TC03689

Appeal number: TC/2013/2999

VAT - ss8 and 9 VATA – reverse charge- whether presence in the UK was a fixed establishment from which supplies were made
VAT – assessment – best judgement
VAT – input tax – whether invoice specifying VAT was enough to permit input tax deduction if supplier was not chargeable to VAT.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MUSTER INNS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
MR JULIAN SIMS, FCA, CTA

Sitting in public in Bristol on 16 April 2014

Peter Baumgardt of Essential VAT Services for the Appellant

L Bingham for the Respondents

DECISION

1. Section 8 VAT 1994 (“VATA”) provides that if a person ("A") who does not belong in UK supplies services to a business ("B") which does belong in the UK, the Act has effect as if B had made the supplied to itself (and A had not made the supply). This is the "reverse charge" procedure.

2. Muster Inns owns the Maltsters Arms, a pub, restaurant and B&B business in Devon. It started operating the pub in the second half of 2011. After a short period it decided to refurbish the pub. It engaged Amberley Construction Ltd, a company incorporated in Guernsey, to do a large part of the work. It closed from 22 January 2012 to 1 April 2012 while the main part of the building work was done. Amberley continued working in peripheral areas into July 2012. A second phase of refurbishment work was planned for later in 2012/13 but on a smaller scale.

3. Amberley invoiced Muster Ins for the work done. The invoices included VAT. Muster Inns claimed the VAT charged as input tax in its VAT returns for the quarters ending 31 March 2012 (“03/12”) and 30 June 2012 (“06/12”). Because the business made little in the way of supplies in these periods, the VAT returns showed net amounts of the VAT due to Muster Inns. HMRC paid the VAT shown as due to Muster Inns soon after receiving the returns (and after conducting some enquiries into the reasons for repayment returns).

4. On 10 January 2012 HMRC had issued a certificate of VAT registration to Amberley. Then they had second thoughts. In the autumn of 2012 they decided that Amberley should not have been VAT registered and cancelled its registration with retrospective effect to the date of issue of the VAT certificate.

5. HMRC concluded that Amberley did not "belong" in the UK and that, as a result of section 8 VATA the "reverse charge" system applied so that the building work done by Amberley for Muster Inns was to be treated for VAT purposes as having been supplied by Muster Inns (to itself) rather than by Amberley. As a result they concluded that no VAT was chargeable by Amberley – so that Muster Inns could claim no credit for it - and that Muster Inns should have declared additional output tax in its returns on the supply it was deemed to have made to itself.

6. In January 2013 HMRC wrote to Muster Inns and made VAT assessments of £33,600 and £21,151 in respect of the two quarters in which Muster Inns had claimed import tax in respect of the Amberley invoices.

7. Muster Inns appeals against these assessments on three grounds:

   (1) first, it says that Amberley did belong in the UK and that as a result of the reverse charge procedure did not apply;

   (2) second, it says the assessments were defective because they assessed output tax due from Muster Inns without giving proper credit for the input tax

which arose as the necessary consequence of the deemed supply by Muster Inns to itself of the building services; and

(3) third, that since Amberley had charged VAT on its invoices at a time when it was a VAT registered person, section 4 VATA had the effect that that supply was therefore a taxable supply in respect of which section 24 and 26 give a right to input tax credit.

8. Each of these grounds of appeal give rise to different legal and factual issues. We therefore deal with them in turn, setting out our legal and factual conclusions under each heading.

Ground 1: the applicability of the section 8 reverse charge: did Amberley belong in the UK?

9. Section 8 provides so far as is relevant:

(1) Where services are supplied by a person who belongs in a country other than the United Kingdom in circumstances in which this subsection applies, this Act has effect as if (instead of there being a supply of the services by that person) -

(a) there were a supply of services by the recipient in the United Kingdom in the course or furtherance of the business carried on by the recipient, and

(b) that supply were a taxable supply.

(2) Subsection (1) applies if -

(a) the recipient is a relevant business person who belongs in the United Kingdom, and

(b) the place of supply of the services is inside the United Kingdom,

and, where the supply of services is one to which any paragraph of Part 1or 2 of Schedule 4A applies, the recipient is registered under this Act.

10. There was no dispute that the requirements of subsection (2) were satisfied: a "relevant business person" is defined by section 7A(4)(b) to include a person registered under the Act and Muster Inns was so registered; whether a person belongs in the UK is defined by section 9, but Muster Inns clearly belonged in the UK; by schedule 4A paragraph (1) and (2) (e) the supply of building works relating to land in the UK is treated as made in the UK so that the place of supply of the services was in the UK; and the supply of the building works was one to which Part 1 Schedule 4A applied.

11. The debate before us therefore turned on whether or not Amberley belonged in the UK in relation to the supply to Musters Inns.

12. Section 9 VAT a provides:

(1) This section has effect for determining for the purposes of section 7A (or Schedule 4A) or section 8, in relation to any supply of services, whether a person who is the supplier or recipient belongs in one country or another.

(2) A person who is a relevant business person is to be treated as belonging in the relevant country.

(3) In subsection (2) "the relevant country" means -

(a) if the person has a business establishment, or some other fixed establishment, in a country (and none in any other country), that country,

(b) if the person has a business establishment, or some other fixed establishment or establishments, in more than one country, the country in which the relevant establishment is, and

(c) otherwise, the country in which the person's usual place of residence is.

(4) In subsection (3)(b) "relevant establishment" means whichever of the person's business establishment, or other fixed establishments, is most directly concerned with the supply.

(5) A person who is not a relevant business person is to be treated as belonging in the country in which that person's usual place of residence is.

(6) In this section "usual place of residence", in relation to a body corporate, means the place where it is legally constituted."

13. In relation to these provisions Mr Bingham advanced two arguments: first that Amberley was not a relevant business person so that subsections (5) and (6) applied, and second that, if it was a relevant business person, the relevant country was Guernsey because Amberley had no fixed establishment in the UK

(a) not a relevant business person

14. Mr Bingham's first argument was that Amberley was not a "relevant business person", with the result that subsections 9(2) to (4) did not apply but subsections 9(5) and (6) did. As a result, because Amberley was incorporated in Guernsey it was, by subsection (6), to be treated as belonging there. This argument turned on the definition of "relevant business person" in section 7A(4) VATA. That provided:

(4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person -

(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EEC,

(b) is registered under this Act,

(c) is identified for the purposes of VAT in accordance with the law of a member state other than the United Kingdom, *or* [our emphasis]

(d) is registered under an Act of Tynwald for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to value added tax,

and the services are received by the person otherwise than for wholly private purposes.

15. The four subparagraphs of subsection (4) are alternatives. If Amberley falls within any of them it is a relevant business person. Subparagraph (a) refers to Article 9 of the Principal VAT Directive. That provides:

> 1. "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, and ... shall be regarded as "economic activity". ...

16. There was no question that Amberley was, not only by virtue of the work it did for Muster Inns and but also as a result of its other activities (see our findings of fact below) conducting an economic activity. Thus we reject the first argument.

(b) Where did Amberley belong?

17. Mr Bingham's second argument was that the effect of section 9(3) was that Amberley would be treated as belonging Guernsey.

18. It is necessary in this context to consider the provisions of the Principal VAT relevant to the application of sections 8 and 9

19. Articles 192a to 194 of the Principal VAT Directive provide:

> Article 192a. For the purposes of this Section, a taxable person who has a fixed establishment within the territory of the Member State where the tax is due shall be regarded as a taxable person who is not established within that Member State when the following conditions are met:
>
> > (a) he makes a taxable supply of goods or services within the territory of that Member State;
> >
> > (b) an establishment which the supplier has within the territory of that Member State does not intervene in that supply.
>
> Article 193. VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in the Articles 194 to 199 and Article 202.
>
> Article 194
>
> 1. Where the taxable supply of goods or services is carried out by a taxable person who is not established in the Member State in which the VAT is due, Member States may provide that the person liable for payment of VAT is the person to whom the goods or services are supplied.
>
> 2. Member States shall lay down the conditions for implementation of paragraph 1."

20. It will be seen that in Article 194 the Directive uses the phrase “who is established in the Member State”. The use of “established” in Article 192a shows that the nature of the establishment to which Article 194 refers is not limited to the place where a person has established his business but includes a fixed establishment. Thus

Article 194 permits the reverse charge only where the actual supplier has not established his business in the Member Sate and has no fixed establishment there or has no establishment there which is concerned with (intervenes in) the supply.

21. As a result the guidance given by the ECJ in relation to the meaning of fixed establishment in the Directive will determine the meaning of that phrase in section 9(3) VATA.

22. The cases in which the ECJ have considered whether or not a supply should be treated as made from a fixed establishment were decided in the context of different general provisions for the place of supply. At that time the relevant provision was Article 9 of the Sixth directive. That provided for a general rule under which the place of supply to a business was determined by the place of the supplier rather than that of the recipient. The general rule in Article 9(1) of the Sixth Directive provided:

> 9. (1) The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the services supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

23. This wording provided two options (place of business establishment or fixed establishment) without an express indication of which should prevail. Articles 44 and 45 of the Principal VAT Directive are different in two respects from Article 9 of the Sixth Directive: (1) in the case of the supply to a business, the general rule is now that place of supply is determined by the place of the consumer, and (2) there is no longer an open choice between the place of business establishment and any fixed establishment from (or to) which the services are supplied.

24. Article 44 now provides:

> "44. The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such a place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.

25. It will be seen that the use of “However” gives a precedence to a fixed establishment to which the services are provided which was not present in Article 9(1).

26. Article 45 contains a provision of a similar nature in relation to supplies to a non business consumer which makes the place of supply the place of the relevant establishment of the supplier.

27. In *Berkholz v Finanzamt Hamburg-Mitte-Altstadt* C-168/84 the ECJ was concerned with whether gaming machines installed on a ferry gave rise to a fixed establishment of the owner The court was concerened with Article 9 of the Sixth Directive. The court first considered how to choose between the options if there were both a place of business establishment and a fixed establishment. It said:

> [14] The ... question must be answered in the light of the objectives pursued by Art 9 within the context of the general scheme of the Sixth Directive. ... Art 9 is designed to secure the rational delimitation of the respective areas covered by national value added tax rules for determining in a uniform manner place where services are deemed to be supplied for tax purposes. Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whilst Article 9(1) lays down the general rule on the matter. The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, secondly, non-taxation, ...
>
> [17] Equally, it is for the tax authorities in each member State to determine from the range of options set forth in the directive which point of reference is most appropriate to determine tax jurisdiction over a given service. According to Art 9(1), the place where the supplier has established his business is a primary point of reference in as much as regarded to be had to another establishment from which the services are supplied only if the reference to the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another member state.

28. Having set out that rule, which may no longer be of direct application because of the order of preference in the new Articles 44 and 45, it turned to the question of what was a fixed establishment. It said:

> [18] It appears from the context of the concepts employed Art 9 and from its aim, as stated above, that services cannot be deemed to be supplied at an establishment other than the place where the supplier has established his business unless that establishment is of a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present. It does not appear that the installation on board a seagoing ship of gaming machines, which are maintained intermittently, is capable of constituting such an establishment, especially if tax may appropriately be charged at the place where the operator of the machines has his permanent business establishment."

29. In *Customs & Excise Commissioners v DFDS* 1997 STC 384 the ECJ started by applying the hierarchy displayed in the *Berkholz* judgement by first considering whether, if there was a fixed establishment, the supply should be treated as made therefrom, and then considering whether in fact there was such an establishment . In that case DFDS, which was established in Denmark, sold package tours to customers through the agency of a subsidiary in the UK. The issue was whether those supplies should be taken to have been made in the UK, and that depended upon whether they should be treated as made by a fixed establishment of DFDS in the UK constituted by its subsidiary.

30. Applying *Berkholz* the court held that the place where the supplier had established his business was the primary reference point: regard was to be had to another establishment from which the services were provided only if the place the business was established did not lead to a rational result or created a conflict. It found that whilst treating the state of the business establishment as the place of supply had the advantage of a single place of supply for all supplies of the business, that treatment would not lead to a rational result since it took no account of the actual place where the tours were sold [22]. The consideration of the actual economic situation was a fundamental criterion, and the possibility of treating the fixed establishment as the place of supply was specifically intended to take account of the diversification of businesses. Reliance on the state of business establishment could also lead to distortions if in particular if states were chosen to avoid VAT. Thus the fixed establishment was the rational choice to decide the place in which the supplies would be treated as made.

31. The court had then to consider whether DFDS had a fixed establishment in the UK. Having found that the subsidiary was merely an auxiliary arm of the parent, it then considered whether that establishment was of the requisite permanent minimum size in terms of human and technical resources.

32. The advocate general had said that there was actual pursuit of an economic activity which was pursued for an indefinite period ([26]), and that among other considerations it was relevant to the existence of a fixed establishment, that the contracts with the customers were concluded in the UK. The court, noting particularly the fact that 100 employees were engaged in its work found that it satisfied the test.

33. In a similar vein in *ARO Lease v Inspecteur* [1997] STC 1272 the court said:

> [15] Furthermore, as regards the general rule in art 9 (1 of the Sixth Directive, the Court has held that the place where the supplier has established his business is a primary point of reference in as much as there is no purpose in referring to another establishment from which the services are supplied unless reference to the main place of business does not lead to a rational result for tax purposes or creates a conflict with another member state. It is clear from the aim of art 9 and from the context in which the concepts are implied that services cannot be deemed to be supplied at an establishment other than the main place of business unless that establishment has a minimum degree of stability derived from the permanent presence of both human and technical resources necessary for the provision of the services ...
>
> [16] Consequently, in order to be treated, by way of derogation from the primary criterion of the main place of business, as the place where a taxable person provides services, and establishment must possess a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis."

34. The meaning given by the court to fixed establishment was in the context of the old Article 9 which did not specify a rule of precedence. Paragraph [18] of the *Berkholz* judgment specifically refers to the objects and context of Article 9. That

raises the question as to whether the limitations placed on the meaning "fixed establishment" are applicable in the context of the Principal VAT Directive (as amended and applicable to this appeal). It seems to us that they are: the object remains to "secure the rational delimitation" of the areas covered by national VAT rules, and it remains the case that the place of business establishment is the general rule from which the fixed establishment is an exception.

35. We conclude that a person will have a fixed establishment in a place different from that in which its business is established only if there is at the other place a "minimum degree of stability" derived from a sufficiently permanent presence of the human and technical resources necessary for the carrying on of the economic activity in that place.

36. The cases provide no guidance on the meaning of what is sufficiently "permanent" or stable. But the principle of legal certainty requires that the VAT treatment of the supply must be capable of determination of the time the supplies made (see for example *Halifax v C&E Comrs* [2006] STC 919: [72] "Community legislation must be certain in its application foreseeable by those subject to it…The requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail fiscal consequences…"). As a result events taking place after a supply is made cannot affect whether or not an establishment has sufficient permanence for the purpose of determining whence the supply is made. The question must therefore be judged only by reference to matters known at the time of the supply.

37. Further it seems to us that the question should be determined without regard to the subjective intentions of the parties. The ECJ has held in a number of cases that the mode of application of VAT should be ascertained by reference to objective factors rather than by subjective ones (see for example *Optigen v C&E Comrs* [2006] STC 419 at [45]).

38. As a result in our judgement the determination of whether or not a taxpayer has a sufficiently permanent presence of the necessary technical and human resources in the UK must be examined by reference to what it was doing in the UK at the time of the relevant supplies. Thus if a taxpayer had a presence in the UK which was associated with a project of limited duration, such as for example the building of the bridge or power station, and the nature of its activity was such that its presence would cease after the completion of project (as would be the case if it was unlikely to have any continuing maintenance or support role), its presence, however large or complex, could not be said to have the necessary permanence required to make its presence a fixed establishment. On the other hand, a presence to build and operate a road that could have an unlimited duration and so could give rise to a fixed establishment.

Belonging - our findings of fact.

39. We had before us a bundle of correspondence. We heard evidence from Mr Welsh, the managing director of Muster Inns and from Mr Lackovic, who had been a director of Amberley in the first half of 2012; both provided witness statements.

40. Mr Lackovic had worked in the building industry for some 25 years - ever since he left school. He lived in Gloucestershire where he had a wife and two children. At some time he had worked with a Kevin Davies in the UK, and in 2010 worked with him on building projects in Guernsey.

41. In early 2011 Mr Lackovic and Mr Davies decided to set up in business together using a Guernsey company. At the time Mr Davies was in a relationship with Miss Le Poidevin, a resident of Guernsey. Mr Lackovic told us that in order to incorporate a Guernsey company, a Guernsey resident shareholder was required. It was decided that Mr Lackovic and Miss Le Poidevin would incorporate the company. On 4 March 2011 Amberley was incorporated. Its shares were held 50:50 by Mr Lackovic and Miss Le Poidevin. Mr Lacovic said that the intention was that Mr Davies would take Miss Le Poidevin's place as shareholder at some stage but that this had never quite been organised, although in June 2011 Mr Davies had become a director.

42. Amberley's registered office was Miss Le Poidevin's house in Guernsey. The company maintained a bank account at branch of HSBC in Guernsey. Muster Inns made its payments to this account by BACS

43. Miss Le Poidevin did the administration. She sent out invoices and collected monies. She monitored stage payments and costs. She arranged payment of suppliers' invoices and wages (and the like) and administered the operation of the construction industry scheme and, if necessary, PAYE.

44. Mr Davies found and managed building contracts for the company in Guernsey during 2012.

45. Mr Lacovic's wife was the sister of Mr Welsh's wife. Mr Lacovic and Mr Welsh met in July 2011. Subsequently Mr Welsh formed a good impression of Mr Lacovic's ability as a builder. When Mr Welsh was contemplating the refurbishment of the Maltsters he decided, partly at the instigation of his wife, to instruct Mr Lacovic. Negotiations over scope and price lasted about a week. Mr Welsh then agreed that the work would be done by Amberley. A schedule of stage payments was agreed. Mr Welsh did not initially signed a formal contract with Amberley but did so at a later stage. Mr Lacovic drafted the contract and discussed its terms with Mr Davies beforehand.

46. The works were organised so that the business of Muster Inns would be out of operation for as short a time as possible. The work began on 18 January 2012 and the pub closed form 22 January to 1 April 2012. Thereafter there remained a number of jobs to be done as part of the first phase of the renovation in other areas of the pub. Those were scheduled to be completed by 5 July 2012, and we understood were completed by the end of July 2012

47. The lion's share of the work was undertaken by Amberley although some other contractors were used for specific items.

48. Amberley started work at the Maltsters on about 18 January 2012 when a group of workers arrived. Many of these came from Gloucester and had worked with or for

Mr Lacovic in the past. Some of Mr Welsh's staff - who would otherwise have been idle - were redeployed in the workforce. There were between six and 12 workers present at any time. During the week the incomers stayed at the Maltsters: Mr Lacovic used the manager's flat, the foreman had a separate B&B room, and the rest stayed in a bunk dormitory. Mr Welsh arranged for his chef to cook all their meals.

49. Apart from three days of plastering towards the end of Amberley's presence, Mr Lackovic spent his time in management and supervision of the project. He was at the Maltsters almost every day. He was given a desk in Mr Welsh's office. There he had his own laptop computer and some filing space. He used the Maltsters' phone for making and receiving calls (there was no mobile reception) but he did not have a separate phone number. On behalf of Amberley he arranged the provision and deployment of labour and materials, he opened accounts with local suppliers, ordered materials for the works and discussed and agreed the progress and details of the works of Mr Welsh as they progressed.

50. Mr Welsh told us that Mr Lackovic was fed up with commuting to Guernsey and wanted to find jobs in the UK. He told us that Mr Lackovic, while he was at the Maltsters, quoted for a job for Mr Welsh's neighbour and for several jobs in Gloucestershire.

51. It was apparent from Mr Lacovic's evidence that, although, as a director of Amberley one of his roles was to generate new business, the day-to-day management of the Maltsters project took up the vast majority of his time and attention. The attempts made to get further work had not been successful.

52. When Mr Lackovic ordered materials from local suppliers, their invoices were generally sent to Amberley's registered office in Guernsey and settled by Miss Le Poidevin. Some invoices, primarily from smaller local suppliers however were sent to the Maltsters (both during and after Amberley's presence there) but were then sent on to Guernsey for settlement. Amberley's business cards bore Mr Lackovic's and Mr Davies mobile phone numbers and the Guernsey address of the company.

53. About once a month in the period from January 2012 to April 2012 Mr Lackovic went to Guernsey to discuss this and other contracts with Mr Davies. Together they managed the activities of the company. Miss Le Poidevin was not involved in this activity.

54. In 2012 in April 2012 the relationship between Mr Lackovic, on the one hand, and Miss Le Poidevin and Mr Davies on the other, deteriorated. Mr Welsh had made a large stage payment under the terms of his agreement but shortly afterwards one of the suppliers of materials for the Maltsters in project was not paid. Mr Lackovic spoke to Miss Le Poidevin. She told him that another creditor had been paid instead. Mr Lackovic alerted Mr Welsh and suggested that he should take Amberley's place as contractor. Mr Davies and Miss Le Poidevin discovered his actions and disapproved. Together they appear to have removed him as a director (or purported to do so) in July 2012. At or around this time Miss Le Poidevin appears to have started dealing directly

and authoritatively with Mr Welch and Mr Davies undertook the oversight of the completion of the works at the Maltsters.

55. In May 2012 in advance of the delivery of its VAT return for the 03/12 quarter, Muster Inns' bookkeeper had sought evidence from Amberley of its VAT registration. She had been sent a copy of Amberley's registration certificate which had been issued by HMRC on 8 March 2012. It appeared that in the Spring of 2012 Mr Welsh had also had a conversation with an officer of HMRC about the VAT on Amberley's invoices but no note of the detail of the conversation had been kept. Muster Inn's 03/12 VAT return was then submitted on 8 June 2012.

Discussion – fixed establishment

56. Mr Baumgardt says that Mr Lackovic managed Amberley's business in the UK and that through him and at the Maltsters Arms Amberley had a presence in the UK equipped with the human and technical resources to conduct its commercial activities in the UK. That was a fixed establishment.

57. It was clear that Amberley had established its business establishment in Guernsey. That was where its registered office was, where its administration was conducted, where Mr Davies sought and managed building contracts, and where Mr Lackovic went to discuss projects with Mr Davies.

58. It was also clear that Amberley had a presence in the UK in the form of Mr Lackovic who acted as its agent both in relation to the work at the Maltsters Arms and in relation to his presence in Gloucestershire.

59. But although when in Gloucester Mr Lackovic may have sought work for Amberley, there was no evidence that any supply was made which had any connection with his presence in Gloucester: Amberley's only economic activity was at the Maltsters Arms.

60. That leaves the base which Amberley had at the Maltsters. We accept that gathered here were the human resources necessary for the provision of services to Munster Inns: the labour and the management of the contract. The necessary technical resources were also present: the expertise in managing the supply, the computer, internet and telephone for the provision of materials. This had substance and size.

61. We do not believe that the fact that the invoicing and payment of suppliers and workers was organised in Guernsey meant that the necessary resources for the provision of the service to Muster Inns were not present in the UK. Those functions were necessary for the continued delivery of the service in the sense that if suppliers or workers were not paid they would not work or provide materials, but they were not necessary for the supply of the building service at the time the work was done. Thus we concluded that the establishment which Amberley had at the Maltsters was one with the necessary structure in terms of having human and technical resources to provide the service to Muster Inns.

62. However we do not regard that establishment as sufficiently permanent or stable. During the period from January to June 2011 Amberley had a contract which was likely to last July 2011. It is possible that it may have been extended to the second phase of the works, but even if that possibility is taken into account its economic activity at the Maltsters was limited in time and unlikely to have been pursued beyond 2013.

63. It is true that Mr Lackovic sought further work in the UK but this was pursued sporadically and did not result in any contract or economic activity in the period. Had contracts been made for further work that would have been indicative of a degree of permanence.

64. We conclude that section 8 did apply to the supply of the building work and that as a result (a) Amberley is to be treated as not having made the supply, and (b) Muster Inns is to be treated as having made the supply to itself with the result that it is liable to output tax on the supply and entitled to input tax credit for that tax.

Ground 2: were the assessments defective?

65. On 15 January 2013 Mr Laming of HMRC wrote to Muster Inns saying that Amberley did not belong in the UK and that as a result Muster Inns and not Amberley had the liability to account for VAT on the supply of the building works. He said:

> "I am therefore making an assessment is to recover the output tax that should have been declared for [03/12 and 06/12]".

A letter notifying the assessment was sent on the same day attaching schedules which indicated that the assessment was to recover underdeclared output tax.

66. Section 73 VATA provides:

> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgement and notify it to him.
>
> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person --
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.
>
> (3) ….

(4) Where a person is assessed under subsection (1) and (2) above in respect of the same prescribed accounting period the assessments may be combined and notified to him as one assessment.

67. Mr Baumgarten says that the assessments are defective. He accepts that if the reverse charge applied then Muster Inns was liable to output tax on its self supply, but he says that that output tax gives rise to an input tax credit of the same amount, and that the assessments took no account of that credit.

68. He says that when Mr Welsh completed his VAT return he did not expect section 8 to apply, and thus his return included neither the reverse charge output nor the corresponding input tax. Thus the correction which was required was to charge the output tax but at the same time to give credit to the input tax. The assessments did not do this.

69. He says that if the result of section 8 is that VAT is not due from Amberley and an input tax credits cannot be claimed for the VAT shown on Amberley's invoice (see Ground 3 below) then the assessment should have been made, not to charge output tax, but to recover the input tax claimed on Amberley invoice. It was plain from the letters to Mr Laming that this was not the mechanism of the assessment.

70. Thus the assessment he says cannot have been made properly or to the best of HMRC's judgement: assessing output tax rather than covering a credit is hardly best judgement.

71. Mr Bingham says that the assessments represented a proper judgement of the amount of VAT which was due from Muster Inns. He says that they represent the combination of the conclusions that: (1) output tax was due on the self supply, (2) input tax is creditable in respect of that self supply, and (3) the input tax claimed on the Amberley invoices was not deductible. Item (2) offsets item (3), leaving an assessment for the output tax. Each conclusion and each step was reached rationally and without caprice: the assessment was therefore HMRC's best judgement of the amount due.

72. For the reasons we shall explore in the next section we conclude that the VAT shown on the Amberley invoices was not properly deductible. As a result the amounts which should have been shown in relation to the building works on Muster Inns' VAT returns should have been (i) the output tax on the self supply, and (ii) the corresponding input tax: these netting off and leaving the net amount due as that arising from Muster Inns' other normal activities[1]. Instead the net amount shown on the returns was reduced by the input tax claimed on the Amberley invoices. Therefore it is the case that the net amount was overstated in Muster Inns' favour by the amount of VAT on the Amberley invoice (which was the same as that on the self supply). Since the net amounts shown in the VAT return as due to Muster Inns had been paid to it by HMRC, Muster Inns was therefore in the position that it had benefited wrongly by an amount equal to that input tax credit.

[1] Which, from its VAT returns appears to be a VAT credit of £7,952 for 03/12, and an amount due of £10,179 for 06/12

73. The effect of the assessments made by HMRC would be to rectify this wrong. To that extent there is nothing improper in the calculation of the amount of each of the assessment.

74. The question arises however as to whether the correct procedure for assessment was adopted.

03/12

75. In relation to the 03/12 period it appears[2] that had Muster Inns accounted for VAT correctly £7,952 would have been repaid to it rather than £41,552. That circumstance falls squarely within section 73(2) - an amount was paid as a refund of VAT which should not have been paid. Thus an assessment could have been made under that subsection in respect of the difference of £33,600.

76. An assessment was made but it was described as being to recover "the output tax which should have been declared" - thus seemingly pointing to its being assessment under section 73 (1).

77. It does not seem to us that the 03/12 assessment could have been made in reliance on section 73(1). That section refers to "VAT due from" the taxpayer. This amount was a reduction in the VAT due to the taxpayer.

78. But whilst the description of this assessment is being in respect of output tax tells only part of the story, it does not, in our view, prevent the assessment itself from being validly made under the provisions of section 73 (2).

06/12

79. The effect of the failure to include the reverse charge output tax in the return for this period (and (in its books) to replace the Amberley input tax credit by the self supply credit) was to turn what should have been tax due from Amberley of £10,179 into a repayment claim of £10,972.

80. It seems to us that HMRC's power to recover the difference relies on a combination of section 73 (1) and (2). Under subsection (2) the overpaid refund of £10,972 may be assessed, and under subsection (1) the VAT due of £10,179 may be assessed.

81. But by issuing a single assessment said to be to “recover the output tax" did HMRC properly exercise these powers? In particular should they have made two separate assessments and referred to the replacement of the Amberley VAT input by the self supply input?

82. In our judgement subsections 73 (1) and (2) do not require such formality. What is required is a notification to the taxpayer of what HMRC consider the position to be and why they take that view. A single form of assessment combining amounts

[2] See footnote 1 above

accessible and (1) and (2) is the assessment of each of these amounts. Further the description of the amount as being output tax due gives in this case an understandable and adequate notice of the reason for the assessment. Further, subsection 73 (4) give HMRC the clear power to combine and notify to a taxpayer amounts assess under subsection 73 (1) and (2) as one assessment

Ground 3: Credit was available for the amount shown on the Amberley invoices.

83. Mr Baumgardt argues as follows:

(1) By section 3 VATA, a "person is a taxable person for the purposes of this Act while he is or is required to be registered under this Act". Amberley was in fact registered by HMRC when it made the supply notwithstanding the later cancellation of its registration. It was therefore a taxable person at the time of the supply.

(2) By section 4 VATA, VAT is charged on the supply of services "where it is a supply made by a taxable person in the course of a business carried on by him"; therefore VAT was charged on the supply of Amberley's services.

(3) By section 24 VATA, input tax "means in relation to a taxable person ... VAT on the supply to him of services". And by section 26 credit was allowable for that input tax.

84. Mr Bingham says that the first step in this argument fails the because Ambereley's registration was cancelled, albeit retrospectively.

85. We do not agree with Mr Bingham. Schedule 1 may permit HMRC to revoke a registration retrospectively, but that cannot affect the fiscal position of a third party in the period between the registration taking effect and its being cancelled. For it to be otherwise would be contrary to the requirement for legal certainty.

86. However, it seems to us that the second stage of Mr Baumgart's argument fails. Section 4 applies only when the supply was made "by" the taxable person. As a result of section 8 Amberley is to be treated as not having made the supply of the building works. Thus its supply was not chargeable to VAT. Accordingly input tax on its invoice is not creditable. (By contrast, of course, input tax on the self supply is creditable since it was to be treated as in respect of the supply made by the taxable recipient in the course of its business).

87. Mr Baumgart also referred as to *Genius Holding BV v Staatssecretaris van Financien* C-342/87. In that case the ECJ was asked to consider whether the provisions in the directive which rendered the provider of an invoice liable to pay the VAT mentioned therein whether or not the supply was chargeable to VAT had the effect that if VAT was mentioned on an invoice and added to the amount of due it was necessarily deductible. In that case the advocate general concluded that it was, but the court found otherwise. It said:

[19] The answer to the first question should therefore be that the right to deduct provided for in the sixth Council directive of 17 May 1977 does not apply to tax which is due solely because it is mentioned on the invoice.

88. We concluded that *Genius Holding* did not assist Mr Baumgart.

Conclusion.

89. We therefore dismiss the appeal.

Rights of Appeal

90. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 6 June 2014