TC04105

Appeal number: TC/2012/05371

VAT – input tax – purchase of iPhones – full VAT invoices not obtained to support claim to input tax – various ordinary retail receipts provided instead – whether supplies actually made to the Appellant, supporting a claim for input tax – section 47(2A) VATA considered – whether adequate alternative evidence of the incurring of input tax – whether HMRC's refusal to accept alternative evidence was reasonable – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

XPRESS TELECOM LTD **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MRS GILL HUNTER

Sitting in public in Bedford Square, London on 24, 25 & 26 June 2014

Robert Holland of Dass Solicitors for the Appellant

James Puzey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns input tax of around £30,000 on a number of alleged purchases of iPhones by the Appellant. HMRC have disallowed the input tax and, consequently, have refused to repay it. They do not accept that the relevant purchases were made by the Appellant, but even if they were, they do not accept that the evidence to support the Appellant's claim for input tax is sufficient.

2. The Appellant asserts that the relevant supplies were made to it. It freely admits it did (and does) not hold the requisite formal VAT invoices to support a claim for input tax. It argues that it held (and holds) other evidence sufficient to demonstrate the charge to input tax, and HMRC have wrongly refused to accept that evidence.

3. The dispute therefore focuses around the twin questions of whether the supplies were made to the Appellant in the first place, and (if they were) whether HMRC's refusal to accept the alternative evidence of the charge to VAT submitted to them is unreasonable. In relation to the latter question, the parties are agreed that the Tribunal's jurisdiction is supervisory, i.e. that the appeal will only succeed if the Tribunal finds that no reasonable body of commissioners could have reached the decision to disallow the input tax which was reached in this case.

The facts

Introduction

4. Mr Holland (on behalf of the Appellant) and Mr Puzey (on behalf of HMRC) helpfully agreed that we should divide our consideration of the evidence into two distinct parts. In relation to the disputed issue of whether the Commissioners' refusal to accept the available evidence in place of proper VAT invoices was unreasonable, we should consider only the evidence available to HMRC at the time the disputed decision was made. It was agreed for this purpose that the relevant time was 5 September 2012, when the final disputed decision was made (being an amendment of an earlier decision). In relation to the rest of the dispute between the parties, we should consider all the evidence now available.

5. We received witness statements and heard oral evidence from:

(1) Mr Sathiharan Balasingam ("SB"), the sole director of the Appellant, on its behalf; and

(2) Officers John Gibbard and Simon Kimber of HMRC, on behalf of the Commissioners.

6. We also received a bundle of documents (mostly comprising exhibits to the witness statements of SB and Officer Gibbard). We did not find the evidence of Officer Kimber particularly useful, as his witness statement spoke predominantly as to

his understanding of the state of affairs on which it was made (June 2014) and we did not find his evidence as to Apple's historical practices to be first-hand, specific or detailed enough to satisfy us as to the exact practices in place from October 2010 to March 2011.

7. The Appellant had also submitted witness statements made by two other individuals, Tila Muhammed and Ishtiaq Ali, but in the event those two individuals did not appear to give live evidence. It had been made clear in an earlier Direction of the Tribunal that their attendance would be required for cross-examination if their evidence was to be admitted. We therefore excluded their evidence altogether (after giving the Appellant the opportunity to secure their attendance on the second day of the hearing).

8. We find the following facts.

Background and disputed issues

9. SB was the sole director of the Appellant and also director of another company Momobile Worldwide Limited ("Momobile") at all relevant times. He had initially become involved in the mobile phone trade through being employed at Carphone Warehouse.

10. Momobile was incorporated on 5 November 2009.

11. The Appellant was incorporated on 18 March 2010 under the name "Cashmysims Limited". It was registered for VAT on 18 September 2010 with effect from 1 May 2010 and its name was changed to its present name on 15 October 2010.

12. The businesses of the Appellant and Momobile were similar and closely interrelated. In particular, they operated out of the same premises in Wimbledon, South London and whilst they had separate bank accounts, SB treated them as interchangeable, using both accounts for the purposes of the combined businesses.

13. The business of the Appellant was initially wholly or mainly the buying and selling of mobile phone SIM cards with pre-paid credit. In its VAT period 1 October to 31 December 2010, however, it started to sell iPhones to a small number of wholesale customers.

14. SB said he had seen from a website called GSM Exchange (of which Momobile was a member) that it was possible to buy iPhones for their full retail price and make a profit by selling them on to wholesalers. By virtue of the reverse charge rules applicable to such transactions, the Appellant would not be required to charge VAT on those sales, though because the phones which it sold were to be bought in ordinary retail transactions, its cost of acquiring the phones would include VAT. In a typical transaction in early 2011, the retail price of an iPhone would be £510 (£425 plus £85 of VAT) and the Appellant would sell the phone as part of a batch for somewhere between £495 and £540 (with no VAT applicable), depending on the prices being offered at the time.

15. The Appellant arranged for iPhones to be bought from Apple Stores operated by Apple Retail UK Limited ("Apple"). SB was aware that Apple Stores would only sell a very small number of phones to a single retail purchaser – he understood the policy to be that there was a limit of 2 phones per retail customer. There was a separate department within each Apple Store to deal with business purchasers, but purchases through that department would be more complex or impossible (as Apple would need to make various checks on prospective business purchasers and might well refuse to sell anyway if it suspected the Appellant was simply intending to sell the phones on in bulk).

16. He therefore arranged a small group of people (referred to as "runners") to attend personally at Apple stores to buy the phones using cash or Apple gift cards; he also did this himself. The phones were batched together and then sold on in wholesale lots, typically of 20 or more phones.

17. The retail receipts issued by Apple were able to accommodate the inclusion of a customer's name, but they could be issued without one. Each receipt included the IMEI and serial numbers of the phone to which it related. The Appellant included lists of the IMEI numbers of the phones involved on its own invoices to customers. There was no suggestion of any mismatch between the phones bought by runners and those sold by the Appellant (apart from as a result of confusion between the Appellant and Momobile).

18. In VAT period 12/10, the Appellant claimed total input VAT of £26,226.76 in its VAT return (which was filed online on 4 February 2011). The net liability shown on the return was £5,109.65 due to HMRC. Of the total input VAT claimed, £2,675 was ultimately disallowed as relating to the iPhones.

19. In VAT period 03/11, the Appellant claimed total input VAT of £43,665.69 in its VAT return (which was filed online on 21 April 2011). The net amount shown on the return was a repayment due from HMRC of £31,244.15. Of the total input VAT claimed, £37,791 was ultimately found to relate to iPhones supposedly supplied to the Appellant by Apple.

20. HMRC decided to verify the 03/11 return before making the repayment. Officer Gibbard dealt with the verification. He obtained various information from the Appellant and visited it on 19 July 2011. He had made an earlier visit to SB at Momobile at the same business address on 30 March 2011. At that earlier visit, a fair amount of information had been given to HMRC about the way in which both Momobile and the Appellant carried on their business and a warning had been given that input tax would be disallowed on purchases over £250 if no proper VAT invoice was obtained.

21. At the 19 July 2011 visit, Officer Gibbard examined the Appellant's records more closely. He was told that the Appellant employed students to buy the iPhones, paying £6 to £7.50 per hour. He was given 7 names, but told that not all of them were still employed. He was also told that the activity had ceased since the earlier visit to Momobile.

22. Officer Gibbard examined the documents relating to one particular sale of 70 iPhones to a customer called R S Global. He noted that although SB had told him that iPhones were bought "to order", the documents showed that the iPhones had in fact been bought four or five days before the date on the purchase order.

23. He also looked closely at the pattern of iPhone purchases on a particular day, 25 January 2011. On that day, 18 iPhones which had supposedly been bought by one Hamza Munir on behalf of the Appellant were shown on the invoices from Apple as having been bought as follows:

Regent Street Apple Store – 8 phones at 12.22, 12.24, 12.27, 12.29, 13.03, 13.05, 13.41 and 13.43

Covent Garden Apple Store – 3 phones at 13.41, 13.50 and 13.53

Bentall Center, Kingston Apple Store – 2 phones at 15.07 and 15.08

Regent Street Apple Store – 1 phone at 15.13

Brent Cross Apple Store – 4 phones at 16.46, 16.49, 16.50 and 16.56

It was, in his view, clearly impossible for one individual to have bought all these phones.

24. He also attempted to reconcile the Appellant's bank statements with the cash purchases but it was not possible.

25. He noted that in period 03/11, the Appellant claimed to have bought well over 400 phones (on Officer Gibbard's count at the time, the number was 439, though the correct number appears to be 436). He examined the till receipts in detail and established that:

(1) around three quarters of them had no customer name on them (he counted 321, though in fact the number appears to be 307, which rises to 314 if obviously fictitious customer names such as "iphone4iphone4" are discounted). As mentioned above, the format of the receipts did allow for a customer name to be printed on them at the store, but did not require it;

(2) 42 receipts appeared to have been addressed to SB in some version of his name (though the correct figure now appears to be 44);

(3) 58 receipts were addressed to "Hamza Munir" (who had not been identified to him as an employee of the Appellant) in some version of that name – though the correct number now appears to be 65;

(4) 7 receipts were addressed to "Sayed Haider" (who had not been identified to him as an employee of the Appellant);

(5) 6 were addressed to Tila Mohammed (who had been identified to him as an employee of the Appellant); and

(6) a few receipts contained obviously invented email addresses (such as "a@a.a") as the customer contact details.

26. In relation to period 12/10, the level of activity was lower. Only 40 iPhones were shown as purchased, but none of the Apple Store receipts for those phones contained any details of the customer name.

27. There were other oddities, such as isolated purchases in Glasgow and Bristol.

28. He therefore informed the Appellant verbally at the visit (confirmed by letter dated 22 July 2011) that the input tax attributable to the various iPhone purchases would be disallowed, on the basis that no formal VAT invoice was held. The amounts involved, according to his note of the meeting, were £2,675 for period 12/10 and £37,791 for period 03/11.

29. On 31 August 2011 the Appellant's VAT adviser VAT Consultants Limited wrote to HMRC, asking them to exercise their discretion to allow the disputed input tax. The runners were quoted as saying they had been told by the stores that Apple refused to log customer names on invoices "as a matter of policy"; that the Apple sales representatives either invented data or inserted a few meaningless characters; that the same name would not be accepted twice by Apple's systems; that only two units were allowed per invoice, "with the name only showing on the first"; and that the lack of correct names was "an Apple policy, presumably approved by HMRC".

30. By letter dated 11 October 2011, Officer Gibbard replied. He said that even if full VAT invoices were now obtained from Apple, that would not necessarily suffice, because (i) HMRC would still not be sure the invoices were "proper" to the Appellant, (ii) as the purchases were mostly in cash, there was no evidence to show the Appellant had made the payments, and (iii) HMRC did not know which individuals had made the purchases, and whether they were directors or employees of the Appellant.

31. On 20 October 2011, the advisers responded, requesting a statutory review of the decision and on 14 November 2001 they wrote again, asserting that full VAT invoices were "simply not available from Apple and never have been due to the limitations of their systems". It was said that HMRC were well aware of this, and were known to be holding meetings with Apple to correct it.

32. The Appellant then appointed new advisers, Veracis Limited, who wrote to HMRC again on 24 November 2011, requesting a "new review" of the refusal decision. In doing so, they submitted a detailed "Bank/Cash Reconciliation" spreadsheet analysing the cash movements, purchases and sales of both the Appellant and Momobile, which showed that between the two companies there was always sufficient cash available to fund the various purchases of phones that had been made.

33. Officer Gibbard replied on 22 December 2011. In that letter, he said that "[d]uring my visit Mr Balasingam was given the option of approaching the Apple Store and requesting full VAT invoices, which he declined to do." This letter went on to cite this as part of the reason for refusing to allow the input tax, as well as the fact

that "a significant proportion of the till receipts have no name of the customer on them, and others are addressed to persons who are not employees of Xpress Telecom Ltd." This letter offered a formal review of the decision.

34. By letter dated 3 January 2012, the new advisers requested a formal review, recording that the previous adviser had approached Apple, who had supposedly informed it that "Apple could not issue full tax invoices for individual retail sales."

35. The review conclusion was notified to the adviser by letter dated 5 April 2012. In that letter, HMRC confirmed that they had been "advised that Apple can and do raise full tax invoices for retail sales if the full names and addresses are disclosed at the point of sale." They also said that the evidence indicated "some of the receipts are made out to individuals who are not employees of the company. The vast majority have no name or address at all and it is not possible to determine who purchased these goods." Reference was made to the existence of 'invoices marked "duplicate"' and also to the concerns about the supposed timings of some purchases which were meant to have been made by one individual. It was said that an opportunity to obtain and provide full invoices had not been taken up, and reference was also made to the effect of section 47(2A) Value Added Tax Act 1994 ("VATA") (see [49] below) where an agent acts in his own name.

36. Some time later, Officer Gibbard reconsidered matters after discussions with HMRC's appeals and reviews unit and wrote again to the Appellant on 5 September 2012.

37. In that letter, he informed the Appellant that HMRC were now prepared to accept it could claim as input tax the £4,318 of VAT shown on the 44 Apple Store receipts which had SB's name included on them and on the 6 receipts which included Tila Mohammed's name. These receipts all related to period 03/11. In the copy employer's annual return information for the Appellant included in our bundle, SB and Tila Mohammed were both shown as having been employees of the Appellant from 3 May 2010, and not having left employment during the tax year 2010-11. SB was of course also its Director at that time.

38. Finally, it has been agreed that £5,814 of the input tax originally claimed by the Appellant (and included in the amounts disallowed set out above) in fact relates to purchases of phones on behalf of Momobile, and should therefore not properly be recoverable by the Appellant in any event. From the schedule provided to us, it would appear that this amount relates to invoices on which the customer names "Hamza Munir" and "Sayed Haider" (or variants of them) have been printed by Apple, as the total of such invoices listed for period 03/11 is very close to that amount.

39. It is worth mentioning that an appeal by Momobile against HMRC's refusal to allow its input VAT on similar purchases had been running in parallel, dealt with by a different HMRC officer. That appeal was finally accepted by letter dated 29 November 2012, and as part of it HMRC accepted that till receipts made out to

Hamza Munir and Sayed Haider could be accepted as sufficient evidence of input tax, those individuals having been accepted to be employees of Momobile.

40. The final extent of the dispute between the parties is therefore:

(1) in relation to period 12/10, the original assessment of £2,675, representing the input VAT claimed on all the purchases of iPhones (though in fact it appears to be slightly smaller than the actual amount of such VAT claimed, namely £2,972.80); and

(2) in relation to period 03/11, the disallowance of £27,659 (made up of the £37,791 originally disallowed in respect of the VAT on the purchases of the iPhones (see [28] above), less the £4,318 subsequently allowed in September 2012 (see [37] above) and the £5,814 which the Appellant accepts should be disallowed (see [38] above)).

The evidence as to what was said when phones were purchased

41. Because the basis on which the phones were bought (i.e. whether there was any disclosure to Apple that the phones were being bought on behalf of the Appellant) is a material issue in the appeal, we explored the evidence in this area in some detail. The main difficulty facing the Appellant was that there was no suggestion that SB (the only witness on behalf of the Appellant) was actually present at the time of any of the relevant purchases. SB was therefore only able to say what instructions he gave to the buyers of phones, i.e. they were instructed to say that they were buying on behalf of the Appellant. It would have been helpful to hear live evidence, properly tested in cross-examination, from the four other individuals (Atheeq Mohammed, Tila Muhammad, Mohammed Ibrahim Ali and Ishtiaq Ali) who were recorded as having actually purchased the phones.

42. Nor was there any clear and coherent evidence as to the identity of the individual who had actually purchased each iPhone. It is true that various individual names were written on the backs of many of the retail invoices, but we do not consider that to be reliable evidence that the named individual had actually bought the phone in question. Officer Gibbard had highlighted the physical impossibility of that being the case in one particular situation mentioned above (even though the invoices in that case were later accepted as being proper to Momobile rather than the Appellant), and in the absence of any evidence to corroborate the names written on the invoices, we do not accept that they can be relied on as an accurate record of who purchased what. In some cases, names had been written on the reverse which conflicted with the customer names actually entered by Apple on the receipt; the names on the reverse had then been struck through.

43. In the absence of any direct evidence, we had to consider whether it was possible for us to make a finding that, on the balance of probabilities, some or all of the purchasers had indeed informed the Apple Store salesmen that they were purchasing the iPhones on behalf of the Appellant in the capacity of its employee or agent. The bundles before us included copies of various employment contracts and

agency terms and conditions, along with copies of employer's annual returns showing earnings paid to the individuals who had supposedly bought the phones. The agency terms and conditions included the following sentence:

> "The products purchased and all paperwork related thereto become the property of Xpress Telecoms Limited as they are purchased from the supplier as though purchased directly by Xpress Telecoms Limited, however they are paid for and this made clear to the vendor at the time."

44. It is clear that the Apple Stores had the facility to put a customer name on the receipt – something of that nature was included on around a quarter of the receipts in period 03/11. We infer that if the purchasers of the phones had asked for an individual name to be inserted, that should have caused no difficulty in principle. However, we also infer that the purchasers were well aware that if they made themselves stand out as multiple purchasers or business purchasers, there was a risk that the Apple staff would refuse to serve them (Mr Balasingam's witness statement confirmed he was aware that it was Apple's policy to sell no more than two phones to each retail customer, and Mr Kimber's evidence was that Apple were aware of, and trying to prevent, the practice of runners seeking to buy phones for subsequent resale).

45. In the circumstances, we find that although the runners did buy the phones for the Appellant, there is insufficient evidence that they gave any indication to Apple of their status as agent for the Appellant. As a result, we conclude that the runners were acting in their own names.

Bank/cash reconciliation

46. Whilst the "bank/cash reconciliation" spreadsheet produced by the Appellant's adviser may demonstrate that there was sufficient cash available at all times to finance the purchase of the relevant phones by Momobile and the Appellant, we do not consider that fact would assist us in reaching a conclusion on the crucial issues (namely whether the phones in dispute were actually purchased on behalf of the Appellant rather than some other entity such as Momobile, and whether Apple were informed of the agency status of the runners).

The law

47. There was a great deal of agreement between the parties as to the applicable law, and we do not propose therefore to set it out at length. The real dispute was about its application to the facts of this case.

48. The parties were agreed that if the Tribunal was not satisfied that the relevant iPhones had been supplied to the Appellant, then the appeal must be dismissed.

49. They were also agreed that, for the input tax to be allowable, it had to be shown that the supplies had been made to the Appellant by Apple. The provisions of section 47(2A) VATA were in point here, providing (so far as relevant) as follows:

> "Where… goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and a supply by the agent."

50. The parties were also agreed that if we were satisfied that the relevant iPhones were supplied to the Appellant by Apple, then (in the agreed absence of proper VAT invoices in respect of the supplies), we would be required to consider whether the decision of Officer Gibbard (to refuse to accept the alternative evidence proffered by the Appellant in support of its assertion that it had incurred the input VAT claimed) was a decision that could reasonably have been arrived at. The relevant provision is regulation 29(2) of the VAT Regulations 1995, which read as follows (so far as relevant):

> (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; *[i.e. a full VAT invoice, including the name and address of the person to whom the supply is made]*
> >
> > …
>
> 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."

51. The nature of the Tribunal's jurisdiction in relation to this latter point was set out by Schiemann J in *Kohanzad v Customs & Excise Commissioners* [1994] STC 968 as follows:

> "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 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 was incorrect."

52. The parties are further agreed that, as stated in the First-tier Tribunal case of *McAndrews Utilities Limited v HMRC* [2012] UKFTT 749 (TC):

> "The supervisory jurisdiction in cases such as this involves consideration of 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."

53. It is also clear that an appellant faces a high hurdle in seeking to persuade a tribunal to exercise this jurisdiction. As was stated by the VAT and Duties Tribunal in *Baba Cash and Carry v HMRC (2007)* Decision 20416 (at [12]), after an examination of the ECJ decision in *Reisdorf v Finanamt Koln-West* Case C-85/95 [1997] STC 180:

> "Against the Community law background summarised above, the domestic provision, in the proviso to regulation 29(2)(a) of the VAT Regulations, 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 [i.e. evidence other than the tax invoice] as the Commissioners may direct, gives only slight scope, as it appears to us, in the absence of mala fides, for a taxable person to appeal successfully to this Tribunal in a case where the Commissioners have considered the case and declined to make any such direction."

54. *Reisdorf* was a case in which the German VAT authorities had refused to permit deduction of input VAT on a taxable supply which was evidenced by a copy VAT invoice solely because the relevant original VAT invoice was not held – a strict requirement of German VAT law, unless the original had been lost (which was not alleged in that case). It was held that the power to accept alternative evidence was a matter for the member state. This effectively meant that the German authorities were quite entitled to refuse to permit a copy invoice to be used to support deduction of input VAT in a situation where the original invoice could be obtained. It was inherent in this decision that input deduction could be denied even if there was no dispute that the taxable supply had taken place; the national authorities were quite entitled to require production of the original invoice as a precondition of allowing the deduction, unless it had been lost or destroyed.

55. HMRC have issued a Statement of Practice (the relevant version being dated March 2007) entitled "VAT Strategy: Input Tax deduction without a valid VAT invoice". This set out their policy in approaching the exercise of their discretion to allow input tax deduction without a proper invoice. In essence, it stated that in respect of "supplies of goods subject to widespread fraud and abuse" (which includes mobile phones), HMRC would 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 the supplier

> * Normal commercial arrangements are in place – this can include payment arrangements and now the relationship between the supplier/buyer was established"

56. It was also stated that for goods such as mobile phones, "claimants will be expected to be able to answer questions relating to the supply in question including all or nearly all of the questions at Appendix 2". Appendix 2 contained the following questions (expressed to be "not exhaustive"):

> "1. Do you have alternative documentary evidence other than an invoice (e.g. supplier statement)?
>
> 2. Do you have evidence of receipt of a taxable supply on which VAT has been charged?
>
> 3. Do you have evidence of payment?
>
> 4. Do you have evidence of how the goods/services have been consumed within your business or their onward supply?
>
> 5. How did you know that the supplier existed?
>
> 6. How was your relationship with the supplier established? For example:
>
> * How was contact made?
>
> * Do you know where the supplier operates from (have you been there?)
>
> * How do you contact them?
>
> * How do you know they can supply the goods or services?
>
> * If goods, how do you know the goods are not stolen?
>
> * How do you return faulty supplies?"

57. It is evident that many of the above questions reflect concerns about MTIC trading and a preoccupation with establishing that the goods in question were acquired from a reputable and reliable source of supply. In the present case, of course, there are no concerns about the source of the iPhones, and no dispute that they were sold on by the Appellant in the course of its business. The key questions of concern to HMRC were therefore those numbered 1 to 3 in [56] above.

Submissions of the parties

Submissions of the Appellant

58. Mr Holland submitted that the Appellant had "demonstrably used the telephones purchased from Apple shops for the purposes of its business in that it sold

the self same telephones" to its customers. Apple had clearly made taxable supplies, evidenced by its till receipts. Those supplies had been made to the Appellant, through the agency of its employees and agents. The list of questions set out in HMRC's statement of practice needed to be read in the present context and not in isolation; the present context made it clear that the concerns to be addressed were not about the bona fides of the supply chain leading to the Appellant, but simply establishing whether the supplies had been made to the Appellant for payment. In that situation, the key concerns were to establish that (i) the Appellant had paid for the goods, (ii) the identity of the goods acquired was clear, (iii) the goods had been used for the purposes of the Appellant's business and (iv) the identity of the supplier. On the basis of the information known to Officer Gibbard on 5 September 2012, those concerns had all been allayed.

59. He submitted we should find that the buyers of the phones had informed the Apple store employees they were buying on behalf of the Appellant.

60. He also submitted that the bank reconciliation supplied clearly showed that the Appellant and Momobile together had sufficient cash at all relevant times to fund the purchases and HMRC should have considered that as sufficient (when combined with Mr Balasingam's evidence) to demonstrate that the Appellant had paid for the goods. He submitted there had, right from the start of HMRC's investigation, been a quite clear chain of documentary evidence linking the goods acquired to the goods sold, and showing that they had been sold in the course of the Appellant's business. Finally, he submitted it was (and always had been) quite clear on the face of the documents that the Appellant had acquired the phones from Apple, a perfectly reputable source of supply.

HMRC's submissions

61. Mr Puzey submitted there was a major hole in the Appellant's evidence – it lacked anything credible to link the sales of the phones by Apple to the sales by the Appellant. It was true that the Appellant's sales invoices quoted the same IMEI numbers and therefore there was no dispute that we were concerned with the same phones, but he characterised as weak and unreliable the evidence of how the Appellant came to be in a position to sell those phones.

62. But even if we found that the Appellant had acquired and sold the phones in question, he submitted it was clear on the evidence that the case fell within section 47(2A) VATA, because the runners had all acted in their own names – for perfectly rational reasons, as they would not have been able to buy the phones they wanted if they had disclosed the true position to Apple. If that was right, that was an end of the matter – if the facts fell within section 47(2A) then the supplies made by the runners to the Appellant were not taxable supplies (as the runners were not registered for VAT) and there could accordingly be no question of the Appellant recovering any input VAT. The input VAT would be "blocked" with the runners, but this was entirely as a result of the way in which the Appellant had chosen to conduct its business.

63. Finally, in relation to HMRC's refusal to exercise their discretion to accept the alternative evidence, he pointed to the fact that HMRC had exercised their discretion to accept, in all the other surrounding circumstances, the receipts on which the names of Mr Balasingam or Mr Tila Mohammed were printed by Apple (who, the evidence showed, were employees (and, in the case of Mr Balasingam, a director) of the Appellant); their refusal to accept the other receipts (which contained nothing to link them to the Appellant apart from what was written or stamped on them by Mr Balasingam and the other individuals who had not given evidence) was perfectly reasonable in the light of Officer Gibbard's state of knowledge on 5 September 2012.

Discussion and decision

64. The burden lies on the Appellant to show that HMRC's decision is wrong. In order to discharge that burden, it would have to satisfy us that (a) it had actually incurred the input tax it seeks to reclaim, and (b) HMRC's decision not to accept the alternative evidence offered was, when it was made, a decision which could not have been reasonably arrived at.

65. As to (a), whilst we accept that the phones which the Appellant sold in the course of its business were the same phones as those that were bought by the runners in the Apple Stores, we have found (see [45] above) that the runners, in doing so, were acting in their own names. It follows we must conclude that, by reason of section 47(2A) VATA, the phones in question were supplied by Apple to the runners and then by the runners to the Appellant. As the runners were not registered for VAT, there has been no taxable supply to the Appellant capable of giving rise to VAT which the Appellant can recover as input VAT.

66. On this ground alone, the appeal must fail.

67. As to (b), on the state of knowledge of HMRC on 5 September 2012, even if our conclusion on (a) is wrong, we consider there to have been sufficient uncertainty as to the existence of taxable supplies made to the Appellant in respect of the relevant phones for the decision of HMRC to be justifiable as within the range of possible reasonable decisions.

68. Officer Gibbard's decision was to a significant extent based on his clearly expressed concerns as to the reliability of the manuscript endorsements on the various till receipts as evidence. We note that many of the concerns, on the sample he examined in detail, related to invoices which turned out to be proper to Momobile and not to the Appellant. Mr Holland invited us to find that this undermined the decision in some way. On the contrary, we find that the apparent confusion between the records and transactions of the two companies would, if anything, strengthen the case for refusing to exercise the discretion.

69. It is clear that Officer Gibbard was also unpersuaded by the "bank reconciliation" which purported to show that the two companies, taken together, always had sufficient cash to fund their combined purchases of phones. What it clearly did not do, however, is provide any positive evidence linking any of the

purchases of phones clearly and directly to payments by the Appellant. In the absence of such a link, he cannot be criticised for his view.

70. It follows that we find that the decision of Officer Gibbard to refuse to accept the alternative evidence put forward by the Appellant was within the reasonable range of decisions and cannot be impugned on the grounds summarised in *McAndrew.*

71. The appeal is therefore DISMISSED.

72. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 5 November 2014