VAT.

44. We can summarise what we see as the principles to be derived from the analysis of the authorities set out above.

(1) It is a fundamental principle of European law that a taxable person has the right to claim a deduction for input tax where he has received supplies from another taxable person and the failure to meet formal requirements such as the requirement of the supplier to be VAT registered cannot impinge on that right;

(2) It follows by analogy that the cases on exemptions for intra-Community supplies *(Collée, Staben)* that any formal requirements laid down in domestic law that must be complied with in order to exercise the right must be proportionate and it would be disproportionate where they go beyond what is necessary to prove that the claim for the substantive right has been substantiated.

(3) None of the cases from the ECJ deal specifically with the situation where the taxpayer has sought to claim a deduction without the benefit of an invoice meeting the requirements of Article 178, which is expressed in mandatory terms, subject to the discretion given to Member States in Article 180. Article 224 of the Principal Directive gives Member States the right to permit self-billing subject to such further conditions as it may prescribe. In our view both Articles 180 and 224 should, in the light of the fundamental principle of the right to deduct, be construed so as to prevent a Member State imposing disproportionate requirements as to the conditions to be met to obtain a deduction in the absence of a valid invoice or self-billing invoice .

(4) There is nothing in European law which prevents national law prescribing that the exercise of the right to deduct in the absence of compliance with the prescribed formalities is at the discretion of HMRC, as is provided in Regulation 29, provided that the exercise of the discretion is narrowly confined and consistent with the principle of proportionality.

(5) There are clearly risks to the revenue inherent in the practice of self-billing which has led the Tribunal to conclude in *UDL Construction Plc* that the practice was "dangerous" and should be "strictly controlled and policed". In light of this in our view it is legitimate for HMRC to have this in mind when considering whether to exercise its discretion under Regulation 29 in cases where the self-billing requirements of Regulation 13 have not been met.

45. We therefore approach the facts of this case in the light of the principles set out above.

Findings of Fact

46. On behalf of Taygroup we had a witness statement from Mr Paul Craven, who until June 2007 was employed as both Managing Director and Financial Director of

Taygroup. Mr Craven also gave oral evidence. On behalf of HMRC we had a witness statement from Ms Pauline Gray, a Higher Officer of HMRC who carried out an inspection visit at Taygroup and who carried out checks on Taygroup's self-billing arrangements as a consequence of which the Assessments were ultimately raised. Ms Gray also gave oral evidence. We found both Mr Craven and Ms Gray to be honest and reliable witnesses and have no hesitation in accepting their evidence.

47. We were also provided with copies of correspondence between HMRC and Taygroup and its advisers together with copies of various self-billing agreements and invoices issued by Taygroup and a specimen of its agreement with haulier suppliers.

48. From the evidence that we heard and the documents submitted we make the following findings of fact.

49. In 2004 in an effort to attract owner-drivers and small local haulage companies as suppliers Taygroup introduced a prompt weekly payment scheme so as to provide the suppliers concerned with enhanced cash flow. In order to facilitate this Taygroup introduced a self-billing system for owner drivers.

50. Before implementing its self-billing system Taygroup considered HMRC Notice 700/62, dated December 2003 which gave guidance as to how the self-billing system should be operated so as to be in compliance with the Regulations and in particular the form and content of self-billing invoices and self-billing agreements.

51. In relation to self-billing invoices these were produced in a form which complied with the Regulations, save that in a number of cases these did not include the supplier's VAT number where this had not, at the time of the invoice, been supplied and in a number of other cases a wrong VAT number for the supplier was included.

52. Suppliers who were to participate in Taygroup's self-billing system were required to sign two documents prior to supplies taking place which had been produced by Taygroup in standard form. The first of these documents was entitled "Haulier Vendor Partnership Agreement". This agreement set out the parties' responsibilities in respect of the supplies to be made by the haulier to Taygroup. The provisions which are relevant as far as this appeal is concerned are those in relation to the period of the agreement and its termination. In this respect the agreement provided:

> "The period of trading will be undetermined. Both parties agree to trade on a continual basis with no set limits for time"
>
> "Both parties agree to a termination notice period of seven days …"
>
> "The notice period can be waived in the event of a mutual agreement in writing. Failure to work the notice period without agreement will incur a penalty of £500.00."

53. The second agreement was a self-billing agreement, as required by the Regulations, in order to enable Taygroup to issue self-billed invoices.

54. Mr Craven's evidence was that the self-billing agreements generated by Taygroup contained wording which was exactly as that set out in Notice 700/62. He pointed out that paragraph 3.1 of this Notice stated that a valid self-billing agreement must:

> "Contain an expiry date after 12 months. Though the expiry date can be related to the term of any contract between the supplier and the customer."

55. It is clear and we so find that Mr Craven interpreted this guidance as meaning that if the agreement with the supplier was for a period greater than twelve months then such a longer period would be included in the self-billing agreement as the period for which Taygroup would issue self-billed invoices and the supplier would accept them.

56. In view of this, the fact that Taygroup entered into rolling contracts with suppliers for an indeterminate period, the fact that it had a close working relationship with them and there were a large number of them (over two hundred and twenty suppliers) Taygroup believed that it was appropriate to have a "catch all" review date which was common to all self-billing agreements. Therefore a date of 1st November 2009 was entered into all the agreements we were shown (save for one as mentioned below) as the date on which the self-billing arrangements would come to an end. Mr Craven accepted in his oral evidence that the date Taygroup chose was not the end date of the relevant supply contract, that is the Haulier Vendor Partnership Agreement which had no specific expiry date, but Mr Craven believed that it was consistent with the specimen wording of the standard agreement set out in Notice 700/62, which we set out in paragraph 19 above.

57. The date chosen was thus approximately 5 years from the date the first self-billing agreement was entered into, and obviously much shorter as later agreements were entered into. We were shown one agreement entered into on 12 June 2007 where the end dates were later. In fact the dates in this agreement did not match, the expiry date for the issue of self-billing invoices being 1 June 2012, and the expiry date for their acceptance being 1 November 2011.

58. Mr Craven explained the process that was undertaken when a new supplier was engaged. Taygroup would check that the supplier's vehicle was of suitable quality, that its operator's licence was valid, that he had adequate goods in transit insurance and insurance for the vehicle. The supplier and Taygroup would then enter into the Haulier Vendor Partnership Agreement.

59. As far as establishing the VAT status of the supplier concerned and therefore its eligibility for receiving self-billing invoices, Mr Craven explained that checking the relevant details was initially the responsibility of the relevant depot. The depot manager would complete the self-billing agreement and enter the supplier's VAT registration number in the box provided. The completed agreement would then be faxed to head office. Mr Craven confirmed that the validity of the VAT number provided would not be checked; it was taken on trust on the basis that Taygroup had satisfied themselves they were dealing with a reputable supplier. Mr Craven told us

that he was not aware of the ability to check the validity of VAT numbers online through the Europa system and that in practice the validity was not checked with HMRC before supplies started.

60. Mr Craven told us he was satisfied that all the relevant suppliers would have been above the VAT threshold and therefore taxable persons in any event. This was because if the haulier concerned was running an articulated unit for over a year then in order to cover the costs of running it his supplies would necessarily be above the threshold, as he estimated that the earnings of the haulier concerned would be between £1600 and £2000 per week per truck. Mr Craven accepted that this was an inference that he had drawn rather than a conclusion borne out by clear documentary evidence of the overall supplies of the hauliers concerned.

61. In relation to two suppliers, MJP International and Craig King, neither of which had been registered for VAT during the relevant periods, the supplies made by in the period to which the Assessments related amounted to £708,663.46 and King £152,046 respectively. On the basis of these figures, which were not disputed by HMRC, we accept that those two suppliers must have been taxable persons, even though not registered for VAT which clearly they should have been. We do however, find in relation to MJP International that this company entered into a new self-billing agreement with Taygroup on 8 June 2007 – but it had de-registered with effect from 5 August 2006.

62. Mr Craven was taken to a number of self-billing invoices where either the VAT number was not entered or the box was completed with "number awaited". Mr Craven explained that would occasionally occur when there was an urgent need to engage a supplier before the formalities could be completed. He confirmed that there would be no ongoing review of a supplier's VAT status unless and until a new agreement needed to be entered into with that supplier, thus the end date which was contained in the self-billing agreements (1 November 2009 in most cases) served as the review date envisaged by Notice 700/62.

63. On 30 June 2008 Ms Gray of HMRC carried out a routine VAT visit at Taygroup's premises in Biggleswade. During the discussions at this visit between Ms Gray and Mr Stephen Gardner and Mr James Baker of Taygroup it was established that Taygroup had no system to check the validity of VAT numbers or to carry out any annual review of those suppliers for whom self-billing arrangements were in place.

64. Ms Gray confirmed, in answer to a question from the Tribunal, that HMRC's expectations in 2005 were that when a supplier was taken on under self-billing arrangements the customer would obtain a copy of the supplier's VAT certificate, asks the supplier to confirm the details were true and also check the validity of the number. In relation to the relevant periods in question in this appeal, the validity of the number could be checked on the Europa system, but not the name and address of the holder of that number, an extra facility that is now available. Ms Gray confirmed that these expectations were not contained in Notice 700/62; as we have seen the guidance in that document referred to the need to keep details of VAT registration

numbers and review them regularly but made no reference to checking them with HMRC.

65. During her visit, Ms Gray, with Mr Baker's assistance, checked the initial list of names and VAT numbers used under Taygroup's self-billing system against the Europa system. This initial check identified 9 invalid numbers which subsequent checks confirmed to be numbers relating to deregistered or missing traders or incorrect numbers for the supplier concerned.

66. Consequently, Taygroup undertook to produce further evidence of any valid VAT registration numbers for the suppliers concerned and a complete list of self-billed suppliers with their VAT numbers was supplied together with transaction reports for each supplier where no valid VAT number was held.

67. Following receipt and review of this information Ms Gray produced a VAT audit report. This was followed, on 21 August 2008 by a letter from Ms Gray to Mr Gardner enclosing two schedules setting out amounts claimed as input tax deductions by Taygroup under self-billing invoices where it appeared to HMRC that the supplier was not registered for VAT at the material time. The actual notices of assessment were set out under separate cover.

68. On 20 October 2008 Taygroup's representatives asked for a review of those assessments and provided a copy of Taygroup's self-billing agreement. Taygroup's representatives contended that this form of agreement met the requirements of Regulation 13(3B). They also contended that input taxes claimed in respect of suppliers who were clearly taxable persons (regardless of whether registered for VAT or not) should be allowed.

69. On 13 February 2009 HMRC upheld the decision to make the assessments in a letter from Ms Gray to Taygroup's representatives. This was on the basis that the self-billing agreements did not comply with Regulation 13(3B) because:

> (1) The Haulier Vendor Partnership Agreement was not an agreement for a specified period as required by Regulation 13(3B)(a)(ii); and
>
> (2) In the absence of a specific document supporting a contracted longer period there is no basis for the self-billing period to be longer than the 12 months period required under Regulation 13(3B)(a)(i).

70. Consequently, HMRC maintained that the purported self-billing invoices were not proper VAT invoices so that there was no evidence of a right to deduct input tax in respect of them.

71. However, the letter stated that where it has been established that the supplier is "legitimately VAT registered" and there is no reason to doubt that the corresponding output tax has been accounted for by the supplier, input tax has been allowed and not included in the assessments raised.

72. On the basis of that approach, further evidence was provided about the VAT status of certain of the suppliers as a result of which the assessments were reduced to

the amount of the assessments which are the subject of this appeal. It has at all times been accepted that the transactions between Taygroup and the suppliers were genuine commercial transactions and no suggestion that Taygroup were party to any fraud on HMRC.

73. We can therefore summarise our findings of fact as follows:

(1) Those suppliers with whom Taygroup entered into self-billing arrangements would enter into two contractual documents with Taygroup, namely:

(a) a Haulier Vendor Partnership Agreement for the supply of haulage services for an indeterminate period terminable on seven days notice from either party; and

(b) a self-billing agreement for a fixed period which did not bear relation to the period of the underlying supply contract but was fixed so as to provide a single review date for all Taygroup's self-billing agreements, being a date which was no later than five years after the self-billing system was first introduced.

(2) Suppliers were signed up to participate in Taygroup's self-billing system at the local depot, providing their VAT registration number at the time which was taken on trust. Occasionally self-billing agreements were entered into without the necessary VAT number having been provided where the need to make the supply was urgent.

(3) Taygroup made no checks as to the validity of VAT numbers and no review of details provided was undertaken unless a new agreement was entered into with the supplier or the review date set out in the self-billing agreement came around.

(4) Taygroup defended its processes on the basis that all suppliers necessarily would be above the VAT threshold and therefore taxable persons. In their view it was to be inferred from the costs of running a single articulated vehicle that this would be so. In any event it was clear that two suppliers were above the threshold on the basis of the supplies made to Taygroup alone. Nowhere in HMRC's guidance was the suggestion that VAT registration numbers should be checked at the outset of the relationship or thereafter.

(5) The Assessments were made on the basis that Taygroup's self-billing invoices in all cases were invalid as the self-billing agreements under which they were issued did not comply with Regulation 13.

(6) Nevertheless, input tax has been allowed where HMRC has been satisfied by further evidence that the supplier was legitimately registered for VAT at the time of supply and the relevant output tax has been accounted for.

Discussion

74. We now turn to consider the four grounds, as set out in paragraph 4 above, on which Taygroup maintains that it is entitled to claim the input tax that is the subject of Assessments.

75. If we were to find that Taygroup's self-billing agreements met the requirements of Regulation 13(3B), then subject to none of the events referred to in Regulation 13(3C) having occurred in relation to the supplier, we should find that Taygroup's self-billing invoices, provided they met the form and content requirements of Regulation 14, would be valid and they should therefore be entitled to claim a deduction in respect of the input tax which is the subject of the invoice. This is because Regulation 13(3) treats the self-billing invoice as a valid VAT invoice and the possession of such an invoice gives the holder the right to claim deduction of the input tax by virtue of a condition of sections 24(6) (a) and 25(2) VATA 1994 and Regulation 29(1). If we find that the self-billing agreements do not comply with Regulation 13(3B) then it follows that the self-billing invoices will be invalid and since the supplier itself has not issued a valid VAT invoice, the input tax may only be claimed if HMRC exercises its discretion under Regulation 29(2).

76. Mr Allen submits that the self-billing agreements do have an end date which meets the requirements of Regulation 13(B). Mr Allen rightly points out that the end date specified in Regulation 13(3B) can be longer than twelve months. He submits that the Haulier Vendor Partnership Agreement is clearly a contract for a continuous supply of services, and whilst it does not itself contain an end date, the self-billing agreement cannot extend beyond the date set out in its face without further agreement. In effect Mr Allen submits that the two documents should be read together to constitute a valid self-billing agreement for the period specified in it, that is in most cases the period ending on 1 November 2009.

77. We reject that submission. In our view a plain reading of Regulation 13(3B) inevitably leads to the conclusion that the self-billing agreement must be for a specified period either of no more than 12 months (which is not the case here) or a period ending on the date that the underlying supply contract ends. The underlying supply contract here has no expiry date; it is continuous until terminated on notice. Therefore, the self-billing agreement, with an expiry date of 1 November 2009, cannot be compliant with Regulation 13(3B) because 1 November 2009 is not the expiry date of the underlying contract. Indeed that contract could be terminated on notice expiring well before the termination date in the self-billing agreement. In effect Mr Allen submits that the date in the self-billing agreement can be treated as the date for the termination of the underlying contract, but it is absolutely clear from the legislation that whilst the date set out in the underlying contract can act as the expiry date for the self-billing arrangement the converse cannot be the case.

78. In any event, in the case of all the suppliers who are the subject of the Assessments, the invoices concerned cannot be valid self-billing invoices because by virtue of Regulation 13(3C)(c) a self-billing agreement shall be treated as having expired when the supplier ceases to be registered for VAT. Clearly, if the supplier concerned was not registered it could not be valid, and even if it were valid at the

outset all invoices issued under it after the supplier ceased to be registered could hot be valid invoices as the self-billing agreement would automatically have expired.

79. Mr Allen put some weight on Regulation 13(3B) (d) which requires the supplier under a self-billing agreement to notify the customer if he ceases to be a taxable person, and that it was Taygroup's position that all the suppliers must have been taxable persons because it can be inferred that the supplies they made would have taken them above the threshold. We accept Mr Allen's submission that Taygroup could not be expected to know whether a supplier is a taxable person, which is not dependent on registration, but it is clear that the self-billing system operates on the basis that it can only be operated whilst the supplier is VAT registered, and that is something that can be checked by the customer. We therefore do not accept that the fact that Taygroup would not know that a supplier had ceased to be a taxable person can help it in this regard.

80. It is therefore clear that HMRC were correct to deny the claims to input tax on the basis of the domestic legislation ground. Insofar as they did accept some of them, notwithstanding that all the self-billing agreements and consequently the self-billing invoices would have been invalid, they must have done so through the exercise of their discretion under Regulation 29.

The twelve month ground

81. Mr Allen points out that in Ms Gray's letter of 13 February she stated:

> "In the absence of a specific document supporting a contracted longer period there is no basis for the self-billing period to be longer than the twelve months recorded period under Regulation 13 (3B)(a)(i)."

She therefore concluded:

> "The self-billing arrangements must therefore run for a duration not exceeding 12 months at which point the individual agreements must be reviewed and renewed."

On the basis of this Mr Allen submits that Taygroup would have been entitled to operate the self-billing system for an initial twelve months in all cases in which case all supplies made during that initial period should be removed from the Assessments.

82. In our view this argument is entirely without merit. It is based on what the self-billing arrangements *might* have contained by way of an expiry date rather than what they actually contained. The Regulations are quite plain; they make no provision for a self-billing agreement to be treated as valid for the first twelve months in any event. The extracts from Ms Gray's letter do not suggest otherwise; they merely confirm that because there was no specific end date in the underlying supply contract the self-billing agreements could not be for a period in excess of twelve months. The agreements in this case clearly exceeded that period and cannot therefore comply with Regulation 13(3B).

The European law ground

83. The essence of Mr Allen's submissions on this ground is that on the basis that the supplies in question were made by taxable persons it would breach the fundamental principle laid down in the Sixth Directive, and now the Principal Directive, that the customer should be entitled to claim the input tax in respect of the relevant supply. Mr Allen submits that circumstances have moved on since the *Credit Ancillary Services* case referred to in paragraph 35 above, where a claim for input tax was denied purely because the supplier was unregistered, and in particular under Regulation 13(3B)(d) the supplier must notify the customer if he ceases to be registered for VAT. In those circumstances, where the supplier wrongly deregisters and does not inform the customer he has done so it is against the fundamental European Law right to claim a deduction to deny the customer a credit.

84. Mr Allen therefore relies on the passages in *Dankowski* referred to in paragraph 43 above to say that the additional conditions prescribed by the Regulations relating to self-billing cannot operate so as to deny Taygroup its right to a deduction where the supplier was unregistered. He also takes support from *Collée* and *Staben* where attempts by Member States to impose additional formalities on the exercise of rights to a deduction or exemption set out in the Directives were held to be unlawful.

85. Mr Allen is right that a taxable person has the right to claim a deduction for input tax where he has received supplies from another taxable person: see our observations in paragraph 44(1) above. However, none of the ECJ cases relied on by Mr Allen related to a situation where the taxpayer was seeking to exercise that right without him being in possession of a valid VAT invoice, which is the situation we are concerned with in this case. Under Article 18(1) (a) of the Sixth Directive in order to exercise his right of deduction the taxable person *must* hold an invoice drawn up in Article 22(3). Article 22(3) makes provision for self-billing and it makes it clear that Member States may impose further conditions on the issue of self-billing invoices. The situation is not materially different under the Principal Directive: Article 168 gives the taxable person the right of deduction and Article 178(a) provides that to exercise that right "he must hold an invoice drawn up in accordance with Articles 220 to 236 and Article 238, 239 and 240." Article 224 makes provision for self-billing in similar terms to Article 22(3) of the Sixth Directive, and in particular the right for Member States to impose further conditions concerning self-billing invoices.

86. As we observe in paragraph 44(3) above, these provisions concerning the holding of a valid invoice are expressed in mandatory terms. In *Dankowski* all the substantive and formal conditions set down by the Sixth Directive were met because under the relevant domestic law in Poland, companies are allocated a VAT number even before they are registered. That is not the situation here where, as we have found, Taygroup did not hold a valid invoice in respect of the supplies in question. The same is true in *Deeds*, the domestic case that Mr Allen referred us to, where there was no finding that the relevant conditions for self-billing had not been met other than the fact that the supplier was not registered for VAT. Neither do we see any support for Mr Allen's submissions from *Maliha*, where the customer held valid VAT invoices.

87. As we also observed in relation to the European authorities, any conditions imposed upon the taxable person in order to exercise the right to deduct must be proportionate. This applies to the conditions that may be imposed under Article 224 of the Principal Directive. We see nothing disproportionate in relation to the conditions laid down in Regulation 13(3B) and 13(3C). The right to operate self-billing, although a right and not a concession, is an exception to the general system of VAT invoicing and as was stated in *UDL Construction*, it is a procedure that should be strictly controlled or policed because the risks to the revenue are clear if the supplier ceases to be registered. In these circumstances, it does not appear to us to be disproportionate that the risk of that happening is borne by the customer, which is the effect of Regulation 13(3B), and the customer can mitigate those risks by undertaking regular checks on the VAT registration position of its suppliers. In a case where input tax is denied, the customer still has his contractual remedy to seek the loss concerned from the supplier.

88. For those reasons, we reject Mr Allen's submissions on the European law ground.

The alternative evidence ground

89. Article 180 of the Principal Directive gives power to Member States to authorise a taxable person to make a deduction in circumstances where he does not hold a valid invoice. Regulation 29 gives effect to this power in the UK by giving HMRC discretion to accept alternative evidence to a valid invoice.

90. As we discussed in paragraphs 27 to 30 above, in our view we do have jurisdiction to review the exercise by HMRC of their discretion under Regulation 29 as to whether they should accept alternative evidence as to the supplies in question. Our jurisdiction is confined to considering whether HMRC have exercised their discretion reasonably.

91. It is clear that HMRC have considered whether the discretion should be exercised. Had they failed to do so at all that would be grounds for allowing the appeal: see *Houseley Ltd v HMRC* [2013] UKFT 150 (TC).

92. HMRC adopted the approach of allowing a deduction to be made in respect of those supplies where Taygroup were able to satisfy them that the supplies concerned had been made by a person registered for VAT and where the relevant output tax had been accounted for. This resulted in a reduction of the amount assessed by approximately £77,000. The Assessments therefore now only relate to unregistered suppliers who HMRC maintain have not paid the relevant output tax. There is a clear loss to the revenue in that situation.

93. Mr Allen submits that in these cases the unregistered suppliers were clearly taxable persons and therefore that was sufficient alternative evidence that HMRC should have accepted.

94. In our view HMRC acted reasonably in not accepting that assertion as sufficient evidence, and in requiring in addition evidence that the output tax had been paid. In that regard we take into account the following factors:

(1) In our view Taygroup were not as diligent as they should have been in taking all reasonable steps to minimise the potential for lost revenue. They did not check VAT numbers at the outset of the relationship with each supplier. Although we accept that the published guidance does not explicitly require number checks in our view it is, as we observe in paragraph 21 above, implicit in any system which reviews, as the guidance requires, the VAT status of suppliers on a regular basis.

(2) There were a number of occasions where supplies took place before VAT registration numbers were acquired and in one case, MJP International, where a new agreement was entered into without a check taking place.

(3) In our view Taygroup's reliance on the inference that all its suppliers were taxable persons was unreasonable. It should have sought specific evidence of that in cases where the supplies made were well below the relevant threshold for the year. In the two cases where the threshold was clearly met, there was still a risk of output tax not being accounted for if the supplier was not registered so it was reasonable to expect Taygroup to go further and check the registration details on a regular basis, which it clearly failed to do in the case of MJP International. In our view HMRC were therefore not unreasonable in denying a claim for a deduction where it had been unable to satisfy itself that the relevant output tax has been paid.

(4) Although *University of Sussex* indicates that the discretion under Regulation 29 is a narrow one, in the special circumstances of self-billing and the risks to the revenue that it entails, in our view it does not go beyond the scope of the discretion for it to be exercised on the basis that it was done in this case.

95. We therefore conclude that Taygroup has not satisfied us that HMRC acted unreasonably in not exercising its discretion under Regulation 29 in relation to the eighteen unregistered suppliers.

Conclusion

96. As we have rejected all four grounds of appeal put forward by Taygroup we must dismiss the appeal.

97. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 6 June 2013