[2014] UKUT 0252 (TCC)

Appeal number FTC/68/2013

VALUE ADDED TAX – Edwards v Bairstow - whether First-tier Tribunal erred in law in finding that that supplies shown on invoices did not take place - no - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

KENNETH CHARLES NOBLE

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge Howard Nowlan

Sitting in public in London on 22 May 2014

Tim Brown, counsel, instructed by Francis Clark LLP, for the Appellant

Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. Kenneth Charles Noble ("Mr Noble") carried on a business of installing suspended ceilings on large building projects as a sole trader under the name K & B Ceilings. He registered for VAT with effect from 20 November 2002. On his VAT returns for accounting periods 04/03 to 04/05, Mr Noble deducted input tax of £209,504.

2. When the Respondents ("HMRC") queried the input tax deduction, Mr Noble produced 178 invoices headed HB Interiors as evidence that he had incurred VAT on services of labourers supplied to him by Harvey Bettsworth ("Mr Bettsworth"), who traded as HB Interiors. Mr Bettsworth had registered for VAT but had never submitted a VAT return or accounted for any VAT. HMRC considered that the services shown on the HB Interiors invoices held by Mr Noble had not been supplied by Mr Bettsworth. HMRC also considered that, even if Mr Bettsworth had supplied the services, the invoices were not VAT invoices as they did not comply with the VAT Regulations 1995. Accordingly, HMRC decided that Mr Noble was not entitled to deduct the input tax shown on the invoices and, in March 2006, assessed Mr Noble for £209,504.

3. Mr Noble appealed to the First-tier Tribunal ("the FTT"). The primary issue before the FTT was whether the supplies were made as stated on the HB Interiors invoices. If the supplies took place, the secondary issue was whether the invoices were valid VAT invoices and, if not, whether HMRC should have accepted them as evidence that Mr Noble had received supplies on which VAT had been charged.

4. In a decision released on 11 December 2012, [2012] UKFTT 760 (TC), ("the Decision"), the FTT (Judge Kameel Khan and Ms Gill Hunter) dismissed the appeal. The FTT decided that Mr Bettsworth did not make the supplies of labour shown on the HB Interiors invoices. Having found that the supplies did not take place, the FTT concluded that it was not necessary to consider whether HMRC should have exercised their discretion to allow Mr Noble to deduct the input tax.

5. Mr Noble appealed, with the permission of Judge Khan, to the Upper Tribunal on the grounds that the FTT made errors of law of the type described in *Edwards v Bairstow* [1956] AC 14 in that the FTT took into account irrelevant matters and failed to take account of relevant matters and, as a result, made findings that no reasonable tribunal could have made.

6. For the reasons given below, we have decided that the FTT was entitled, on the basis of the evidence, to find that Mr Bettsworth did not supply the services shown on the HB Interiors invoices to Mr Noble and the Decision does not contain or reveal any error of law by the FTT. Accordingly, Mr Noble's appeal is dismissed.

Background to the appeal

7. The description of the events leading to the appeal that follows is taken from undisputed findings of fact in the Decision and documents to which we were referred at the hearing before us.

5 8. On 18 March 2005, two officers of HM Customs and Excise (soon to be HMRC and referred to as such hereafter) visited Mr Noble in order to verify the VAT returns submitted for the periods 01/03 to 01/05. One of the officers explained that Mr Noble's Construction Industry Scheme returns did not support the amount of input tax claimed and, as Mr Noble supplied labour only, the input tax was unlikely to relate to 10 the purchase of materials. The bulk of the input tax claimed by Mr Noble in his returns was VAT shown on 178 invoices, dated between 30 November 2002 and 28 January 2005, in the name of HB Interiors. Mr Noble explained to one of the officers that he did not have any employees and only used one sub-contractor, Mr Bettsworth who traded as HB Interiors, who supplied him with the labour that he used in his 15 business.

9. HMRC discovered, on checking, that Mr Bettsworth registered for VAT with effect from 30 November 2002 but had never made a VAT return or accounted for any VAT. On 11 December 2003, HMRC had deregistered Mr Bettsworth with effect from 3 December 2002. Further inquiry disclosed that Mr Bettsworth had never 20 operated a PAYE scheme in respect of any employees or registered as a contractor under the Construction Industry Scheme to record payments to sub-contractors. On 23 March 2005, HMRC wrote to Mr Noble telling him that he was no longer entitled to reclaim input tax shown on any invoices issued by HB Interiors.

10. On 26 March 2006, HMRC issued Mr Noble with an assessment for £209,504 25 being input tax claimed by him in his VAT returns for periods 04/03 - 04/05. There was no dispute about the input tax claimed by Mr Noble in relation to HB Interiors invoices issued before 31 January 2003.

11. Any further action in relation to the VAT assessment was suspended pending the resolution of a dispute about Mr Noble's direct tax position. That was resolved by 30 agreement in late 2010. On 18 January 2011, Mr Noble's tax adviser, Francis Clark Tax Consultancy Limited, wrote to HMRC about the VAT assessment. The letter stated that:

> "11. During the course of the investigation HMRC:
>
> (a) Accepted that Harvey Bettsworth DID exist and was not KN.
>
> 35 (b) Confirmed that a CIS 6 had been issued BY HMRC to HB and it was valid throughout the period during which HB invoiced KN.
>
> (c) Confirmed that the HB VAT reg no WAS valid at the start of the relationship with KN, albeit that it was cancelled a few months into the relationship.
>
> 40 …

> 12. The direct taxes aspect of the investigation has been concluded with the investigating office *(sic)* accepting that there was insufficient evidence with which to challenge the authenticity of the HB invoices.
>
> 13. The investigating officer informed me that the proposals which I had made to settle the direct taxes aspect had been agreed …
>
> I cannot understand how there can possibly be a settlement in a case involving two different taxes, conducted by just one government department, where one officer accepts the authenticity of invoices and the other does not."

12. HMRC treated the letter of 18 January 2011 as an appeal and conducted a review of the decision to issue the VAT assessment. In a letter dated 31 March 2011 to Mr Noble, HMRC upheld the assessment. The letter stated:

> "At the heart of this case are questions about the nature of supplies received by your business, whether and from whom those supplies came from *(sic)* and how they were paid for: these questions have arisen through the investigations undertaken by both Direct and Indirect Tax colleagues. In addition to those general questions, on the Indirect Tax (VAT) side, are questions about the strength of the evidence to deduct VAT on invoices as input tax.
>
> Your representative … has raised a series of questions that point to apparent differences of approach across both sets of taxes. Such differences of approach will occur because of the varying nature of the taxes. On the Direct side they are mainly looking at income and profits and on the VAT side looking in detail at transactions. For example, whilst there may be acceptance on both Direct and Indirect taxes that a supply has taken place, on the VAT side it is important to go further and see whether there is sufficient evidence to justify the claiming of input tax. It is important to stress that the tests to deduct VAT as input tax go considerably further than the invoice requirements for direct taxes including income tax and self assessment and that is what lies at the heart of this case. Put simply, HMRC does not consider that there is sufficiently strong evidence to justify the claiming of this VAT, since assessed."

13. The letter then discussed the situation of HB Interiors before stating that:

> "Although HB was a missing trader for VAT purposes you have VAT invoices purporting to be from HB claiming VAT back on them. This situation has in effect, whether wittingly or unwittingly, supported a fraud against the Exchequer whereby claims totalling £209,504 have been requested from HMRC but are not balanced by a declaration and payment of that amount by HB.
>
> …
>
> In this case, whatever the doubts about whether supplies were made by HB to your business or not, there is no doubt that a fraud against the exchequer has occurred and that the evidence to justify a VAT supply and the claiming of input tax has not been strong enough. …"

14. On 21 April 2011, Mr Noble appealed against HMRC's decision to uphold the assessment.

The right to deduct input tax

15. In summary, the Value Added Tax Act 1994 ("VATA94") provides that a taxable person has a right to deduct VAT which that person has paid or is liable to pay for supplies of goods or services to the extent that the goods or services are used for the purposes of the taxable person's taxable transactions.

16. Section 24(6) of the VATA94 states that regulations may provide that VAT on a supply of goods or services to a person can only be treated as input tax if it is evidenced and quantified by reference to such documents or other information specified in the regulations or directed by HMRC. Regulation 29 of the VAT Regulations 1995 (as amended with effect from 1 April 2009) provides that a person claiming a deduction of input tax must do so on a VAT return and, at the time of submitting the return, must hold a document or invoice specified in regulation 29(2) Regulation 29(2) provides that where a person claims a deduction of input tax in respect of a supply by another taxable person, the person making the claim must hold a VAT invoice in respect of the supply or such other evidence of the charge to VAT as HMRC may direct. Regulation 14 of the VAT Regulations 1995 sets out what an invoice must contain in order to be a VAT invoice.

The hearing before the FTT

17. The hearing of the appeal took place over two days in September 2012. The FTT heard oral evidence from Mr Noble, who had provided a letter but no formal witness statement, and from two HMRC officers, Martin Barnes and Noelle Forsyth, who both provided witness statements. The FTT also had two ring binders of documents which were also provided to us. At the hearing before the FTT, Mr Noble's case was that Mr Bettsworth had made the supplies of labour to him as described on the HB Interiors invoices. He accepted that the invoices issued by Mr Bettsworth after 11 December 2003 were not valid VAT invoices as he was not a taxable person, as he was no longer registered for VAT. Mr Noble contended that HMRC should have exercised their discretion, under regulation 29(2) of the VAT Regulations 1995, to accept the invalid invoices issued in periods 01/04 to 04/05, as alternative evidence of entitlement to deduct input tax on the basis that Mr Bettsworth had supplied the services and was a taxable person, ie a person who was required to be registered for VAT. HMRC's position was that the supplies said to have been made by Mr Bettsworth did not take place. HMRC also contended that the HB Interiors invoices were not VAT invoices for the purposes of the VAT Regulations 1995.

The Decision

18. As the FTT noted at [2] of the Decision, the core issue to be determined was whether the supplies took place as stated on the HB Interiors invoices. At [40], the FTT set out the core issue as follows:

> "The fundamental question, before any other question is answered, is did the supplies take place. It is evident that supplies of labour were made to the Appellant but were the supplies made by HB Interiors?"

The FTT discussed this issue at [41] - [62] of the Decision.

5 19. In [42], the FTT commented that there was no evidence that Mr Noble kept the records that the FTT would expect to see in a business of the size of his one. The FTT also noted, in [43], that the audit trail for the payments (all of which were said to have been paid in cash) that Mr Noble said that he made to Mr Bettsworth was virtually non-existent.

10 20. At [45] – [47], the FTT noted that the amount shown on the HB Interiors invoices was approximately £1.3m but the total amount of cash withdrawn by Mr Noble to pay the invoices was approximately £1.15m, leaving a shortfall of £219,795. The FTT concluded as follows in [47]:

> "There is no evidence that those monies withdrawn were paid to HB at
> 15 all. The Tribunal is not convinced that part payments took place. In spite of the claims to part payments, neither the invoices nor the payment certificates recorded any of the part payments. This suggests that cash was not withdrawn to pay the invoiced amounts. There were handwritten figures on the invoices which Mr Brown suggested were
> 20 the accountant's attempt to reconcile the cash withdrawals from the bank statements to the invoices. This was unconvincing. This conclusion conflicts with the Appellant's evidence that all sums were paid in full and that he met Mr Bettsworth at his home and sat down with all records and made full payment."

25 21. At [48] – [50], the FTT commented on discrepancies between some of the HB Interiors invoices and the sub-contractors' payment certificates signed by Mr Bettsworth and other discrepancies between the HB Interiors invoices held by Mr Noble and those submitted to HMRC by Mr Bettsworth in support of his application for gross payment status under the CIS. The FTT stated that the "discrepancies
30 question the authenticity of the recorded transactions". At [53], the FTT observed that, in his evidence, Mr Noble was unable to explain the invoice discrepancies.

22. In [54], the FTT recorded that Mr Bettsworth did not operate PAYE or the CIS during the period covered by the invoices and he failed to make VAT returns or account for VAT. The FTT agreed with HMRC's view that it appeared that there was
35 no genuine economic activity between Mr Noble and Mr Bettsworth that could have led to the making of the supplies.

23. In [56], the FTT rejected the argument on behalf of Mr Noble that HMRC's acceptance of Mr Noble's figures for direct tax purposes gave credibility to his records for the purpose of his input tax claim. The FTT stated that the fact that the
40 direct tax arm of HMRC had accepted the figures could not be used to support a claim for input tax under the VATA legislation.

24. In [57] – [62], the FTT set out the evidence provided by Mr Noble which it summed up at the beginning of [57] as follows:

> "The further evidence provided by the Appellant was not convincing. First, his witness statement was a statement which was not signed nor dated. The evidence which was provided under oath was vague and self-contradictory."

5 The FTT noted that Mr Noble could not explain the details on the invoices or describe how he arranged for additional workers to be provided by HB Interiors.

25. At [60], the FTT observed that:

> "The Tribunal places little weight on the invoices as evidence of a supply being made. The invoices themselves did not bear sequential 10 numbers, a requirement for VAT purposes, and the evidence presented was not fully credible. This was accepted by Mr Brown at the beginning of the hearing."

In his skeleton argument, Mr Brown, who appeared for Mr Noble before us, stated (and we accept) that he had not accepted that the evidence presented was not fully 15 credible but he had accepted that the invoices were not sequentially numbered and, therefore, were not tax invoices for the purposes of an input tax claim.

26. At [61] – [62], the FTT said:

> "It is correct to say there were withdrawals of cash but there is no evidence that these were actually withdrawn to pay HB Interiors or 20 indeed that the sums withdrawn were given to HB Interiors.
>
> There was also no evidence that he had met Mr Bettsworth to make those payments."

27. The FTT's finding on the core issue is set out at [64] of the Decision:

> "In the Tribunal's view and in assessing the evidence, it has come to 25 the conclusion that the supplies relating to the invoices put forward by the Appellant did not actually take place. There is insufficient evidence to show that payment for the supplies had been made. The Appellant has not discharged the burden of proof, which has been placed upon him, to show that those supplies did in fact take place. It 30 is not enough to say that the labour had been supplied from a source. What matters is whether the labour was supplied from HB Interiors to the Appellant."

28. The FTT summarised their reasons for not accepting Mr Noble's evidence that the supplies had actually taken place at [66]:

> 35 "Given that the Appellant was a high end operator one would have expected a more professionally run business with proper records, staff and professional help to assist with compliance. It is understandable if the Appellant sought to do his own VAT returns to save costs but it is not convincing if he could not explain the figures or provide 40 reconciliations for invoices. The Tribunal was therefore not convinced by the evidence presented by the Appellant to support his case and he therefore did not discharge the burden which was placed on him to show that the supplies were made."

29. Having found that the supplies did not take place, the FTT concluded, at [67], that it was not necessary to consider whether HMRC should have exercised their discretion to allow Mr Noble to deduct the input tax.

Discussion

30. Mr Noble has appealed against the Decision on the ground that the FTT had erred in law in rejecting his evidence and finding that Mr Bettsworth did not make the supplies shown on the HB Interiors invoices. That was a finding of fact by the FTT.

31. It is only possible to appeal against a decision of the FTT on a point of law (Section 11 of the Tribunals, Courts and Enforcement Act 2007). This means that, normally, findings of fact by the FTT cannot be the subject of an appeal. A finding of fact can, however, be an error of law where it is one that no reasonable tribunal properly instructed as to the relevant law could have come to on the evidence. The authority for this proposition is the well-known decision of the House of Lords in *Edwards v Bairstow.*

32. In *Edwards v Bairstow*, Viscount Simonds said, at 29, that a finding of fact should be set aside if it appeared that the finding had been made "without any evidence or upon a view of the facts which could not reasonably be entertained". Lord Radcliffe, at 36, said that finding of fact would be an error of law where the facts found were "such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal" or, in a formulation which he said he preferred, "the true and only reasonable conclusion contradicts the determination". As Lord Diplock observed in his speech in *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F - 411A, a better term for this ground for challenging a decision might be "irrationality".

33. Mr Brown submitted that the FTT's conclusion, in [64], that the supplies by Mr Bettsworth of labour services shown on the HB Interiors invoices did not actually take place was contradicted by the evidence and was not one that a reasonable tribunal, properly instructed, could have come to on the evidence. Mr Brown also referred us to a passage from the speech of Lord Millett in *Begum v London Borough of Tower Hamlets* [2003] UKHL 5, [2003] 2 AC 430 at [99]:

> "A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law. The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court."

34. The proper approach of an appellate court to a challenge to findings of fact by a VAT and Duties Tribunal was considered by the Court of Appeal in *Georgiou and*

another (trading as Mario's Chippery) v Customs and Excise Commissioners [1996] STC 463. At 476, Evans LJ, who gave the only judgment, said

> "...the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

35. In summary, Mr Brown contended that the FTT took into account irrelevant matters and failed to take account of relevant matters and, as a result, made findings that no reasonable tribunal could have made and reached a conclusion that no reasonable tribunal could have reached. The hearing before us was not a re-hearing of the appeal but a hearing to determine whether the Decision contained or revealed any finding or conclusion by the FTT that was an error of law without which Mr Noble's appeal would have been allowed. In considering Mr Brown's submissions, we bear in mind that we are not engaged in a fact-finding exercise. The issue for us is not whether Mr Bettsworth made the supplies shown on the HB Interiors invoices but whether the FTT was entitled, on the basis of the evidence, to find that he did not make them. In reviewing the evidence that was before the FTT, we accept that, as Lord Millett made clear in *Begum*, questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the FTT. Whether to accept or reject the evidence of a witness is a matter for the tribunal that has seen and heard the witness and an appellate tribunal or court which has not seen the witness should be slow to reach a contrary view.

36. Mr Brown submitted that the FTT failed to take proper account of the evidence provided by Mr Noble. He contended that the FTT had accepted Mr Noble's unsigned and undated witness statement as his evidence in chief without question but then failed to give it due weight. Mr Brown pointed out that the FTT does not say at any point in the Decision that Mr Noble was unreliable or untruthful. We do not agree that the FTT accepted Mr Noble's evidence as accurate nor do we accept that the FTT regarded Mr Noble's evidence as reliable and truthful. As set out above, the FTT said in [57] that Mr Noble's evidence was "not convincing". In the same

paragraph, the FTT referred to Mr Noble's oral evidence as "vague and self-contradictory".

37. Mr Brown also contended that the FTT ignored the oral evidence of Mr. Noble, specifically his evidence that he met with Mr Bettsworth and paid him in cash for the supplies. Mr Brown referred to the passage from [61] – [62] of the Decision quoted above where the FTT said that there was no evidence that the withdrawals of cash were withdrawn to pay HB Interiors or that they were given to HB Interiors and there was also no evidence that Mr Noble met Mr Bettsworth to pay him. In our view, this contention is contradicted by the terms of the Decision. The FTT recorded Mr Noble's evidence that he met Mr Bettsworth at his home and sat down with all records and made full payment in cash to him in [47]. In the same paragraph, the FTT stated that there was "no evidence that those monies withdrawn were paid to HB at all". It is clear that the FTT understood Mr Noble's evidence on this issue. We consider that the FTT's statements in [47], [61] and [62] must be read as saying that there was no evidence to corroborate Mr Noble's evidence that he met and paid Mr Bettsworth. Although the FTT does not say so in terms, it is clear that the FTT did not accept Mr Noble's evidence on this point and no further evidence was provided.

38. Mr Brown pointed out that the FTT appeared to accept, at [49], that Mr Bettsworth had signed the payment receipts on behalf of HB Interiors. We agree that it seems that the FTT accepted that Mr Bettsworth had signed the receipts but that fact would not compel the FTT to conclude that Mr Bettsworth had made the supplies shown on the HB Interiors invoices. It is clear that the FTT was aware of the signed payment receipts but nevertheless concluded that the services were not supplied as described on the invoices.

39. Mr Brown criticised the FTT for taking into account the discrepancies between some of the HB Interiors invoices and the sub-contractors' payment certificates signed by Mr Bettsworth when they related to only a handful out of over 150 invoices and payment receipts and the differences were minor. We consider that if the FTT had based its conclusion that Mr Bettsworth had not made the supplies shown on the HB Interiors invoices solely on the discrepancies then Mr Brown's submission would have considerable force. It is clear, however, that the discrepancies were just one factor that caused the FTT to question the authenticity of the transactions recorded on the HB Interiors invoices. The FTT also took into account the fact that Mr Noble was unable to explain the invoice discrepancies. There was, in addition, other evidence (or a lack of evidence) that supported the FTT's conclusion.

40. Mr Brown also criticised the FTT for taking account, in [50], of the fact that Mr Noble could not explain the differences between the HB Interiors invoices provided to HMRC by Mr Bettsworth in support of his CIS application and the HB Interiors invoices held by Mr Noble. Mr Brown pointed out that Mr Noble had neither provided nor seen the invoices sent to HMRC at the time of supply. We agree that this point was irrelevant but it is not clear that the FTT relied on it and, even if they did, that would not be enough, by itself, to show that the FTT was not entitled to conclude that Mr Bettsworth did not make the supplies shown on the HB Interiors invoices.

41. Mr Brown suggested that, when it stated in [47] that the shortfall between withdrawals and payment had not been fully explained, the FTT did not take into account the fact that the events had taken place between six and nine years earlier so it was not surprising if Mr Noble's recollection of events had faded with the passage of time and that he no longer had any records because he had destroyed his personal business diaries and cash books. We consider that the FTT was clearly aware that the events which were the subject of the appeal had taken place some years before. The FTT, in [53], noted the lack of reliable and credible commercial records which would have been evidence of an audit trail and payments made gave reasons to doubt whether the transactions had taken place. In our view, the FTT were entitled to conclude that the absence of any coherent explanation or records cast doubt on the supplies having occurred as described on the HB Interiors invoices.

42. Mr Brown submitted that the FTT failed to take account of or give proper weight to the fact that HMRC had accepted that supplies had taken place for direct tax purposes. In [56], the FTT referred to the different requirements in relation to deductions for VAT and direct tax which Mr Brown said showed a misunderstanding of Mr Noble's case. Mr Brown contended that the FTT was wrong to ignore the fact that HMRC had accepted that supplies had taken place for the purposes of determining Mr Noble's direct tax liability. The FTT should have treated the fact that HMRC accepted that supplies had taken place for direct tax purposes but did not do so for VAT purposes as a relevant factor. Mr Brown pointed out that there was no reference to the direct tax negotiations in the Decision.

43. We accept that the FTT did not refer explicitly to the direct tax negotiations in the Decision. We find this understandable. Although a letter to HMRC from the Appellant's accountant complained vigorously that it was incoherent that the analysis of the payments seemingly accepted for direct tax purposes was not being accepted for VAT and input deduction purposes, it was not clear from the documentation provided to us (and we imagine not to the FTT) what had actually been agreed for direct tax purposes. There was no dispute that work had been carried out by Mr Noble and, therefore, that he must have engaged workers. It appears obvious that Mr Noble made payments for the labour provided by the workers. Theoretically, this could have happened in three ways, namely:

(1) Mr Noble employed the workers directly, in which case he should have deducted PAYE tax and NIC on making the payments but would not have incurred any VAT;

(2) the workers were self-employed persons engaged directly by Mr Noble, in which case he should have made deduction under the CIS on paying them but, again, would not have incurred any VAT unless the individuals in question were taxable persons (as defined in VATA94); and

(3) the workers were employees of HB Interiors who were seconded to Mr Noble, in which case he could pay HB Interiors, which had a CIS 6 certificate, without deduction under the CIS but paying VAT in addition.

44. Mr Noble had contended that the third possibility was the correct analysis and that this was supported by the HB Interiors invoices. On that scenario, Mr Noble had

not failed to account for PAYE tax or CIS deductions and was also entitled to deduct the VAT shown on the invoices. Before us, neither party was able to give any more detail about what had actually been agreed in the direct tax dispute (and we believe that the FTT was in the same position). Mr Noble's accountant recorded that:

> "The direct taxes aspect of the investigation has been concluded with the investigating office accepting that there was insufficient evidence with which to challenge the authenticity of the HB invoices."

The HMRC letter in response stated that "there may be acceptance on both Direct and Indirect taxes that a supply has taken place" but it did not indicate any acceptance by HMRC that the supplies were made by Mr Bettsworth and later referred to "the doubts about whether supplies were made by HB to your business or not".

45. It seems to us that the explanation of the distinction between the conclusions reached in the direct tax dispute and the VAT dispute is that, in the former, the challenges were dropped, not because it was clear that the third of the three possibilities mentioned in the previous paragraph had been established, but because HMRC felt that they had insufficient evidence to challenge the invoices. The issue in the appeal before the FTT was whether Mr Bettsworth had supplied the services shown on the HB Interiors invoices. Once there was no clear acceptance that HB Interiors supplied staff on a secondment basis, doubt was cast on the whole issue of whether Mr Bettsworth really supplied workers and whether the invoices were genuine. Once this position is reached, we consider that, while the FTT did not refer directly to the inconsistencies of which Mr Noble's accountant had complained, the FTT's repeated reference to the numerous doubts about the facts and the invoices entirely explain why they were unable to conclude that Mr Bettsworth had made any supplies of staff to Mr Noble. In seeking to claim the input tax deduction for the asserted supply, the burden fell on Mr Noble and the FTT concluded, for reasons that we cannot challenge, that he failed to establish that crucial point.

46. Mr Brown submitted that the FTT wrongly ignored evidence that indicated that Mr Bettsworth was a defaulting trader engaged in an output tax fraud. The FTT accepted, in [32], that the fact that Mr Bettsworth never filed any VAT returns suggested that there was no proper and compliant business activity. The FTT stated, in [33], that HMRC made several attempts to contact Mr Bettsworth but they were unsuccessful. Mr Brown contended that the FTT had ignored evidence of a telephone call between HMRC and Mr Bettsworth in which he acknowledged that he owed money to HMRC and was evasive about when it would be paid. If Mr Noble's appeal had been allowed, Mr. Bettsworth would be liable for £209,504 output tax. In the circumstances, it was not surprising that Mr Bettsworth did not appear as a witness for Mr Noble. Mr Brown said that there was no allegation that Mr Noble had involved in any fraud. He contended that the FTT should have concluded that Mr Bettsworth was committing a fraud and Mr Noble was the innocent victim. In our view, the FTT must have been aware of the possibility that Mr Bettsworth was engaged in fraud because it was discussed in the letter dated 31 March 2011 from HMRC which the FTT had before it. Whether Mr Bettsworth was committing a VAT fraud was, however, irrelevant to the issue of whether he made the supplies shown on the HB Interiors

invoices. We consider that the FTT correctly focussed on the question of whether the evidence showed that Mr Bettsworth made those supplies.

47. In conclusion, we consider that the FTT was entitled, on the basis of the evidence, to find that Mr Bettsworth did not supply the services shown on the HB Interiors invoices to Mr Noble and the Decision does not contain or reveal any error of law by the FTT.

Disposition

48. For the reasons set out above, we dismiss Mr Noble's appeal.

49. Mr Michael Jones, who appeared for HMRC, asked for costs in the event that the appeal was dismissed. We direct that Mr Noble shall pay the costs incurred by HMRC in relation to the appeal. If the parties are unable to agree any issue as to costs, then we direct that, within one month of the release of this decision, they are to serve on each other and on the Upper Tribunal written submissions on any remaining issue as to costs.

Greg Sinfield

Judge of the Upper Tribunal

Howard Nowlan

Judge of the Upper Tribunal

Release date: 16 June 2014