TC07753

VAT – whether assessments made in time – no in respect of periods 02/12, 05/12 and 08/12 – yes in respect of all other periods – whether or not the relevant supplies were made by the appellant or by contractors – made by the appellant – output tax due – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02232

BETWEEN

MARSHALLS BATHROOM STUDIO LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MR NOEL BARRETT

Sitting in public at Manor View House, Kings Manor, Newcastle Upon Tyne, NE1 6PA on 7 November 2019 with further written submissions dated 19 November 2019.

Mr Michele Fasolino of Proactive Consultancy Group for the Appellant.

Mr Alex Turnbull, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal arises out of VAT assessments for the periods 02/12 to 11/15 in the sum of £22,615. In short, HMRC alleges that the Appellant, Marshalls Bathroom Studio Ltd ("Marshalls") has failed to pay output tax on payments made by its customers to third party contractors ("the Contractors"). Marshalls argues that the assessments were out of time and, in any event, should not have been made as (on its case) it was acting as an agent for its customers in dealing with the Contractors. For reasons that we set out in full below, we find that the assessments for the periods 02/12 to 08/12 were out of time, the remainder of the assessments were in time, that there was no such agency relationship, and that the payments made by customers to the Contractors were in respect of supplies by Marshalls.

FINDINGS OF FACT

2. We propose to make our findings of fact at the outset as the disputed factual analysis is inextricably bound up with the uncontroversial background. In doing so, we bear in mind that the burden of proof in establishing that the assessment is wrong is upon Marshalls and that the standard of proof is that of the balance of probabilities.

3. We heard oral evidence from Mr Leslie Marshall, a director of Marshalls. Mr Marshall was clearly doing his best to assist the Tribunal and gave his evidence in a genuine and honest manner. It must be said, however, that on occasion his evidence was at odds with what had been written on his behalf by his representatives. We resolve those inconsistencies as set out below.

4. We also heard evidence from Mr Gavin Emms, the decision-making officer, on behalf of HMRC. Mr Emms' evidence was clear and credible. However, neither his witness statement nor his oral evidence particularly added to the documentation, save for as regards the date upon which he says he made the assessment.

5. As the name suggests, Marshalls carries on business in the design, manufacture, supply and installation of bathrooms. It is a family business with a strong reputation going back to the 1970s. A full service is provided; indeed, we were provided with a printout of Marshall's website which states as follows:

> "We provide the complete service from initial discussion, to planning and designing. We help choose the equipment and materials through to the work being completed. We are here to help all the way through."

6. Marshalls employs a number of fitters, plumbers and tilers as what was described as an "in-house team". However, the in-house team is not large enough to be able to cover all orders sufficiently quickly or at all. As such, Marshalls can call on the Contractors to assist; effectively a range of plumbers, tilers and fitters who have worked with Marshalls for a long time and who can be trusted to carry out installation and other work introduced by Marshalls. The Contractors are not VAT registered. Electrical work is formally sub-contracted to VAT registered electricians and is beyond the scope of this appeal.

7. There are effectively three stages in the customer journey once a design has been finalised and a deposit has been paid. First, Marshalls provides the customer with a quotation. The samples in the hearing bundle separate out the cost of the bathroom fittings and the labour costs but make no mention of any Contractors. Secondly, Marshalls provides a document described as an "Order" immediately before the fitting, which incorporates any changes. Again, the samples in the hearing bundle separate out the cost of the bathroom fittings and the labour costs but make no mention of any Contractors. Thirdly, a final invoice is issued on completion which shows how the customer should make payment. It is at this stage that any payment to a

Contractor is set out, including the amount of the payment due to the Contractor, any bank transfer details, or the name that a cheque should be made out to. Cheques are often delivered to Marshalls' showroom for Marshalls to forward to the relevant Contractor.

8. As pre-empted above, there is something of a disparity between the way in which the appeal documentation deals with the introduction of the Contractors into the ordering and fitting process and the way in which Mr Marshall said this happened in oral evidence.

9. Marshalls' stance in the appeal documentation (particularly in the Grounds of Appeal) appears to be that customers were aware from the outset when a Contractor was to be involved and that the customer was involved in the process of deciding whether to engage a Contractor or wait for the in-house team, with Marshalls merely taking a co-ordinating or introductory role.

10. Mr Marshall provided a rather different analysis in his oral evidence. Contractors would often be involved in estimating the labour costs at the quotation stage. However, Mr Marshall said that the decision as to whether a Contractor or the in-house team would carry out the work would be decided after the quotation had been given. Indeed, it follows from his evidence that this decision was actually once an order had been obtained, as Mr Marshall said that he would then look at his information about availability and decide who was going to carry out the work. He would then telephone a Contractor and, as he put it, "book them in." He said that it was a case of winning the job and then deciding who would do the work. We took from Mr Marshall's evidence that it was in fact Marshalls which was allocating work to the in-house team or to the Contractors after an order had been made by the customer. We also note that Mr Marshall did not suggest that the customer took part in the process of deciding who would do the work (whether in terms of the in-house team or the Contractor or in terms of the identity of any Contractor) and we find that the tenor and effect of Mr Marshall's evidence is that the customer did not do so.

11. We prefer the oral evidence of Mr Marshall to the summary in the Grounds of Appeal and correspondence written by Marshalls' representatives. We therefore make findings of fact in accordance with Mr Marshall's evidence as set out in paragraph 10 above. Crucially, this is because we accept Mr Marshall as an honest and genuine witness. Mr Marshall's position in oral evidence also sits comfortably with contemporaneous documentary evidence, particularly the sample quotations and orders which make no mention of the Contractor. We also note that Mr Fasolino drew our attention to a letter from one of the fitters, Mr Dawson, which in fact reinforces Mr Marshall's oral evidence. Mr Dawson states that, "Marshalls contact me when they need my services, I go to the showroom, Marshalls show me the layout of the job, plans etc and give me a price to complete the work." Finally, we note that the documents compiled by Marshall's representatives do not constitute primary evidence of fact (although we take into account that we do not know how much input Mr Marshall or any other director or employee of Marshalls had into it).

12. The invoices do not itemise any VAT element and so provide a gross amount payable. As such, Marshalls has treated them as VAT inclusive and accounted for output tax on money received. However, it is common ground that it has not accounted for any output tax on money paid by customers to the Contractors (Marshalls' case being that it does not need to do so, arguing that the payments were for supplies by the Contractors rather than supplies by Marshalls).

13. On the rare occasions that a customer complained to Marshalls about the fitting of a bathroom, Marshalls would take the matter up with the relevant Contractor. Mr Marshall's evidence (which we accept) was that it would then be for the Contractor to resolve the problem.

An example of a complaint was in the hearing bundle, which was addressed to Marshalls but which Marshalls then directed to the Contractor involved.

14. On 5 August 2015, Mr Emms and another officer conducted a routine VAT visit. On 12 August 2015, Mr Emms requested further records for the VAT periods 08/14 and 11/14 and bank statements for the period from 1 December 2013 to 31 July 2015. Some of these records were collected from Marshalls on 19 August 2015 and others were collected on 7 September 2015.

15. Mr Emms wrote to Marshalls on 20 October 2015 ("the October Letter") and sought further information about, amongst other things, the relationship between the Contractor, the customer and Marshalls, as well as various queries about payments into Marshalls' bank account. Marshalls' accountants responded to the October Letter by a letter dated 2 November 2015 ("the November Letter"). Arrangements were made for further documentation to be provided to HMRC on 16 December 2015.

16. Mr Emms then requested further information in a letter dated 15 January 2016, noting that he was not in a position to conclude his investigation without it. This included what he referred to as, "the VAT build up for the periods 02/12 to 11/15 inclusive," and questions arising out of the November Letter.

17. Marshalls' accountants responded with an email dated 21 January 2016 which effectively complained about the length of time it was taking HMRC to deal with the matter. Mr Emms responded with a letter on 5 February 2016 which sought to address these concerns and noted that copies of the VAT accounts were not included within the documentation provided on 16 December 2015.

18. On 25 February 2016, HMRC issued a notice of assessment in respect of the 02/12 period in the sum of £1,400.33 as the four year time limit was about to expire. This was followed by notices of assessment issued on 25 May 2016 in respect of the 05/12 period in the sum of £1,330.74 and 30 August 2016 in respect of the 08/12 period in the sum of £2,238. There was further correspondence passing between the parties in the course of these assessments (together "the Earlier Assessments") whilst HMRC's investigations continued.

19. A notice of the assessments calculated as at 17 October 2016 was sent to Marshalls in respect of the periods from 02/12 to 11/15 ("the Assessments"). It is common ground that the notice was issued on 1 November 2016 and received by Marshalls on or after 2 November 2016. We also accept Mr Emms' evidence that he made the Assessments on 1 November 2016, which is reinforced by a printout from HMRC's computer system to the same effect. We note that Mr Emms did not suggest that he was relying upon the time that he made the Earlier Assessments for any part of the Assessments. His witness statement and oral evidence was clear that the Assessments made on 1 November 2016 were referable to the whole of the periods 02/12 to 11/15.

20. The schedule attached to the Assessments shows that the assessments for the 02/12, 04/12, 05/12 and 08/12 periods are in the same sums as the Earlier Assessments. The total sum for all periods from 02/12 to 11/15 was £22,615.

21. Mr Emms explained the calculation of the assessments to us. In essence, he analysed the output tax declared in the periods 05/14 to 05/15 and compared these with the output tax due on all sales for the same periods (with customers' payments to Contractors included – where relevant, and so not where specific additional work was agreed). This revealed that the resultant under-declaration of output tax for that period was 10.35% of the output tax declared. Mr Emms then applied the uplift of 10.35% across the whole period of the assessments. This evidence was not challenged by Mr Fasolino and we accept it.

22. Marshalls requested a review. HMRC upheld the Assessments in a review conclusion letter dated 2 February 2017.

23. On 20 March 2018 and 26 March 2018, Marshalls issued two appeals. By agreement of the parties, the Tribunal closed the file on one of the appeals (TC/2018/02339) upon the basis that this was effectively a duplicate of the present appeal.

24. Following a hearing, Judge Christopher Staker granted Marshall permission to bring a late appeal on 8 February 2019.

THE SCOPE OF THE APPEAL

25. A preliminary point is as to whether the appeal is against only the Assessments within the notice issued on 1 November 2010 or also the Earlier Assessments. We find that the appeal is only against the Assessments and not against the Earlier Assessments. Crucially, neither the Notice of Appeal nor the Grounds of Appeal refer to the Earlier Assessments. It is also clear from those documents that it is the Assessments which have been appealed. Further, HMRC's Statement of Case refers to the Earlier Assessments but notes that these were notified under separate cover and does not seek to argue that the Assessments incorporated the Earlier Assessments or that the appeal should be treated as against those Earlier Assessments.

26. We note that we do not have any jurisdiction to go beyond the Assessments appealed against. As such, the Earlier Assessments are beyond the scope of this appeal. As such, we do not deal with whether or not the Earlier Assessments have been (or are to be treated as having been) withdrawn or alternatively whether they remain due and owing.

ISSUES

27. The effect of the parties' helpful submissions is that the following issues arise for determination:

(1) Whether or not the Assessments were made out of time.

(2) Whether the sums paid to the Contractors were in respect of supplies by the Contractors (Marshall's involvement simply being as an agent for the customers) or in respect of supplies by Marshalls.

28. We note that the Grounds of Appeal, Mr Fasolino's skeleton argument and Mr Fasolino's oral submissions did not raise any dispute as to the calculation of the Assessments and did not suggest that they were not to best judgement. As such, we take it that the amount of the Assessments is not in dispute.

TIME LIMITS

The Legal Framework

29. The relevant sub-sections of sections 73 and 77 of the VAT Act 1994 ("VATA 1994") provide as follows:

> "73. Failure to make returns etc.
>
> (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 judgment and notify it to him.
>
> …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits

provided for in section 77 and shall not be made after the later of the following—

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

…

77. Assessments: time limits and supplementary assessments.

(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—

(a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, or

(b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, 4 years after the event giving rise to the penalty."

Marshalls' Submissions

30. Mr Fesolino submitted that Marshalls did not receive the notice of the Assessments until after 2 November 2016 and so this was more than one year after Mr Emms had evidence of facts sufficient to justify the making of an assessment. He said that these facts arose out of the visit on 5 August 2015, the records collected in August 2015 and September 2015 and the response to the October Letter given by Marshalls' accountants in the November Letter on 2 November 2015.

HMRC's Submissions

31. Mr Turnbull submitted that the relevant date is not the notification of the Assessment but instead the making of the Assessment, which Mr Emms says was 1 November 2016. He referred us to *Courts plc v Customs and Excise Commissioners* [2004] EWCA Civ 1527 *per* Jonathan Parker LJ at [106]:

"[106] The statutory requirement for notification of an assessment to the taxpayer demonstrates that in enacting section 73 Parliament regarded the process of making the assessment itself is an internal matter for the Commissioners. However, given that the time limits in section 73(6) apply to the making of an assessment, as opposed to the notification of the assessment, it is clearly important that the Commissioners' internal processes and procedures in relation to the making of assessments should, so far as practicable, be standardised; and that in relation to any particular assessment the process which has been followed, and the date or dates on which the various steps comprised in that process were taken, should be readily verifiable by contemporary documentary evidence. (See, generally, the observations of Lawrence Collins J in *Cheesman*, quoted in paragraphs 43 and 44 above.) The absence of any statutory time limit within which an assessment, once made, must be notified to the taxpayer means that, in theory at least, it is open to the Commissioners to delay notification for some considerable time (see Lawrence Collins J's reference in paragraph 19 of his judgment (quoted in paragraph 43 above) to the observation of May LJ in *House (t/a P & J Autos) v. Customs & Excise Commrs*.). However, it is clearly

> undesirable that that should occur, and the Commissioners' policy of not relying on any earlier date for the making of an assessment than the date on which the assessment was notified to the taxpayer ensures that no unfairness will be caused to the taxpayer in this respect."

32. Mr Turnbull also referred us to *Corbally-Stourton v Revenue and Customs Commissioners* [2008] STC (SCD) 907 (Charles Hellier) at [91] to [93]:

> "[91] Dr Branigan told me that no longer is an assessment book maintained. HMRC's practice now is that the relevant officer will write to the taxpayer indicating that an assessment is to be made and will key into HMRC's computers the amount of the assessment. That was what had happened with the appellant. Once keyed into the computer the amount appears in a record maintained by the computer (and capable of being printed out) of the taxpayer's statement. I was shown a printout of the appellant's statement which showed an entry for an 'adjustment from [self-assessment] return 18 October 2004' recording the entries made when the appellant was notified that she would be assessed.
>
> [92] Mr Barnett put the respondents to proof that the appellant had been assessed.
>
> [93] It seems to me that Dr Branigan made the assessment when, having decided to make it, he authorised the entry of its amount into the computer. I find that the assessment was made."

33. Further, Mr Turnbull submits that Mr Emms did not have evidence of facts sufficient to justify the making of the Assessments until March 2016 at the earliest, as this was when the VAT records which enabled the Assessments to be made were provided. In any event, he submitted that the relevant date could be no earlier than 2 November 2016 as this was the date of the November Letter constituted Marshalls' accountants' response to the questions posed in the October Letter.

Discussion

34. The starting point is as to whether or not any of the Assessments were made more than four years after the end of the prescribed accounting period concerned. Given that HMRC's own stance (and evidence) is that the Assessments were made on 1 November 2016, we are driven to the conclusion that the Assessments for the periods 02/12, 05/12 and 08/12 are out of time. The one year period in section 73(6) of VATA 1994 is expressly made subject to the time limits provided for in section 77 and so is subject to the four year time limit as opposed to being in addition to it. As such, the time limit for the 02/12 period expired on 28 February 2016, the time limit for the 05/12 period expired on 31 May 2016 and the time limit for the 08/12 period expired on 31 August 2016. Indeed, HMRC were alive to these limits as this was the reason they made the Earlier Assessments. However, no basis has been put forward for any entitlement to make new assessments for those periods after the expiry of the time limits, which is what the Assessments purport to do.

35. We note that the Assessments for the periods 11/14 to 11/15 were less than two years after the relevant prescribed accounting periods. As such, these Assessments were within time pursuant to section 73(6)(a) of VATA 1994, irrespective of the one year rule within section 73(6)(b) of VATA 1994.

36. As regards the Assessments for the periods 11/12 to 08/14 therefore, the key issue is as to whether 1 November 2016 (being the date of the Assessments) was no more than one year after evidence of facts, sufficient in the opinion of HMRC to justify the making of the Assessments, came to their knowledge. We find that these Assessments do fulfil that requirement and so were made within time. The notes for the visit on 15 August 2015 were in

evidence and were not challenged by Mr Fesolino. Although the discussion appears to have been quite wide ranging, it did not deal with the level of detail about the Contractors required by the October Letter. It would not have been possible to make an assessment prior to the receipt of the November Letter as Mr Emms questions about the Contractors were central to the making of the Assessments. Given that the Assessments were made just under a year after the receipt of the November Letter, the Assessments for the periods 11/12 to 08/14 were within time on that basis. For completeness, we note that the most significant records appear to have been provided in December 2015 and so this is likely to have been the first time that the Assessments could have been made. We do not accept Mr Turnbull's argument that the Assessments could not have been made before March 2016 as, crucially, an assessment for the 02/12 period was in fact made on 25 February 2016.

37. It follows that the remainder of this decision relates only to the Assessments for the periods 11/12 to 11/15.

AGENCY

The Legal Framework

38. The parties referred us to a series of First-tier Tribunal (or equivalent) decisions, which, whilst not binding upon us, illustrate the legal principles involved.

39. In *I & PA Ramsey (trading as Kitchen Format) v HMRC* [1994] Lexis Citation 996, the Tribunal (Dr Brice) stated as follows at page 11 of the transcript:

> "Was there an agency relationship?
>
> In *Customs and Excise Commissioners v Johnson* [1980] STC 624 Woolf J defined agency as:-
>
> "The relationship which exists between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf and the other of whom similarly consents to represent the former or so to act".
>
> Whether or not an agency exists in any particular case is a question of fact to be decided in accordance with the evidence. An essential element of agency is that both parties should consent to the relationship of principal and agent.
>
> The correct approach was outlined by McCullough J in *The Commissioners of Customs and Excise v Music and Video Exchange Ltd* [1992] STC 290. If there is an express agreement that the relationship is one of agent and principal then there is no need to evaluate the other evidence, except to see whether there is anything in it which is "wholly inconsistent" with that conclusion. However, if there is no express agreement then it is necessary to analyse the evidence to see which factors would support the conclusion that there is an agency relationship and which factors resist such a conclusion. A balance has then to he struck according to the weight of the evidence.
>
> Applying those principles to the facts of the present case I find that there was no evidence before me of any express written agency agreement between the Appellant firm and the fitters. This distinguishes the present case from that of Freer cited by Mr Topping and from Group Montage cited by Mr Rowbottom, and also from a number of other decisions which turned on the construction of written agreements between those claiming the relationship of principal and agent. In this case the only written agreement was between the Appellant firm and its customers and the terms of that agreement, in my view, do not support the conclusion that the Appellant firm acted as an agent for the customers in introducing them to the fitters."

40. In *Michael Wilson (trading as M&S Interiors) and others v HMRC* [2001] Lexis Citation 1001, the Tribunal (Dr Huggins, Mr Kippest and Mr Hazledine) stated as follows at [71]:

> "[71] The whole import of the transaction between the Appellants and their customers was that the Appellants supplied and installed fitted kitchens for customers and the customers paid an inclusive price to the Appellants. The contract was between the customer and the Appellants for a single supply of fitted furniture. The customer has the right to sue the Appellants for any defect in the fitting services and there was no evidence before us that this right was varied orally, although we accept in practice, the fitter may well have regarded it as part of his arrangements with the Appellants that he, the fitter, should remedy any defects. If the fitter carried out any extra work at the request of any customer then it would amount to a supply of services in that respect only between the fitter and the customer. Then if the fitter was registered for VAT be would have to include the output in his VAT Return."

41. In *JM Ledger & CE Ledger (trading as Lewis Carpets) v HMRC* (VAT Decision 18756) the Tribunal (Miss Gort and Mr Battersby) stated as follows at [48] to [55]:

> "[48] Whilst we accept that in the present case the customer would not know the identity of the fitter with whom he was said to be contracting, we do not find that this is a relevant factor in determining the question of whether or not there was a separate contract with the fitters. We are only concerned here with those instances where a customer uses the fitting service provided by the Appellant. A customer on seeing the tag advertising a free fitting service would conclude that there was but one contract, and that was with the Appellants for the supply and fitting of the carpet.
>
> [49] We consider that it is a matter of great importance that the customer has no ability to negotiate any of the principal terms of the contract with the fitter, in particular if the customer wishes to change the day of the appointment to have the carpet fitted, he has to contact the Appellants and is asked to do so at least 48 hours beforehand. If he did indeed have a separate contract with the fitter, then it would be expected that such negotiations would be made directly with the fitter. Whilst this of itself might be indicative of the Appellant acting as agent for the fitter and for the customer as well, the fact that the customer has an invoice which includes a price for the fitting, but which price has been settled by the Appellant, rather than being a matter for negotiation or agreement between the customer and the fitter, points to there being a sub-contract with the fitter.
>
> [50] In the circumstances of this case it would be possible for the Appellants to create a situation of agency, but in our judgment they have not done so. The customer has no control over who will act as fitter, he has no control over the amount paid to the fitter and if things go wrong he will on some occasions look to the Appellants to correct matters. If a fitter does not arrive, it is to the Appellants that the customer turns. If he wishes to change the date of the fitting, it is the Appellant who deals with this. Whilst it was stated by the Appellants on their documents that they had no legal responsibility if the fitting went wrong, this is not necessarily a matter on which they can rely. It was Mr Ledger's evidence that if he were asked, he would say to a customer that the fitters were "Very good", and this therefore becomes an implied term of the contract as to the standard of fitting to be expected. The fact that the Appellant pays the fitter is not sufficient by itself to create a separate contract. -There is nothing to indicate to the customer that there will be a separate contract because he pays the fitter directly. The customer would perceives that there is one contract with the Appellants.

> [51] It is the case that certain additional matters, such as the removal of doors, are negotiated between the customer and the fitter, and a price for those services is similarly negotiated, this is not incompatible with the initial arrangement being a sub-contract, and any such additional matters being part of a separate contract between the fitter and the customer.
>
> [52] We distinguish the case of *Music and Video Exchange Limited* (*supra*) relied on by Mr Shelley because the factual situation is entirely different. There the customer was dealing with the same person for all aspects of the purchase; in the present case the customer is dealing with two separate people, and his view of the relationship between those two people is relevant. In the Music and Video case the customer had no knowledge of the existence of the third party on whose behalf the company was held to be acting. The Triumph and Albany Car Service case can also be distinguished in that there was no contract for goods in that case to which a supply of service, was ancillary, as in the present case, nor were there any written contractual terms, as here, which specified that the drivers were sub-contractors. The situation is not analogous.
>
> [53] A further indication that in the present case there is a sub-contract between the Appellants and the fitters is the fact that on the invoice which is given to the customer it states that the fitter is a sub-contractor, the customer would therefore believe that this was the case. On the conditions of sale which are on the back of the copy of the invoice which a customer receives it says inter alia: "Rooms should be clear of all furniture. We do not trim doors and we cannot give a time of day for fitting. 48 hours notice must be given for re-arranging fitting date to avoid cancellation charges." This gives the customer the clear indication that the Appellants are in overall charge of the arrangements for the fitting of the carpet, despite the following statement that a sub-contractor can be arranged to carry out the work who is "Completely separate from us" and that any queries reference fitting errors should be taken up with the fitter as we will not accept any liability." For there to be a separate contract with the fitters this would have to be made clear to the customers, which it is not from the contradictory nature of these two conditions of sale.
>
> [54] In the circumstances where a fitter does not turn up, it is the Appellant who finds another one, this is consistent with a sub contract and is not consistent with agency. There is no principal of law which allows the Appellants to find another fitter unless there is a contract between him and the customer in respect of the fitting.
>
> [55] We do not consider that in this case it is necessary to look separately at the VAT position and we decide this matter on the basis that there was a sub-contract, as stated on the invoice, between the Appellants and the fitters and in the circumstances this appeal is dismissed."

42. In *Fineline Bedrooms & Kitchens Ltd v HMRC* (V20049) (a case relied upon heavily by Marshalls), the Tribunal (Mr Porter and Mr Whitehead) stated as follows at [41] to [42] and [45] to [54]:

> "[41] Park J in *Kieran Mullen Ltd v Customs and Excise Commissioners* [2003] EWCH 4(Ch)states:
>
> 'So the critical question is: what was the relationship between the self-employed stylists and KML? In my view the starting point, and sometimes the finishing point as well, in answering a question of that nature is to analyse the contractual terms which operate between the parties.

I accept that the matter is not automatically concluded just by considering the apparent contractual position. It is necessary to examine what the evidence shows, and to ask whether the evidence requires a departure from what would otherwise be the result of the apparent contractual position.'

[42] The critical question, with which we are faced, is what is the contractual relationship between the fitters and the Appellant on the one hand and the Fitters and the customers on the other."

…

"[45] What then is the contractual arrangement between the Appellant and the fitter? The answer is none. The evidence identified. that the Appellant kept a list of 7 to 8 fitters, who it believed would fit its products to a high standard. Not surprisingly, fitters, who were glad to receive recommendations from the Appellant, sometimes made contact to say when they were not available. The Appellant sensibly kept a T Card index of that detail. This did not create a contractual relationship between the Appellant and the fitters.

[46] Nigel Bird made much of the fact that the Appellant did not give the list of fitters to its customers and tell them to make their own arrangements. If the Appellant had done so, we assume, Nigel Bird would accept that the fitters were not contractually bound to the Appellant. If the Appellant had given the list to its customers and told them to make their own arrangements, we are struggling to see what difference it would have made. Presumably that fitter would have had to contact the Appellant to obtain the plan; find out when the units would be ready and make arrangements to collect them. He might have been asked to quote a price by the customer when he was first contacted. We suspect he would have answered that he would need to see the plans before he was in a position to give a price.

[47] Nor are we concerned with the advertising. We accept that the pamphlets may be used to give an idea of the Appellant's business, as did the web site. We are satisfied that the Appellant made it clear throughout the assessment periods that they did not fit (install) the units. In any event the evidence from Mr Jackson revealed the internet accounted for 1% of its customers and advertising for 6% which is a very small proportion of the Appellant's business.

[48] We consider that the satisfaction note, which was undoubtedly prepared by the Appellant, was an attempt on the part of the Appellant to distance itself from liability for the fitting work. Mr Jackson said that the satisfaction note had been introduced so that the customers would know whether a complaint should be raised against the Appellant or the fitter. It clearly states that the fitter gives a 12 month guarantee to the customer. That is what we would expect where the contract to fit the units is between the fitters and the customers.

[49] We are told that after November 2004 it was not possible for the Appellant to give an estimate of the cost of fitting the units because the Appellant was not qualified to give the Part 7 Regulation Certificate. Mr Daniels told us that the fitters had increased their prices to accommodate the regulations, which indicates that there is an industrial standard. He also said that that taking account of the regulations there was no difference in the way that the fitting is done.

[50] What of the cases we have been referred to by Nigel Bird. As both counsel have submitted these cases are fact-sensitive and the facts from other tribunal cases do not necessarily help. The assistance that the three case do provide is

confirmation of Park J's proposition that an analysis of the contract between the parties is paramount.

[51] 18756: *J M Ledger & C E Ledger trading as Lewis Carpets* was decided on the basis that the cost of fitting the carpet was included in the contract between the customer and that company. The Company provided the fitters and their replacements. They also required the fitters to fit more than one carpet each day. There was clearly a contract between that company and the-fitters.

[52] 17494: *I. Michael Wilson trading as A M & S Interiors; 2. Michael Wilson and Stuart Wilson T/A A M & S Interiors; M & S Interiors Limited; M &S Interiors* advertised an expert fitting service, their contract being for a fixed price. The only apparent influence on our appeal lies in the fact that the Appellant has called a customer and a fitter to give evidence, something which was lacking in M & S Interiors.

[53] 1293 I & RA Ramsey trading as Kitchen format is perhaps the nearest to this appeal. There was a total price contract: the customer paid the company in full and the company "ring fenced" in a separate account the money for the fitters. The printed contract, however, made reference to the control that the company had over the installation of the units and confirmed that all the terms between the company and the customer were contained in that contract.

[54] In this case there is no contract between the Appellant and the fitters. There is, on the evidence before us, a clear contract between the Fitters and the customers. The contractual terms accepted by a customer when the fitter made arrangements to fit the units created that contract. The evidence before us does not lead us to change our view that the fitters install the units under a contract with the customers and we therefore allow the appeal."

43. Although not referred to us by the parties, we also note that it is clear from *Revenue and Customs Commissioners v Airtours Holidays Transport Ltd* [2016] STC 1509 that when identifying the recipient of a supply it is necessary to consider the contractual position as a starting point and then consider whether that characterisation is in accordance with the economic reality. The majority in the Supreme Court stated as follows per Lord Neuberger at [47] and [48] (see also [49] to [51]):

"[47] This approach appears to me to reflect the approach of the Supreme Court in the subsequent case of WHA Ltd v Revenue and Customs [2013] UKSC 24, [2013] STC 943, [2013] 2 All ER 907where at [27], Lord Reed said that '[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point'. He then went on in paras [30]–[38] to analyse the series of transactions, and in para [39], he explained that the tribunal had concluded that 'the reality is quite different' from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said *in Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs* [2014] UKSC 16, [2014] STC 937, [2014] 2 All ER 685 (at [35]), when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts.

[48] The same approach was adopted by the Court of Justice in paras 39 and 40, where they stated, citing previous judgments, that 'consideration of economic realities is a fundamental criterion for the application of the

> common system of VAT', and added that that issue involved consideration of 'the nature of the transactions carried out' in the particular case. To much the same effect, in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, [1994] ECR I-743 (at para 14), the Court of Justice said that 'a supply of services is effected "for consideration" only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance', which it explained as meaning 'the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'. In the context of the supply of goods, the court made the same point in *Primback Ltd v Customs and Excise Comrs* (Case C-34/99) [2001] STC 803, [2001] ECR I-3833 (at para 25), where it described 'the determining factor' as 'the existence of an agreement between the parties for reciprocal performance, the payment received by the one being the real and effective countervalue for the goods furnished to the other'."

Marshalls' Submissions

44. Mr Fesolino submitted that the supplies are made directly by the Contractors to the customers and not by Marshalls. Marshalls' own role was as nothing more than an agent for the customers in co-ordinating the fitting works and liaising with the Contractors. He said that the Contractor was identified at the beginning of the works and the contractual relationship was between the Contractor and the customer. There was no contract between Marshalls and the Contractors. He accepted that Marshalls controls the dates of the fitting works but maintained that this was simply a matter of convenience for the different parties involved. Further, the Contractors retained control because, if the price was not acceptable, the Contractor would not take on the work. Crucially, payment is made directly to the Contractor.

HMRC's Submissions

45. Mr Turnbull submitted that Marshalls controls the whole transaction from start to finish. It is for a set price, Marshalls arranges the dates, and, if there is a problem, the only evidence is that the customers contact Marshalls rather than the Contractor. The Contractors' supplies are therefore to Marshalls rather than to the Customer.

Discussion

46. We find that Marshalls was not acting as an agent for the customer or for the Contractors. Instead, the fitting supplies are by Marshalls to the Customer, with the Contractors supplying their services to Marshalls. This is for the following reasons.

47. First, we find that the contractual relationship is between the customer and Marshalls and relates to the whole of the supply of the bathroom, including the fitting. The customers only ever dealt with Marshalls at the stage of negotiating the contract and were given a price which included labour, and committed to the contract by making an order, before knowing that a Contractor would be involved. As we have set out above, Marshalls did not decide whether or not the work would be carried out by a Contractor or the in-house team until the order had been made.

48. Secondly, the decision as to whether the fitting works are carried out by a Contractor or by Marshalls' in-house team is made by Marshalls without reference to the customer. Again, this takes place after the order has been made and so after Marshalls is contractually obliged to make the supplies to the customer. There is no separate negotiation between the customer and the Contractor (whether directly or even through Marshalls) and everything is controlled by Marshalls. We find that Mr Marshall's explanation of the ordering process would make it look to the customer as if Marshalls were responsible for all supplies, including labour.

49. Thirdly, the first time payment to the Contractor directly is mentioned is in the invoice and so after the formation of the contract between the customer and Marshalls and also after the work has been supplied. This cannot create an agency relationship between the customer and Marshalls. Instead, Marshall's requirement that customers pay the Contractors is simply Marshalls directing the customer as to how the consideration for the contract between Marshalls and the customer is to be paid.

50. Fourthly, any complaints are made to Marshalls. We accept that these are passed on to the Contractors and the expectation of both Marshalls and the Contractors is that they will ultimately be the Contractors' responsibility. However, we find that that is a feature of the contractual relationship between the Contractors and Marshalls, rather than evidencing any direct contractual relationship between the Contractors and the customers.

51. Fifthly, the economic reality (taking into account the findings of fact and for the reasons set out in paragraphs 46 to 50 above) is that the supply of the services is by the Contractor to Marshalls and then by Marshalls to the customers.

DISPOSITION

52. It follows that the appeal is allowed in part in respect of the out of time elements of the Assessments for the periods 02/12, 05/12 and 08/12 but is dismissed in respect of the remainder of the Assessments. The Assessments for these disallowed periods are in the sum of £4,969.07. As such the Assessments are reduced to £17,645.93.

53. Again, we make no findings about the continued effect or otherwise of the Early Assessments as the same is beyond the scope of this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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.

RICHARD CHAPMAN QC

TRIBUNAL JUDGE

RELEASE DATE: 24 JUNE 2020