



TC05394

Appeal number: TC/2014/06199

VALUE ADDED TAX – invoices – whether they complied with the requirements of regulations 13 and 14 of the VAT Regulations 1995 as valid VAT invoices – held, no – whether the decision not to allow deduction as input tax for the VAT stated on (some of) them on the basis of alternative evidence in accordance with regulation 29 of the VAT Regulations 1995 was reasonable – held, no – the decision maker had not considered adequately or at all certain relevant evidence before her – appeal allowed in part and a fresh decision on whether to allow input tax deduction on the basis of alternative evidence directed to be made – appeal allowed in part and dismissed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GMK BUILDING CONTRACTS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
MS ELIZABETH BRIDGE**

Sitting in public at the Royal Courts of Justice, Belfast on 22 August 2016

Tom Penman, Baker Tilly Mooney Moore, for the Appellant

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

DECISION

Introduction

- 5 1. The Appellant, GMK Building Contracts Limited (“GMK”) appeals against an assessment to value added tax (“VAT”), dated 8 July 2014, disallowing the deduction of £80,511 claimed by GMK as input tax and charging interest thereon.
2. The amount disallowed relates to 32 invoices spanning the VAT accounting periods 05/11, 08/11, 11/11, 02/12, 05/12, 08/12, 11/12 and 02/13.
- 10 3. In relation to 6 of the invoices (in respect of which a deduction as input tax had been claimed), GMK could not produce an invoice document. Mr Penman, for GMK, accepted at the hearing of the appeal that the amounts claimed for deduction as input tax in respect of those 6 invoices must be disallowed. Those amounts totalled £15,112. Thus the amount in dispute was reduced from £80,511 to 65,399 and the
- 15 number of invoices in dispute was reduced from 32 to 26.
4. All the (4) invoices relating to the period 05/11 contained in the assessment were invoices for which GMK could not produce an invoice document, as recorded above. The other two of the 6 invoices for which GMK could not produce an invoice document related to the period 08/11 (1 invoice) and the period 11/11 (1 invoice).
- 20 5. In a schedule handed up by Mr Mandalia at the hearing of the appeal, it is stated that of the remaining 26 invoices, the disallowance of the deduction as input tax had been made by reason of the view of the Respondents (“HMRC”) that there had been no supply as recorded in the invoice in the case of 13 of the invoices, and in the case
- 25 as input tax) had been made because HMRC recorded the supplier to GMK as a ‘missing trader’.
6. HMRC’s case was that the deductions claimed as input tax were properly disallowed because the invoices concerned did not comply with regulation 13 of the VAT Regulations SI 1995/2518 (“the Regulations”) in the case of those invoices
- 30 which purported to be self-billed invoices (see: below) and in the case of all the invoices in issue did not comply with regulation 14 of the Regulations (particulars to be stated on a VAT invoice). Further, HMRC submit that no satisfactory alternative evidence had been produced by GMK to HMRC on the basis of which they ought to have allowed a deduction of any amount claimed as input tax, pursuant to their
- 35 discretionary power to allow such deductions where a VAT invoice is not held, which is to be found in regulation 29(1) of the Regulations.
7. HMRC also submit that the Tribunal cannot be satisfied on the evidence before it that taxable supplies were made by the entities named on the various invoices.
- 40 8. Mr Penman made a submission that in relation to the 13 invoices in respect of which the disallowance of amounts claimed as input tax was made because HMRC recorded the supplier to GMK as a ‘missing trader’, GMK’s appeal fell to be allowed

without more, because HMRC was not invoking the principle enunciated by the Court of Justice of the European Union in the case of *Kittel v Belgium* (Case C-439/04) to the effect that the benefit of deduction input tax which was *prima facie* deductible was not to be allowed to a trader who knew or should have known that the supply in question was connected to fraudulent evasion of VAT.

9. We reject that submission. Although HMRC are not relying on *Kittel* in this appeal, it is clear from both the letter, dated 8 July 2014, sent by Officer Paul Stewart to GMK giving notice that the assessment would shortly be issued, and the letter dated 10 October 2014, sent by Officer Y B Gerrard of HMRC's Appeals & Reviews Team to GMK upholding on review Officer Stewart's decision to raise the assessment, that HMRC's case was based not on GMK's knowledge or means of knowledge of a connection between its purchased supplies and fraudulent evasion of VAT (the area where the *Kittel* principle would be engaged), but on HMRC's view that the evidence supporting the claim to deduct input tax was unsatisfactory and did not meet the relevant statutory criteria.

10. We conclude that the main issue in the appeal is whether or not GMK has discharged the burden of proof on it to show that the invoices in question were valid VAT invoices or that the decision not to allow a deduction as claimed on the basis of alternative evidence was unreasonable.

11. We also understood Mr Penman to concede that of the amount claimed by GMK for deduction as input tax, a net figure of £4,651.57 was not allowable in any event because it related to the VAT element of sums due to be paid by GMK to its suppliers which was unpaid at the end of 6 months following the later of the date(s) of the relevant supply/supplies and the date(s) on which the sum(s) in question became payable. Credit for input tax for such amounts is, as Mr Penman accepted, disallowed by section 26A VAT Act 1994 ("VATA").

12. We had before us a bundle of documents, and witness statements made by the Gerard McKenna, Christopher Kelly and William Loughrey, for GMK, and by Officer Stewart, for HMRC. In addition we heard the oral evidence on oath of Mr McKenna, Mr Kelly, Mr Loughrey and Officer Stewart. All the witnesses were cross-examined.

The facts

13. From the evidence we find the following facts.

14. GMK was registered for VAT with effect from 5 April 2003. It carries on the business of providing construction services. We had before us unaudited accounts of the business for the years ending 30 November 2012 and 30 November 2013. From these accounts it appears that GMK's turnover in the years ended 30 November 2011, 2012 and 2013 was £253,670, £339,197 and £236,163 respectively and the gross profit figures for those years were £65,156, £82,079 (later apparently revised to £80,456) and £68,227. However, it has substantial administrative expenses and although it made a modest after-tax profit in 2011 and 2012 (£8,482 and £32,450 respectively), it suffered an after-tax loss of £2,629 in 2013.

15. GMK typically acts as sub-contractor to a main contractor on a project and, in turn, engages the services of other sub-contractors. This case concerns the payments apparently made for the services of other sub-contractors, specifically J Campbell (“Campbell”), SJEL Construction (“SJEL”), W J Loughrey (“WJL”), Paul Sykes (“Sykes”) Marc Johnston (“Johnston”), Loughrea Contracts (“LC”) and Devay Limited (“Devay”).

16. Of the 26 invoices remaining in issue, 2 purportedly relate to Campbell’s supplies, 7 purportedly relate to SJEL’s supplies, 1 purportedly relates to WJL’s supplies, 1 purportedly relates to Sykes’s supplies, 10 purportedly relate to Johnston’s supplies, 3 purportedly relate to LC’s supplies and 2 purportedly relate to Devay’s supplies.

17. Mr McKenna has at all material times been the sole director of GMK and at all material times Mr Kelly’s firm, J Kelly & Co Accountants Ltd. of Omagh, Co.Tyrone (“JJK”), has acted for GMK, preparing accounts from books and records supplied by GMK, including bank statements, payroll records and cheque stubs.

18. There were three meetings between officers of HMRC and Mr McKenna at the offices of JJK which were relevant to the dispute in this appeal. They took place on 4 December 2012, 6 June 2013 and 27 January 2014.

19. The first meeting, on 4 December 2012, was attended by Officer Stewart accompanied by another officer, and Mr McKenna and Mr Kelly. This meeting was arranged on the initiative of Officer Stewart who informed Mr Kelly before the meeting that he was inquiring into subcontractors, specifically Johnston. At the meeting, Officer Stewart issued to Mr McKenna, on behalf of GMK, a “veto letter” informing GMK that Johnston’s VAT registration had been cancelled with effect from 24 November 2012 and that any input tax claimed in relation to transactions involving Johnston ‘may be subject to verification’. Officer Stewart also issued to Mr McKenna and to Mr Kelly copies of an HMRC leaflet “Use of Labour Providers – Advice on due diligence” and an (unspecified) VAT Notice. The notices explain the checks that traders can make to avoid dealing with high risk businesses and individuals and include details of a dedicated telephone number, which traders can call to verify the VAT status of their suppliers. These documents were explained to Mr McKenna and Mr Kelly.

20. Mr McKenna told Officer Stewart that Johnston had supplied men to work on a site at Dungiven. Before GMK made any payments to Johnston, Mr McKenna had verified his status with HMRC and had successfully carried out a VAT check on him. However, after Mr McKenna telephoned Johnston informing him that he was meeting with HMRC, who had queries about him, the two men supplied by Johnston at the Dungiven site had not returned to work. This led to arguments about payment by GMK to Johnston. Payment was only made after Mr McKenna had confirmed with the main contractor that the work at Dungiven had in fact been completed.

21. At the meeting on 4 December 2012, Officer Stewart also asked Mr McKenna about supplies from SJEL, WJL and LC and asked for copies of their invoices, as well as the invoices from Johnston.

22. The second meeting, on 6 June 2013, was attended by Officer Stewart with another Officer (Claire Scullion) and Mr McKenna, Mr Kelly and Mr Kelly's father, John Kelly, also a partner in JJK. On that occasion Mr Kelly told Officer Stewart that certain invoices which Officer Stewart had queried, were Mr McKenna's interpretation of self-billed invoices issued by GMK in respect of supplies made to GMK by Johnston and SJEL. GMK generated these invoices after having paid the amounts referred to on them and pending receipt of invoices from the suppliers.

23. These invoices were produced by means of payroll software which had been acquired by GMK to help it in keeping track of its Construction Industry Scheme payments. The software had a 'self-billing' option, which Mr McKenna operated because he thought it would keep track of part payments made by GMK pending receipt of suppliers' invoices. Mr Kelly, however, advised Mr McKenna that invoices produced in this way did not meet the VAT requirements in relation to self-billed invoices (regulation 13 of the Regulations) and Mr McKenna's evidence was that, on being so advised, he stopped producing invoices in this way. We were not told when this advice was given.

24. From the invoices in evidence, we have seen 9 out of the disputed 26 invoices which have the appearance of being invoices produced by GMK by means of the 'self-billing' option on its software. These 9 invoices are as follows:

<u>Period</u>	<u>Name of supplier per invoice</u>	<u>Amount of VAT charged</u>
11/11	SJEL	£4,170
11/11	SJEL	£3,685
02/12	SJEL	£3,000
02/12	SJEL	£2,334
02/12	WJL	£10,600
05/12	Sykes	£2,819
11/12	Johnston	£1,980
02/13	Devay	£935
02/13	Devay	£2,139

25. Of the remaining 17 disputed invoices, we have seen 11. These appear to be invoices issued by the respective suppliers as follows:

<u>Period</u>	<u>Name of supplier per invoice</u>	<u>Amount of VAT charged</u>
08/11	Campbell	£3,400
08/12	SJEL	£4,316

	08/12	SJEL	£5,323
	08/12	SJEL	£4,023
	08/12	Johnston	£716
	08/12	LC	£656
5	11/12	LC	£3,959
	11/12	Johnston	£349
	11/12	Johnston	£790
	11/12	LC	£2,600
	11/12	Johnston	£543

10 26. There remain 6 disputed invoices, according to the schedule referred to at
paragraph 5 above. Five of these disputed invoices relate to supplies to GMK by
Johnston. They were all apparently issued in the period 08/12 and charged VAT of
£479, £1,204, £573, £976 and £520 (total: £3,752). The sixth of these disputed
15 invoices relates to supplies to GMK by SJEL and charged VAT of £3,650. We have
not seen these invoices. As they are not in evidence, these supplies are in the same
position as those referred to in paragraph 3 above, as to which Mr Penman no longer
pursues a case that they support an input tax deduction. We mention that have seen 3
other invoices apparently issued by Johnston in the period 08/12 which do not feature
in the schedule referred to at paragraph 5 and so are not relevant to the appeal. (They
20 were exhibited to Mr McKenna's witness statement dated 8 July 2016.) These charge
VAT as follows: £1,505 (invoice dated 22 June 2012); £1,220 (invoice dated 6
August 2012); and £650 (invoice dated 20 August 2012) (total VAT charged: £3,375).

25 27. A peculiarity of the invoices issued by Johnston (not the invoice produced by
GMK by means of the 'self-billing' option on its software naming Johnston as the
supplier) is that some (not all) of them appear to charge VAT at 25%, instead of the
prevailing standard rate of 20%. Mr Kelly noticed these errors when completing
GMK's VAT return(s) and included the incorrect amount of VAT in the figures
making up the return(s). Clearly, in any event, this would call for an adjustment to be
made to GMK's VAT accounting.

30 28. The third meeting, on 12 September 2013, was attended by Officers Stewart and
Scullion and Mr Kelly (it is not clear whether or not Mr McKenna was also there). At
that meeting Officer Stewart told Mr Kelly that Tony McHugh of SJEL had said that
he had never made any supplies to GMK, but that he had admitted putting money
through his account for GMK. This had aroused Officer Stewart's suspicion that a
35 form of tax fraud was being operated, whereby SJEL's VAT registration was being
used to operate a scheme to pay an illegal workforce (made up of persons not paying
tax or national insurance contributions) in cash, and claim VAT back by means of
fraudulent invoices. He clearly had suspicions that GMK was involved in such a form

of tax fraud but in evidence he said that he did not know whether Mr McHugh's allegations that SJEL had not worked for GMK and that SJEL's invoices had been "borrowed" were true or not. No reliance was placed by HMRC at the hearing of the appeal on any allegation of fraudulent involvement by GMK and therefore we have had no regard to any such allegation in reaching our decision in this appeal.

Discussion of the invoices in dispute

(a) Were they (or any of them) valid VAT invoices?

29. The invoices produced by GMK by means of the 'self-billing' option on its software, do not meet the legislative requirements for invoices supporting an input tax deduction because none of them was 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" [GMK])' as required by regulation 13(3A) of the Regulations. There were also other shortcomings in the invoices which would (even if a self-billing agreement had been in place) have disqualified them from supporting an input tax deduction. In particular, they did not contain the particulars required under regulation 14(1) – see: below. It was accepted by Mr Penman for GMK that the invoices produced by GMK by means of the 'self-billing' option on its software did not comply with regulation 13(3A) of the Regulations.

30. The requirements generally imposed by law for the contents of a valid VAT invoice are provided for by regulation 14(1) of the Regulations (which deals with supplies within the UK). This is subject to the accepted discretion vested in HMRC to allow an input tax deduction on the basis of alternative evidence (that is, evidence alternative to a valid VAT invoice).

31. The particulars relevant to this case, which are required by regulation 14(1) of the Regulations to be stated on a valid VAT invoice are:

(a) A sequential number based on one or more series which uniquely identifies the document;

(b) The time of the supply;

(c) The date of the issue of the document;

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

(e) The name and address of the person to whom the goods or services are supplied;

...

(g) A description sufficient to identify the goods or services supplied;

(h) For each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in any currency;

(i) The gross amount payable, excluding VAT, expressed in any currency;

(j) The rate of any cash discount allowed;

...

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

5 (m) The unit price;

...

32. These requirements implement article 226 of the Principal VAT Directive 2006/112/EC.

10 33. HMRC draw particular attention to the requirements of regulation 14(1)(a), (g) and (h). We have examined the 11 invoices in issue, referred to in paragraph 25 above.

15 34. The first invoice, made out to GMK by Campbell and charging VAT of £3,400, bears a sequential number (0312) with the description "labour - £17,000", with no indication of the extent of the services provided. This invoice shows a VAT registration number.

20 35. The second invoice, made out to GMK by SJEL and charging VAT of £4,316, is dated 1 June 2012, and bears a sequential number (0008) with the description "Enniskellen new hospital – plant & machinery provided to carry out earth works at the above job ref – value of work to date £20,603.50; 1 man – 3 weeks labour £978.50". This invoice shows a VAT registration number.

36. The third invoice, made out by SJEL to GMK and charging VAT of £5,323, is dated 5 July 2012, and bears a sequential number (0014) with the description "Ref: Barton Port (Muldoon) Machine hire & small plant; scaffold hire to date £24,965 3 men x 1 week £1,650". This invoice shows a VAT registration number.

25 37. The fourth invoice, made out by SJEL to GMK and charging VAT of £4,023 (actually £4,204), is dated 3 August 2012, and bears a sequential number (0016) with the description "62 Wellington Park, Belfast – supply of scaffold & safety netting for duration £11,000; erect and removal (labour) £1,988.50; tool hire etc. £7,120.50". This invoice shows a VAT registration number.

30 38. The fifth invoice, made out by Johnston to GMK and charging VAT of £716 (actually £717) bears no serial number and has the description "Paintwork carried out at various sites as agreed". This invoice does not show a VAT registration number.

35 39. The sixth invoice, made out by LC to GMK and charging VAT of £656, is dated 30 August 2012 and bears a serial number which is indecipherable from the copy with our papers, and has the description "Omagh Gold Mine – Month ending August – Amount due £3,937". This invoice shows a VAT registration number.

40. The seventh invoice, made out by LC to GMK and charging VAT of £3,959, is dated 25 September 2012, bears a serial number (0203) and has the description “Invest NI Strabane Site – Month ending Set: 20T Digger Hire, 5T Digger Hire, Agreed repair to 20T pump £18,291.00; 1 Man 15 days x £100 - £1,500”. This invoice shows a VAT registration number.

41. The eighth invoice, made out by Johnston to GMK and charging VAT of £349, bears what may be an informal serial number (21) and has the description “Sacred Heart Chaple [*sic*] Old Park Road Belfast work carried out as agreed – paid cash in full - £1,743”. This invoice does not show a VAT registration number.

42. The ninth invoice, made out by Johnston to GMK and charging VAT of £790, bears what may be an informal serial number (25) and has the description “Shopfitting Work carried out as agreed – paid in full cash - £3,949”. This invoice does not show a VAT registration number.

43. The tenth invoice, made out by LC to GMK and charging VAT of £2,600, is dated 19 October 2012, bears a serial number (0202) and has the description “Value of work up to and inc the above date [19 October 2010] – Machine Hire £7,000; Labour 4 men x 15 days @ £100 £6,000”. This invoice shows a VAT registration number.

44. The eleventh invoice, made out by Johnston to GMK and charging VAT of £543, has the description “Harvey Nichols Liverpool Second Fix Shop Fitting £2,718”. This invoice shows a VAT registration number but no serial number.

45. From the above descriptions it is clear to us that the first, fifth, eighth, ninth and eleventh invoices clearly do not comply with the requirements of regulation 14(1) of the Regulations and are invalid VAT invoices.

46. The position with regard to the second, third, fourth, sixth, seventh, and tenth invoices is not so clear, but we have decided that they cannot be accepted as valid VAT invoices.

47. This is because the second, third and fourth invoices, all apparently made out by SJEL to GMK, appear to be in the same handwriting as the sixth, seventh and tenth invoices, apparently made out by LC to GMK. No explanation was given for this.

48. Apart from this, we also consider that the second invoice does not carry a description sufficient to identify the goods or services provided or the quantity of the goods or the extent of the services. In addition, there is no unit price given.

49. We make the same criticisms of the third and fourth invoices.

50. We consider that the serial numbers carried by the seventh and tenth invoices, both apparently made out by LC to GMK, cannot be relied on. The dates on the invoices, respectively 25 September 2012 and 19 October 2012, are matched with serial numbers which are not in sequence, viz: 0203 and 0202. Further, as we have already mentioned, the serial number on the other invoice apparently made out by LC to GMK, the sixth invoice, is indecipherable from the copy with our papers and we

cannot accept that it was a sequential number as required by regulation 14(1) of the Regulations.

51. It follows that our decision is that none of the invoices in dispute is a valid VAT invoice.

5 ***(b) Is HMRC's decision not to allow any input tax deductions on the basis of alternative evidence unreasonable?***

52. Pursuant to article 180 of the PVD, Member States may authorise a taxable person to make an input tax deduction even when he does not hold a valid tax invoice. Article 182 of the PVD provides that Member States shall determine the conditions and detailed rules for applying article 180.

53. Mr Mandalia submitted that in the UK these provisions were implemented by the closing words of regulation 29(2) of the Regulations which operate as a proviso to the requirement to hold a valid VAT invoice where 'a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct'.

15 54. This proviso has been interpreted in this case as a requirement for GMK to hold 'supporting alternative evidence behind prime documents e.g. bank statements, time sheets, insurance policies, associated charges, quotations, tenders, but to name a few common ones' – to quote the letter containing the decision on review, dated 10 October 2014, sent by Officer Gerrard to GMK.

20 55. In that letter, Officer Gerrard referred to 'your letter received the 11th August 2014 and 9th October 2014', but later also referred to 'your agent's letters dated 11th August 2014 and 9th October 2014', with the comment that those letters enclosed copies of contracts signed by suppliers, copies of invoices and a schedule of payments.

25 56. Officer Gerrard commented that Officer Stewart (who made the decision to assess GMK) had formed the view that the evidence to support the reclaiming of input tax on the supplies in issue was unsatisfactory – and she agreed with that view. She added that the copy contracts supplied did not in themselves provide evidence of supplies having been made, and the 'no independent documentation [had] been supplied which shows actual payment'.

30 57. It is remarkable that Officer Gerrard considered that she was able to consider fully the letter from GMK's agent (JJK) dated 9 October 2014 before replying on 10 October 2014. JJK's letter dated 9 October 2014 was principally devoted to GMK's case that Mr McKenna was completely unaware of the existence of fraud in the chains of supply in which GMK was involved and with the due diligence operated by GMK
35 – together with a commentary on some of the case law relevant to the *Kittel* principle (although it was not referred to as such). As stated above, HMRC are not taking any point in this appeal based on the *Kittel* principle.

58. The letter did, however, address in one paragraph the issue 'as to whether a taxable supply existed or not' which is centrally relevant to the appeal. JJK wrote:

‘As to whether a taxable supply existed or not, our client has provided us with copies of contracts which were signed between [GMK] and the subcontractor. These contracts are with [LC], [Johnston], [SJEL] and [WJL] (see enclosure) and relate to the provision of plant and labour and, in some cases, labour only. Furthermore, we have enclosed a schedule of payments made to subcontractors.’

59. The ‘schedule of payments’ was a series of reconciliations between the payments made to individual subcontractors, inclusive of VAT, as per the bank statement evidence supporting the accounts of GMK for the years ending 30 November 2011, 2012 and 2013, and the input VAT claimed from HMRC in GMK’s VAT returns. They showed discrepancies in both directions.

60. Nevertheless, the ‘schedule of payments’ was documentation which evidenced actual payment and was provided to HMRC by an independent source, namely JJK. Mr Kelly gave evidence at the hearing (as noted above). His witness statement (dated 7 July 2016) makes it clear that he prepared GMK’s accounts from records including bank statements, using a nominal ledger, which he exhibited to his statement. The relevant bank statements themselves were not all in evidence (but some were). Mr McKenna had apparently retrieved the missing statements from JJK and they had subsequently been mislaid.

61. The nominal ledger, exhibited to Mr Kelly’s witness statement, includes a record (under nominal codes 771 and 772) of the entries to GMK’s bank accounts with the Bank of Ireland (with given account numbers), as recorded by Mr Kelly in the course of his preparation of GMK’s accounts.

62. We have checked the ‘schedule of payments’, provided to HMRC under cover of JJK’s letter dated 9 October 2014, against the record (under nominal codes 771 and 772) of the entries to GMK’s bank accounts. The payments in the ‘schedule of payments’ are largely substantiated by the nominal ledger records.

63. In detail, the ‘schedule of payments’ supported by the nominal ledger records provide independent documentation showing actual payments to Campbell of £28,700 (inclusive of VAT) in the year ended 30 November 2011. In that year, JJK’s ‘schedule of payments’ showed input tax claimed relative two payments by GMK to Campbell, each claim being for £3,400 (relative to a payment inclusive of VAT of £20,400). A claim for an input tax deduction of £3,400 was made in period 08/11 and also in period 11/11. One of the payments of £20,400 concerned is represented by one of the 6 invoices in relation to which GMK could not produce an invoice document (see: paragraph 3 above). It is therefore probable (and we find) that input tax relative to a VAT inclusive payment to Campbell of £20,400 was claimed twice (in error). However, the ‘schedule of payments’ is evidence which may support the actual payment to Campbell of the VAT inclusive sum of £20,400 shown on the first invoice (referred to in paragraph 34 above). That invoice is dated 5 August 2011, and the relative claim for an input tax deduction was made in the period 08/11. The nominal ledger records show (VAT inclusive) payments to Campbell of £18,000 in the period 08/11 and £10,700 in the period 11/11. There is, therefore, independent

documentation which may show payment of this invoice (albeit not completely in period 08/11). The information in the ‘schedule of payments’, which was before Officer Gerrard, does not appear to have been considered adequately or at all by her, when making her review decision, and we so find.

5 64. The evidence provided by the ‘schedule of payments’ supported by the nominal ledger records is independent documentation supporting the making of actual payments to Johnston (according to our examination of the nominal ledger records) of £54,890¹ between July and November 2012 – which equates to £45,742 plus VAT of £9,148. In the VAT period 08/12, JJK’s ‘schedule of payments’ showed input tax claimed on payments by GMK to Johnston of £5,467 (relative to VAT-inclusive payments totalling £27,817), and for the VAT period 11/12, JJK’s ‘schedule of payments’ showed input tax claimed on such payments of £3,662 (relative to VAT-inclusive payments of £21,974). We therefore have seen evidence which may support actual payments to Johnston of amounts justifying all the input tax claimed. Again, this evidence does not appear to have been considered adequately or at all by Officer Gerrard when making her review decision, and we so find.

65. In particular, the eleventh invoice, referred to in paragraph 44 above, which was apparently raised by Johnston for £2,718 plus VAT of £543.60 (total, erroneously stated as £3,262, when it should have been £3,261.60) and is dated 25 October 2012, corresponds to the entry in the nominal ledger showing a payment out of one of GMK’s Bank of Ireland accounts of £3,260 to ‘M Johnston Tech Shopfit’ on 1 November 2012. The invoice is endorsed “Chq. No. 14” and the nominal ledger shows a reference number “14” against the payment.

66. Further, the fifth invoice, referred to in paragraph 38 above, which was apparently raised by Johnston for £2,868 plus VAT of £717 (total £3,585) and is dated 6 July 2012, corresponds to the entry in the nominal ledger showing a payment out of one of GMK’s Bank of Ireland accounts of £3,585 to ‘M Johnston ref Joseph Hughes’ on 6 July 2012.

67. The evidence provided by the ‘schedule of payments’ supported by the nominal ledger records is independent documentation supporting the making of actual payments to LC (according to our examination of the nominal ledger records) of £38,336² in the period 11/12 (Mr Kelly’s ‘schedule of payments’ also states that a payment of £3,750 in cash was paid to LC, on 19 September 2012, but, of course, that is not identifiable as such in the nominal ledger records). In the period 11/12, Mr Kelly’s ‘schedule of payments’ shows input VAT claimed on payments by GMK to LC of £6,559 (relative to payments inclusive of VAT of £39,350). We have, therefore, seen evidence supporting actual payments to LC of an amount justifying almost all of the input tax claimed. Again, this evidence does not appear to have been considered

¹ £3585 on 6 July 2012; £3,250 on 20 August 2012; £7,525 on 22 June 2012; £3,262 on 1 November 2012; £5,325 on 3 September 2012; £6,100 on 6 August 2012; £4,480 on 24 August 2012; £5,000 on 29 August 2012; £6,363 on 17 July 2012 and £10,000 on 23 October 2012.

² £3,936 on 19 September 2012; £20,000 on 12 October 2012 and £14,400 on 23 October 2012.

adequately or at all by Officer Gerrard when making her review decision, and we so find.

68. In particular, the sixth invoice, referred to in paragraph 39 above, which was apparently raised by LC for £3,280 plus VAT of £656 (total £3,936) and is dated 30 August 2012, corresponds to the entry in the nominal ledger showing a payment out of one of GMK's Bank of Ireland accounts of £3,936 to 'Loughrea' on 19 September 2012.

69. The seventh invoice, referred to in paragraph 40 above, which was apparently raised by LC for £19,791 plus VAT of £3,959 (total £23,750) and is dated 25 September 2012, may correspond to the entry in the nominal ledger showing a payment out of one of GMK's Bank of Ireland accounts of £20,000 to 'Loughrea' on 12 October 2012 together with the cash payment of £3,750 referred to in paragraph 67 above.

70. The evidence provided by the 'schedule of payments' supported by the nominal ledger records is independent documentation supporting the making of actual payments to SJEL (according to our examination of the nominal ledger records) of £97,013³ between December 2010 and November 2011 – which equates to £80,844 plus VAT of £16,169, and £44,285⁴ between December 2011 and November 2012 – which equates to £36,904 plus VAT of £7,381. In the year ended 30 November 2011, JJK's 'schedule of payments' showed input tax claimed on payments by GMK to SJEL of £17,218.20⁵ (relative to VAT-inclusive payments totalling £103,309), and for the year ended 30 November 2012, JJK's 'schedule of payments' showed input tax claimed on such payments of £18,997.50⁶ (relative to VAT-inclusive payments of £113,985). We therefore have seen evidence supporting actual payments to SJEL of amounts justifying most of the input tax claimed in the year ended 30 November 2011 and just under 40% of the input tax claimed in the year ended 30 November 2012. Again, this evidence does not appear to have been considered adequately or at all by Officer Gerrard when making her review decision, and we so find.

71. The evidence provided by the 'schedule of payments' supported by the nominal ledger records is independent documentation supporting the making of an actual payment by GMK to WJL (according to our examination of the nominal ledger records) of £40,000 on 29 October 2012. This equates to £33,333 plus VAT of £6,667. This goes some way to justifying the input tax claimed of £10,600 in period

³ £5,000 on 10 November 2011; £15,000 on 25 October 2011; £2,003 on 22 December 2010; £2,010 on 18 April 2011; £9,000 on 22 December 2010; £5,000 on 14 January 2011; £5,000 on 2 February 2011; £2,500 on 11 February 2011; £10,000 on 10 March 2011; £7,000 on 24 March 2011; £6,000 on 31 March 2011; £15,000 on 14 April 2011; £3,500 on 28 April 2011; £5,000 on 5 May 2011 and £5,000 on 10 December 2010.

⁴ £1,248 on 9 November 2012; £225 on 1 December 2011; £1,967 on 29 December 2011; £9,380 on 5 January 2012; £6,500 on 10 January 2012; £6,000 on 27 January 2012; £965 on 25 April 2012 and £18,000 on 20 April 2012.

⁵ In the periods 05/11, 08/11 and 11/11.

⁶ In the periods 02/12 and 08/12.

02/12 (see: paragraph 24 above). Again, this evidence does not appear to have been considered adequately or at all by Officer Gerrard when making her review decision, and we so find.

5 72. The evidence provided by the ‘schedule of payments’ supported by the nominal ledger records is independent documentation showing an actual payment by GMK to Sykes (according to our examination of the nominal ledger records) of £16,912. This equates to £14,093 plus VAT of £2,819. This may justify the input tax claimed of £2,819 in period 05/12 on the basis of the invoice produced by GMK by means of the ‘self-billing’ option on its software (see: paragraph 24 above). Again, this evidence
10 does not appear to have been considered adequately or at all by Officer Gerrard when making her review decision, and we so find.

15 73. The evidence provided by the ‘schedule of payments’ supported by the nominal ledger records is independent documentation showing an actual payment by GMK to Devay (according to our examination of the nominal ledger records) of £12,833 on 11 January 2013, and £5,610 on 11 February 2013. This equates (in total) to £15,369 plus VAT of £3,074. This may justify the input tax claimed of £3,074 in period 02/13 on the basis of the invoices produced by GMK referencing Devay by means of the ‘self-billing’ option on its software (see: paragraph 24 above). Again, this evidence
20 does not appear to have been considered adequately or at all by Officer Gerrard when making her review decision, and we so find.

74. We accept that the contracts between GMK and the various subcontractors, which Mr McKenna provided do not themselves establish that any payments were made to the subcontractors named. However, we note that HMRC have not made any suggestion that these contracts are forgeries or in some way contrived.

25 75. We also accept that the lack of evidence of labour actually being provided – for example in the form of diaries or timesheets – and the lack of detailed evidence of the materials charged for in the invoices does suggest that GMK conducted its business in an unusually lax fashion and that this would reasonably suggest to HMRC that the payments may not have been made to the persons indicated on the invoices. We note
30 that Officer Stewart stated in evidence that he had no doubt that the work, which the payments on the invoices in dispute represented, had in fact been done, but that he could not be satisfied that the traders named on the invoices did in fact do the work which was paid for. He said (and we accept) that he had tried without success to contact the subcontractors to verify that they had done the work.

35 76. One of those subcontractors, WJL, gave evidence at the hearing of the appeal. He was extremely vague about the calculations behind the figures appearing for labour and cost of materials in invoices made out to GMK by WJL and LC. One of the invoices (that showing VAT payable of £10,600, mentioned at paragraph 24 above) was made up of a net of VAT figure of £23,128 for labour, which he could not
40 convincingly explain, and a net of VAT figure of £29,872 for cost of materials. When asked about these materials, he explained that they were shuttering pans which he bought and still owns. We accept that HMRC’s scepticism about these invoices was

reasonable but, as we have noted above at paragraph 71, the ‘schedule of payments’ goes some way to justifying the input tax claimed of £10,600.

The parties’ submissions and our decision

5 77. Mr Mandalia contended that the chief question arising in the appeal is whether or not the supplies recorded in the disputed invoices were carried out by the subcontractors respectively named on them. He submitted that the Tribunal could not be satisfied that they were. He submitted that none of the disputed invoices satisfied the requirements of regulation 14 of the Regulations, and we agree that none of them does.

10 78. Turning to regulation 29 of the Regulations, he stressed that the Tribunal’s jurisdiction on the issue of whether HMRC’s refusal to allow deductions of input tax on the basis of alternative evidence to valid VAT invoices was supervisory. We agree.

15 79. In the light of our decision at paragraph 51 above, that none of the invoices in dispute is a valid VAT invoice, the remaining question for us to decide is whether HMRC’s refusal to allow deductions of input tax on the basis of alternative evidence to valid VAT invoices was reasonable in the sense that the decision maker took account of all relevant evidence and disregarded all irrelevant material.

20 80. Mr Mandalia submitted that JJK’s letter of 9 October 2014, which we have mentioned at paragraphs 57 and 58 above was vague and contained only general assertions and told HMRC nothing about the transactions, and, in particular, that the recitation from the ledger was of no evidential value, and that there was no audit trail by which the payments under the disputed invoices could be traced from GMK to the respective subcontractors. This being the position, Mr Mandalia submitted that
25 Officer Gerard was entitled to deal with it in the brief fashion in which she did so, in her letter of 10 October 2014. He submitted that Officer Gerrard had not disregarded any material evidence.

30 81. We consider that Mr Mandalia has overstated his case here. It is plain to us that the “schedule of payments” enclosed with JJK’s letter of 9 October 2014 (supported by the nominal ledger records) was material evidence of the payments made by GMK and their destination. It is also plain to us that Officer Gerrard did not give them any or any adequate consideration.

35 82. With respect to Mr Mandalia, our task on this aspect of the appeal is not to be satisfied that the supplies recorded in the disputed invoices were carried out by the subcontractors respectively named on them, but to decide whether HMRC’s refusal to allow input tax deductions on the basis of alternative evidence was, in all the circumstances, reasonable. In the light of our decision that the “schedule of payments” was relevant evidence and that Officer Gerard did not give it any or any adequate consideration, we find that HMRC’s refusal to allow input tax deductions on
40 the basis expressed in Officer Gerrard’s letter dated 10 October 2014 was not reasonable.

5 83. Mr Penman submitted to us that article 1 of the First Protocol of the Convention on Human Rights was engaged in this appeal. We disagree. The discretion to disallow a claim to deduct input tax where there is no valid VAT invoice or alternative evidence satisfactory to HMRC, when exercised lawfully, is compliant with the Convention.

Disposition

10 84. The appeal is dismissed as respects the 6 invoices mentioned in paragraph 3 above and the 6 invoices mentioned in paragraph 26 above. It is also dismissed to the extent that the adjustment mentioned at paragraph 27 above is required, and to the extent that input tax of £4,651.57 is disallowed, as mentioned at paragraph 11 above. With regard to the remaining 20 disputed invoices (those referred to at paragraphs 24 and 25 above), although we have decided that they are not valid VAT invoices, we allow the appeal on the ground that the decision of Officer Gerrard not to allow input tax deductions in respect of the related VAT on the basis of alternative evidence was not
15 reasonable for the reasons given in this Decision. In the exercise of our supervisory jurisdiction we direct that this question is to be re-examined by a different review officer of HMRC in the light of this Decision and a fresh decision is to be taken on whether or not to allow input tax deductions of whatever amount on the basis of alternative evidence. GMK must be given the opportunity to make further
20 submissions in the light of this Decision (which must also be taken into account by the decision maker). The re-examination which we have directed should take place as soon as possible and a fresh decision should be made and communicated to GMK by 1 February 2017 at the latest.

25 85. 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)”
30 which accompanies and forms part of this decision notice.

**JOHN WALTERS QC
TRIBUNAL JUDGE**

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RELEASE DATE: 3 October 2016