[2011] UKUT 497 (TCC)

Appeal number: FTC/95/2010

VAT – input tax – absence of valid invoices – refusal by HMRC to allow input tax claims – absence of reconsideration – whether original decision reasonable – finding by FTT that unreasonable – conclusion by FTT that decision would have been the same had HMRC acted reasonably – nature of jurisdiction – whether FTT's finding that supplies were made in relevant transactions was perverse – unclear what matters taken into account in arriving at that finding – appeal remitted to FTT to make appropriate findings

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BEST BUYS SUPPLIES LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE THEODORE WALLACE
JUDGE JOHN CLARK

Sitting in public in London on 19 October 2011

Timothy Brown, instructed by The VAT Consultancy, for the Appellant

Richard Smith, instructed by the Solicitor for HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal against the decision of the First-Tier Tribunal ("FTT") released on 6 July 2010 dismissing the appeal by the Appellant against an assessment in the sum of £110,324 VAT for the period ending 31 May 2006 on the grounds that 24 invoices for alcohol in the name of Samson Traders Ltd ("Samson") were invalid either because they showed no VAT registration number or because they were issued after Samson was deregistered on 21 April 2006.

2. The grounds of appeal can be summarised as follows:

> (1) that the FTT misdirected itself in deciding that it had a supervisory jurisdiction and that it could dismiss the appeal on the basis that the decision by the Respondents would have been the same had it taken all the relevant information into account on a review, such power being only exercisable if the jurisdiction was appellate;
> (2) that if the FTT did not so misdirect itself, it failed to apply the correct test, namely whether the decision would inevitably have been the same, see *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 at 953;
> (3) that if the FTT did apply the correct test, it was wrong to conclude that the decision would inevitably have been the same bearing in mind that it found as a fact that the supplies did take place.

3. In a Respondents' Notice it was contended that the finding at paragraph [37] that the disputed supplies had taken place was perverse being contrary to the weight of the evidence.

<u>The facts</u>

4. The Appellant was registered for VAT following an application dated 11 March 2005 giving its activity as wines, beers and confectionery wholesale. Within a year its turnover had grown to over £2 million. The Appellant had no warehouse facilities of its own and only purchased goods after a customer placed an order. The goods were delivered directly to the Appellant's customer by its supplier as its margins did not allow for the cost of haulage. Mr Patel, the managing director, was always looking for a deal in this high volume business.

5. On 13 December 2005 the Appellant was visited by Mr Abdul-Karim and another officer to verify the supply chain to another company. Mr Patel was told that because the Appellant was involved in a trade sector with a high incidence of fraud on the Revenue great care should be taken when entering into transactions to ensure that potential suppliers were bona fide traders.

6. In March 2006 Samson became the Appellant's main supplier. Before any transactions Mr Patel undertook due diligence checks obtaining details of Samson's

registration and certificate of incorporation and on 1 March obtained confirmation from the National Advice Service that Samson's VAT registration number was valid.

7. The FTT recorded that Mr Patel described a typical transaction between the Appellant and Samson. After receiving an order, usually by telephone from Checkprice UK Ltd ("Checkprice"), Mr Patel would order supplies of wines and beers which Samson would then deliver to Checkprice. The Appellant would invoice Checkprice and receive payment by an exchange of goods or cash. Mr Patel paid Samson in cash at Samson's office in Edgware. In practice Samson usually gave credit for longer than the agreed period of 7 to 14 days. Mr Patel did not ask about the location of Samson's warehouse or how it obtained its stock. Mr Peneron, managing director of Checkprice, confirmed Mr Patel's evidence insofar as it involved Checkprice.

8. On 6 June 2006 Mr Abdul-Karim telephoned Mr Patel to arrange an inspection of the Appellant's records; when informed by Mr Patel that the Appellant was receiving supplies from Samson, Mr Abdul-Karim told him that Samson appeared to have been deregistered from April.

9. Mr Abdul-Karim visited the Appellant on 7 June. He found 43 invoices from Samson, 19 of which were dated after 21 April when Samson was deregistered; he found that 15 invoices including 5 dated before 21 April did not carry Samson's VAT number and were therefore invalid. Mr Patel explained that the Appellant had paid the invoices and had received receipts from Samson with the VAT number.

10. The Appellant claimed input tax on the 43 Samson invoices in its 05/06 return. On 25 July Mr Abdul-Karim wrote to the Appellant stating that the Respondents had decided to disallow input tax on 24 Samson invoices: tax on invoices after 21 April was not VAT and therefore was not deductible, in addition invoices with no VAT number were deemed as invalid. His letter stated that he was aware that the Appellant had based recovery of the input tax on the facts that the Appellant "had not been aware of Samson . . . being deregistered for VAT at the time of making these supplies" and that on 1 March the Appellant had verified Samson's VAT number; however the Appellant had not been able to demonstrate that reasonable steps were taken to ensure that the supplies were bona fide. The letter stated that £110,324 input tax would be disallowed and that an assessment would follow. A schedule of the invoices was included.

11. On 13 September The VAT Consultancy on behalf of the Appellant wrote to the Respondents to appeal against a decision in respect of the recovery of input tax. This was not the appeal to the FTT which came later. The letter of 13 September enclosed 15 amended invoices from Samson which included its VAT number; it also referred to a Statement of Practice (July 2006). On 21 September the Respondents wrote that as requested "we will be carrying out a reconsideration".

12. On 29 September Mr Alan Crombleholme, Higher Officer, wrote to The VAT Consultancy asking for further documents including the corresponding sales invoices to Checkprice and the commercial documentation.

13. On 17 November The VAT Consultancy wrote enclosing copies of invoices issued to Checkprice. The FTT stated that these did not correspond to the invoices from Samson in that the Samson invoices were for wines and beers whereas the invoices to Checkprice were for beers only. The letter confirmed that Samson had been paid and that Samson had despatched the goods to Checkprice.

14. On 22 November Mr Crombleholme wrote that he had not yet ruled on the original documents and sought further information regarding the payments by the Appellant.

15. On 25 January 2007 The VAT Consultancy wrote further stating that copies of all sales invoices all with VAT numbers, payment receipts from Samson and sales invoices to Checkprice had been sent; the letter asked for an appealable decision to be given.

16. On 13 February Mr Crombleholme wrote stating "there is no active reconsideration … following your failure to supply the information required …" He wrote that the debt would be desuspended and that any appeal to the FTT would be an out of time appeal.

17. The Appellant thereupon appealed to the FTT on 28 February 2007 against the decision of 13 February, and served amended grounds of appeal on 30 March 2009.

18. The FTT recorded that Mr Crombleholme had accepted in evidence that, in the absence of further information, no decision was made on reconsideration and the original decision by Mr Abdul-Karim stood. He had also confirmed that Customs would have exercised their discretion as to whether to allow input tax in the absence of a valid VAT invoice in accordance with the Statement of Practice of July 2003 although this did not have the force of law.

19. The Statement of Practice stated that for supplies listed at Appendix 3 (goods subject to widespread fraud including alcohol) claimants would be expected "to be able to answer satisfactorily all or nearly all of the questions at Appendix 2" and were likely to be asked further questions to test whether they took reasonable care. Appendix 2 listed the following matters: alternative documentary evidence other than an invoice; evidence of receipt of the taxable supply on which VAT was charged; evidence of payment; evidence of consumption or onward supply and questions as to the supplier. At paragraph 20 of the Statement of Practice it was stated,

> "Decisions on when to disallow VAT claims will only be made after an independent central review of the case has been carried out."

Decision of the FTT

20. At paragraph [32] the FTT said that the first question to consider was whether the supplies from Samson to the Appellant actually took place; this was a prerequisite of any claim to deduct input tax and in the absence of any supply the appeal could not succeed.

21. After recording the contentions of counsel the FTT said this,

> "[37] Given that there were 43 transactions between the Company and Samson all of which took place in similar circumstances and that it was accepted by HMRC that the Company was entitled to deduct input tax, and therefore that there was a supply, in 19 of these we conclude that there were also supplies made by Samson to the Company in the other 24 transactions as evidenced by the invoices on which input tax has been disallowed."

At paragraph [38] the FTT said that support for this conclusion was found in Mr Abdul-Karim's letter of 25 July 2006 (see paragraph 10 above) from which it was apparent that his concern

> "was not whether there had been any supplies to the Company by Samson but the lack of a VAT number on, and the dates of, the invoices in 24 of the 43 transactions."

22. The FTT then turned to consider whether the Respondents were unreasonable in the exercise of their discretion not to allow the input tax, citing the test in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 23, HL at 239.

23. At paragraph [44] the FTT said that, in the absence of a review or reconsideration, relevant information provided by the Company after the issue of the assessment in July 2006 had been disregarded and had not been taken into account in the exercise of discretion. At paragraph [45] the FTT said this,

> "[45] By disregarding matters to which they should have given weight and failing to take account of all relevant matters we find that HMRC have acted unreasonably in the exercise of their discretion to disallow the Company's claim for input tax. However, the decision of HMRC to disallow the claim for input tax will stand if we find that it would have been the same had HMRC acted reasonably in the exercise of their discretion which would have been the case had Mr Crombleholme carried out the review or reconsideration and taken account of all relevant matters (*Merton v Williams*)."

24. At paragraph [46] the FTT accepted the submission of Mr Smith that although the Statement of Practice was not binding on the FTT it provided a reasonable

approach to the question of how Customs should apply their discretion in the absence of a valid VAT invoice. At paragraph [47] the FTT said that the Appellant "is unable to answer all or nearly all the questions in Appendix 2." The FTT then considered those questions.

25. At paragraphs [48] and [49] the FTT said this,

> "[48] Given that the Company is not able to answer all, or nearly all, of the questions in Appendix 2, we find that had HMRC carried out the independent central review, as stated in paragraph 20 of the Statement of Practice or the reconsideration as stated in the letter of 21 September 2006, they would have come to the same conclusion and not exercised their discretion to allow the Company's claim for input tax in the absence of valid VAT invoices.
>
> [49] In the circumstances we dismiss the appeal."

Submissions

26. Mr Brown for the Appellant said that the jurisdiction of the FTT in relation to the discretion of the Commissioners under regulation 29(2) of the VAT Regulation 1995 to allow a deduction of input tax on evidence other than a valid invoice is supervisory, see per Schiemann J in *Kohanzad v Customs and Excise Commissioners* [1994] STC 967 at 969. The FTT however is a statutory body without the powers of the High Court on judicial review. He submitted that the FTT was wrong to apply *Merton Borough Council v Williams* [2002] EWCA Civ 980 which was a public law case. He said that *John Dee Ltd v Customs and Excise Commissioners* should be distinguished because the jurisdiction there was appellate, see Neill LJ at page 950c; that decision concerned a requirement for security and, whatever else it covered, did not cover the type of discretion in the present case.

27. He said that, even if the FTT did not misdirect itself in relation to its powers, it failed to apply the test in *John Dee* at page 953 correctly in that it found at [48] that the Commissioners "would have come to the same conclusion" rather than that the decision would inevitably have been the same; "inevitably" was italised in *John Dee*. Having found as a fact at paragraph [37] that the supplies from Samson did take place, the FTT could not be sure that the decision would have been the same.

28. He said that after deregistration Samson continued to be a taxable person because it was still required to be registered since its supplies were well over the threshold.

29. He said that in *Reisdorf v Finanzamt Köln-West* (Case C-85/95) [1997] STC 180 the Court of Justice said at [31] that Articles 18.1(a) and 22.3 of the Sixth Directive permitted member states to permit other evidence where the transaction "actually took place". He said that although this did not give rise to a directly

effective right, when a member state uses the power it must have regard to whether a supply actually took place. When finding that the decision would have been the same the FTT failed to have regard to this.

30. Mr Smith, for Customs, stated that *Kohanzad* decided that, where an appeal concerns a case in which the Commissioners have a discretion, the jurisdiction of the FTT although formally appellate is a supervisory jurisdiction; this is not the same as the inherent jurisdiction of the High Court on judicial review. It is necessary to look at the nature of the decision against which the appeal is brought, see *John Dee* at page 952c. He said that there was no reason for the present type of case to be treated any differently from *John Dee*.

31. He said that the test in *John Dee* at page 953 applies in the present case. The question for the FTT was whether the decision would inevitably have been the same if it had been made on a correct basis. The Upper Tribunal is entitled to take account of the approach taken by the FTT generally; that approach had not been shown to be wrong. He said that although the FTT did not use the word "inevitably" at page [48] the reasoning met the inevitably test. The FTT had earlier set out at paragraph [31] the test in *Merton BC* where "inevitably" was referred to at [43]. He said that it was clear that the FTT had the "inevitable" test in mind. He said that the finding of the FTT at paragraph [37] that the supplies had taken place did not undermine a conclusion that the decision would inevitably have been the same.

32. Mr Smith accepted that Mr Crombleholme should have made a decision although he declined to do so and that it was necessary to look at the material before him including the material produced after the decision of Mr Abdul-Karim to assess.

33. Mr Smith said that the finding of the FTT at paragraph [37] that actual supplies did take place was perverse on its face, being based on an unjustified assumption that it was accepted that supplies took place in the other 19 transactions. All that happened was that Mr Abdul-Karim accepted the invoices for those transactions at face value and limited his assessment accordingly. In *Jeunehomme v Belgium* (Case 123/87) [1988] ECR 4517, the Advocate General, Sir Gordon Slynn, said at page 4534 that if there was a valid invoice the trader was entitled to input tax unless it was shown by the tax authorities to be false. It was not suggested that the Appellant was aware of any fraud by Samson, however Mr Patel never saw the goods and thus could give no direct evidence that they were supplied, although the FTT did accept that he paid Samson. The FTT did not have the evidence to make a finding as to whether the goods were supplied and overlooked the fact that Mr Abdul-Karim could not have raised the assessment if he thought that the supplies had been made.

34. He said that comparing paragraphs [37] and [38] of the FTT decision with [46] to [48] the reasoning was quite different. Paragraph [37] was based on a misconception and an inadequate record at [38] of Mr Abdul-Karim's evidence taken out of context.

35. He submitted that the finding at paragraph [37] was perverse, from which it followed that the FTT was entitled to find that the decision of the Commissioners would have been the same even if "inevitably" had been added expressly in paragraph [48]. He said that "inevitably" was implicit.

36. Mr Smith accepted that the Commissioners could not confine their discretion by the Statement of Practice: the questions in Appendix 2 were not exhaustive.

37. He accepted that Samson remained a taxable person if it made supplies after it had been deregistered because it was required to be registered.

38. In reply, Mr Brown said that Mr Abdul-Karim had accepted during cross-examination that the supplies not disallowed had taken place. He referred to the manuscript note of the FTT judge at page 47t of the bundle as follows:

> "of 43 transactions only disallowed 19
> - 24 satisfied that supplies took place
> benefit of doubt & Sams … reg. trader."

He said that, having heard the evidence, the FTT was perfectly entitled to reach a decision of fact that 43 transactions took place. On that footing it was impossible to say that the decision would inevitably have been the same because the purpose of the reconsideration was to establish whether the supplies took place or not.

39. In reply on the Respondents' Notice, Mr Smith said that the passage in the judge's note at 47t was consistent with the Respondents' case that Mr Abdul-Karim gave the Appellant the benefit of the doubt. He said that the note had "19" and "24" the wrong way round. The note did not detract from his submission that the finding of the FTT at [37] was perverse. There was a stark difference in reasoning between paragraphs [37] and [38] and paragraphs [46-8].

Conclusions

40. We start with the legislation as to the deductibility of input tax.

41. Article 18 of the Sixth Directive provided so far as relevant as follows:

> "(1) To exercise his right of deduction, a taxable person must:
>
> (a) in respect of deductions pursuant to Article 17(2)(a), hold an invoice drawn up in accordance with Article 22(3);
>
> …
>
> (3) Member States shall determine the conditions and procedures whereby a taxable person may be authorised to make a deduction

which he has not made in accordance with the provisions of paragraphs 1 and 2.

…"

42. Article 22(3) and (8) provided so far as relevant,

"(3)(a) Every taxable person shall ensure that an invoice is issued either by himself or by his customer … in respect of goods … which he has supplied …

(8) Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion …"

Article 22(3)(b) required inter alia that the invoice should include the supplier's VAT registration number.

43. Section 24(6)(a) of the VAT Act 1994 provides,

"(6) Regulations may provide –

(a) for VAT on the supply of goods … to a taxable person … to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or as the Commissioners may direct either generally or in particular cases or classes of cases."

44. Section 25(2) provides,

"(2) Subject to the provisions of this section, [a taxable person] is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him."

45. Section 26 provides,

"(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax … as is allowable by or under regulations as being attributable to supplies within subsection (2) below."

Supplies within subsection (2) include taxable supplies.

46. Claims for input tax are covered by regulation 29 of the Value Added Tax Regulations 1995. Regulation 29(2) provides,

> "(2) At the time of claiming deduction of input tax … a person shall, if the claim is in respect of –
>
> > (a) a supply from another taxable person, hold the document which is required to be provided under regulation 13; …
> >
> > Provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct."

Regulation 13(1) requires the provision of a VAT invoice. Regulation 14(1)(d) requires a VAT invoice, "save as the Commissioners may otherwise allow", to state the registration number of the supplier.

47. No direction has been made either generally or in relation to particular classes of cases as to what other evidence a claimant should hold or provide. The Statement of Practice was not a direction.

48. In *Kohanzad v Customs and Excise Commissioners* [1994] STC 967, Schiemann J said at page 969 that the effect of regulations 12(1) and 62(1) and (1A) of the Value Added Tax (General) Regulations 1985 was that prima facie a taxable person is not entitled to input tax credit unless he holds a tax invoice but that,

> "the Commissioners have a discretion to allow credit for input tax notwithstanding that the registered person does not hold such a tax invoice."

The wording of those provisions was similar to that of regulation 13(1) and regulation 29(2) of the 1995 Regulations. Schiemann J went on to say that when considering a case where the Commissioners have a discretion the Tribunal exercises a supervisory jurisdiction.

49. Although the jurisdiction of the FTT was appellate since the appeal was against a decision as to the amount of input tax to be credited within section 83(c) and an assessment within section 83(p), it was common ground that the jurisdiction in respect of the decision of the Commissioners under regulation 29(2) not to allow the input tax which was not covered by valid invoices was supervisory in that the FTT could not substitute its own decision but could only decide whether the discretion had been exercised reasonably. The burden of proof was on the Appellant to satisfy the FTT that the decision was incorrect, see *Kohanzad* [1994] STC 967 at 969. The FTT had no power to substitute its own decision as to the exercise of the discretion, nor did it have power, as in section 16(4)(b) of the Finance Act 1994, to direct the Commissioners to review the original decision.

50. If the appeal had involved issues which did not depend on the exercise of the Commissioners' discretion, the FTT would have had a full appellate jurisdiction. Since the appeal was solely in relation to the exercise of the discretion the FTT could only allow or dismiss the appeal.

51. In *John Dee* [1995] STC 967, which concerned an appeal against a requirement for security, the tribunal concluded that the Commissioners had acted unreasonably in failing to have regard to the possibility of seeking relevant financial information before imposing the requirement but found that it was "most likely" that the decision would have been the same. The Court of Appeal decided that the correct test was whether "the decision would inevitably have been the same" and dismissed the appeal by the Commissioners against the decision of Turner J in favour of the company.

52. We are unable to accept the submission by Mr Brown that the jurisdiction in the present case is supervisory whereas that in *John Dee* was appellate so that in the present case the Appellant must succeed since the decision to disallow the invoices was not taken reasonably.

53. In the present case the jurisdiction of the FTT arose under section 83 which provided that an appeal shall lie to the Tribunal. The reference in *Kohanzad* to exercising "a supervisory jurisdiction" is shorthand for the fact that the Tribunal cannot substitute its own discretion for that of the Commissioners but can only consider whether the discretion was exercised reasonably; the opening words of the judgment in *Kohanzad* were "This is an appeal."

54. Apart from the labelling used in *John Dee* and *Kohanzad* Mr Brown did not advance any reason why the principle in *John Dee* should not apply in the present case.

55. In *John Dee* Neill LJ said at page 952h,

> "the function and powers of a tribunal in each case will depend in large measure on the nature of the decision appealed against and of course on any special statutory provisions."

Mr Brown did not make any submissions as to why on an appeal involving regulation 29(2) the FTT should not have power to dismiss an appeal where the decision would inevitably have been the same if there had been no unreasonableness. In our judgment there is no logical reason for distinguishing the Tribunal's powers in this appeal from those considered in *John Dee*.

56. There has been no appeal by the Respondents against the finding of the FTT at [45] that they had acted unreasonably in the exercise of their discretion, see paragraph 23 above. Accordingly it is necessary to consider whether the decision would inevitably have been the same if Mr Crombleholme had carried out a proper reconsideration. In this respect it is important to note that the facts are not a matter of

discretion. The facts are a matter for the Tribunal on the basis of evidence. An illustration of this is in *Golobiewska v Customs and Excise Commissioners* [2006] V&DR 267, CA per Lloyd LJ at paragraphs 16, 17 and 27.

57. The test in *John Dee* has therefore to be applied in the light of the findings of fact by the FTT at paragraph [37] that there were supplies by Samson in the 24 disallowed transactions, unless the Respondents establish that the finding was perverse.

58. Mr Smith did not dispute this in principle but contended that the finding was perverse within *Edwards v Bairstow* [1956] AC 14 at 36, in which case it must be disregarded when applying the test in *John Dee*.

59. We therefore consider the Respondents' Notice next, see paragraph 3 above, on which we have summarised Mr Smith's submissions at paragraphs 33 to 35 above.

60. In *Edwards v Bairstow* Lord Radcliffe said this,

> "I do not think that it matters much whether this state of affairs is described as one in which there was no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test."

61. In the present case the hearing before the FTT went into a second day with most of the first day taken up with evidence. The Respondents obtained a photocopy of the judge's notes which run to 34 pages which they included in the bundle but did not provide a typed version. The notes were difficult to read with any confidence. The only reference during the hearing was that at paragraph 38 above; both Counsel were agreed as to that extract.

62. The FTT recorded in the decision that there was oral evidence from Mr Patel and Mr Peneron for the Appellant and Mr Abdul-Karim, Mr Crombleholme and Mr Lamb for the Respondents; it is apparent from the judge's notes that the first four of these gave evidence and were cross-examined. There is nothing in the decision of the FTT to indicate that the evidence by the Appellant's witnesses was not accepted, although at paragraph [47] the FTT accepted that the Appellant was unable to answer all or nearly all of the questions in Appendix 2 (see paragraph 25 above).

63. Mr Smith said that the finding of the FTT at [37] was based on an unjustified assumption as to the 19 invoices on which a deduction was allowed. That submission was undermined somewhat by the judge's note referred to at paragraph 38 above of the cross-examination of Mr Abdul-Karim: "only disallowed 19 - 24 satisfied that supplies took place". There was nothing in Mr Abdul-Karim's statement to suggest that he was aware of the Advocate General's opinion in *Jeunehomme*, see paragraph 33 above.

64. We accept the force of the submission by Mr Smith as to the difference in reasoning between paragraphs [37-8] and [46-8]. It seems clear that at [46-8] the FTT did not consider the potential relevance of [37-8]; it is unclear whether in making its finding at [37] the FTT considered the matters referred to at [47].

65. In *Golobiewska* at [43] Lloyd LJ cited the following passage from the judgment of Henry LJ in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381 in relation to the duty to give reasons:

> "(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties – especially the losing party – should be left in no doubt why they won or lost. This is especially so since without reasons the losing party will not know … whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
> (2) The first of those aspects implies that want of reasons may be a good self-standing ground of appeal."

In *Golobiewska* the Court of Appeal allowed the appeal because of the Tribunal's failure to give adequate reasons for its finding and remitted the appeal. There, as here, there was a tension between different findings by the Tribunal.

66. Leaving to one side the apparent confusion in the Judge's note between numbers of transactions in respect of which it had been accepted by HMRC that the Appellant was entitled to deduct input tax and those in respect of which it had not been accepted, (corrected in the actual decision of the FTT), it is not apparent from the decision at [37] precisely what matters had been taken into account in arriving at the conclusion in that paragraph. It is preceded by paragraphs setting out the submissions of the respective parties on the evidence. However, it is not clear what findings the FTT made on the evidential matters raised in those paragraphs, or whether it took any other evidence into account.

67. It is not clear from the decision of the FTT what evidence was given on the question of whether the supplies actually took place. Mr Patel and Mr Peneron each made one page witness statements which did not expressly address the supplies covered by the disallowed invoices. Mr Patel was recorded at [7] as describing a typical transaction with Samson involving Checkprice. Since no transactions took place with Samson before March 2006, typical transactions presumably encompassed those in dispute. Both Mr Patel and Mr Peneron are recorded as stating that Samson delivered goods to Checkprice which paid the Appellant. Mr Patel is recorded as saying that he paid Samson in cash at its Edgware office.

68. It is not apparent from the decision of the FTT whether or not there was any direct challenge by counsel for the Respondents to their evidence. It appears from

[33] of the decision that the case was conducted on the footing that there was insufficient evidence to establish that the supplies took place rather than that the evidence of Mr Patel and Mr Peneron should be rejected.

69. Nor is it apparent to what extent Mr Patel was cross-examined on the questions in Appendix 2 of the Statement of Practice referred to at [47].

70. Having recorded the submissions of counsel at [33] to [36], the FTT concluded at [37] that the supplies did take place giving the reason that the input tax on similar supplies in 19 transactions with Samson had been accepted by the Respondents. The logic of inferring from the failure to disallow the earlier invoices that the supplies to which they related and also the supplies to which the disallowed invoices related were made is not apparent to us.

71. If that was the only reason for the conclusion at [37] it was clearly open to challenge, particularly given that there was no reference at that stage of the decision to the matters covered later at [47] which presumably must have been covered in cross-examination.

72. However the FTT came to an unqualified conclusion at [37] and stated in terms at [39] that it had found that the supplies did take place. This could only have been on the basis that the FTT accepted the evidence of Mr Patel and Mr Peneron.

73. In our judgment the reasons for the conclusion at [37] have not been adequately explained by the FTT in its decision.

74. We turn next to the conclusion of the FTT at [48] that if the Respondents had carried out an independent central review they would have come to the same conclusion.

75. We do not accept Mr Smith's submission that in its conclusion at [48] it is clear that the FTT had the "inevitably" test in mind. If that was so we can see no reason why the FTT did not say so.

76. There is a further problem. It would seem that, in deciding at [48] that the decision would have been the same, the FTT did not consider its finding at [37] to be relevant but considered rather that the matter merely needed to be approached on the basis of paragraphs 18 to 20 and Appendix 2 of the Statement of Practice.

77. Mr Smith accepted that the Commissioners could not confine their discretion by the Statement of Practice. Implicitly, although not explicitly, he accepted that the FTT could not ignore its finding at [37] (if it was not perverse) when considering whether the decision would inevitably have been the same.

78. Without clearer findings, we find ourselves unable to decide whether to accept or reject Mr Brown's submission that the FTT could not have been sure that the decision of the Commissioners would inevitably have been the same in the light of its

finding at [37]. This issue will of course only be relevant if after further consideration the FTT decides that the finding at [37] is supported by the evidence.

79. Reluctantly, therefore, we find it necessary to remit the matter to the FTT (constituted as before) to make appropriate findings, if necessary with further evidence, and in particular in respect of the matters raised by the parties at [33]-[36], and to determine in the light of those findings whether supplies were made in the 24 transactions for which the Appellant did not have valid invoices.

THEODORE WALLACE

JOHN CLARK

JUDGES OF THE UPPER TRIBUNAL
RELEASE DATE: 20 December 2011