[2021] UKUT 296 (TCC)

Appeal number: UT/2020/0033

VAT – Penalty – Personal liability notice – whether FTT erred by deciding that HMRC had failed to prove the amount of the penalty – yes – as the relevant matter was not in dispute – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
-and-	
LAURENCE DONNELLY	**Respondent**

TRIBUNAL: MR JUSTICE MILES
JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, Rolls Building, London on 16 November 2021

James Puzey and Jenny Goldring instructed by The General Counsel and Solicitor for Her Majesty's Revenue and Customs for the Appellants

Etienne Wong, instructed by DLS Law for the Respondent

DECISION

1. Korum Wholesale Limited ("Korum") claimed credit for input tax said to have been incurred on purchases of 11 consignments of alcohol. It issued VAT invoices to its customer relating to averred supplies of the same alcohol. The FTT found that, by application of the principle in *Kittel v Belgium* (Case C-439/04 and Case C-440/04) [2008] STC 1537, Korum was not entitled to input credit on its purchases. HMRC sought a penalty under the provisions of Schedule 24 of the Finance Act 2007, recoverable from the appellant, Mr Donnelly, in his capacity as a director of Korum, for the inaccuracies in Korum's VAT returns.

2. In a decision (the "Decision") reported as *Laurence Donnelly v HMRC* [2019] UKFTT 655 (TC), the FTT concluded that, in principle, Mr Donnelly was liable for a penalty. However, it considered that the amount of penalty payable would depend on whether the supplies of the alcohol had actually taken place. If the supplies had taken place, the penalty would be properly charged at £379,864.98. However, if there had been no such supplies the penalty would be nil because, applying paragraph 6 of Schedule 24, the inaccuracy (in Korum's favour) consisting of Korum's overclaim of input tax would be cancelled out by an overstatement (in HMRC's favour) of the amount of output tax due on Korum's sales of the alcohol which had not taken place. There was a dispute as to the precise basis on which the FTT reached its conclusion which we will not determine in these introductory remarks. However, in essence, the FTT concluded that it was not satisfied that goods had been supplied, that accordingly HMRC had failed to establish that a penalty of £379,864.98 was properly payable and so allowed Mr Donnelly's appeal.

3. HMRC's appeal raises the question whether the FTT was entitled to make that decision in circumstances where both parties had been proceeding on the basis that the supplies of the alcohol had indeed taken place.

Relevant statutory provisions

Provisions relating to the penalties

4. The penalties in dispute are chargeable pursuant to the provisions of Schedule 24 of the Finance Act 2007 ("Schedule 24"). Paragraph 1 of Schedule 24 provides that a person (described as "P") is liable to a penalty if, among other matters, P submits a VAT return that contains an "inaccuracy" including an excessive claim for input tax credit. Where a penalty becomes payable pursuant to paragraph 1 of Schedule 24, the amount of that penalty is fixed by determining the appropriate penalty percentage and applying it to the amount of "potential lost revenue".

5. Paragraph 4 of Schedule 24 makes provision for a sliding scale of penalty percentage depending, among other matters, on whether the inaccuracy is "careless", "deliberate" or "deliberate and concealed". It is common ground that paragraph 4 of Schedule 24 produces a penalty percentage of 100% in the circumstances of this case which, as the FTT found, involved "deliberate and concealed" behaviour in the context of a purely domestic matter.

6. The penalty percentage must be applied to "potential lost revenue" which is calculated under rules set out in paragraphs 5 and 6 of Schedule 24 which provide, so far as material, as follows:

> **5 Potential lost revenue: normal rule**
>
> (1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.
>
> (2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to—
>
> > (a) an amount payable to HMRC having been erroneously paid by way of repayment of tax, and
> >
> > (b) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected.
> >
> > …
>
> **6 Potential lost revenue: multiple errors**
>
> …
>
> (2) In calculating potential lost revenue where P is liable to a penalty under paragraph 1 in respect of one or more understatements in one or more documents relating to a tax period, account shall be taken of any overstatement in any document given by P which relates to the same tax period.
>
> (3) In sub-paragraph (2)—
>
> > (a) "understatement" means an inaccuracy that satisfies Condition 1 of paragraph 1, and
> >
> > (b) "overstatement" means an inaccuracy that does not satisfy that condition.

7. Paragraph 6 was at the heart of the FTT's analysis. It concluded that, if supplies of the alcohol had not taken place, there was an "overstatement" as defined in paragraph 6(3)(b) consisting of Korum returning a liability to pay output VAT on supplies of alcohol which had never taken place. In arguing contrary to that conclusion before the FTT, HMRC had submitted that even if supplies of the goods had not taken place, Korum's act of issuing VAT invoices in respect of its supplies made it liable to pay the amounts stated on those invoices. Accordingly, HMRC submitted that, even if Korum had not actually effected any supplies of the alcohol, there was no "overstatement" falling within paragraph 6. It relied on paragraph 5 of Schedule 11 of the Value Added Tax Act 1994 ("VATA") in that regard which provides as follows:

> **5 Recovery of VAT, etc**
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> …
>
> (2) Where an invoice shows a supply of goods or services as taking place with VAT chargeable on it, there shall be recoverable from the person

> who issued the invoice an amount equal to that which is shown on the invoice as VAT or, if VAT is not separately shown, to so much of the total amount shown as payable as is to be taken as representing VAT on the supply.
>
> (3) Sub-paragraph (2) above applies whether or not—
>
> > (a) the invoice is a VAT invoice issued in pursuance of paragraph 2(1) above; or
> >
> > (b) the supply shown on the invoice actually takes or has taken place, or the amount shown as VAT, or any amount of VAT, is or was chargeable on the supply; or
> >
> > (c) the person issuing the invoice is a taxable person;
>
> and any sum recoverable from a person under the sub-paragraph shall, if it is in any case VAT be recoverable as such and shall otherwise be recoverable as a debt due to the Crown.

8. Paragraph 19 of Schedule 24 provides that officers of companies (such as Mr Donnelly who was a director of Korum at material times) can, in appropriate circumstances, be made liable for penalties that have been imposed on companies in respect of deliberate inaccuracies.

The Decision and the process by which it was made

The key conclusions contained in the Decision

9. The Decision is quite lengthy because the FTT needed to make findings on several factual matters that were in dispute. However, none of the FTT's findings of fact is challenged in the appeal before us. Accordingly, we can set out the FTT's salient findings of fact briefly as follows:

> (1) Korum's averred purchases and sales of the 11 consignments of alcohol were said to have taken place in its VAT periods 04/14, 07/14 and 10/14.
>
> (2) In its VAT returns for those periods, Korum claimed to have incurred input VAT of £399,857.88 on purchase of that alcohol from the proprietor of a business trading as Beehive Wine Stores ("Beehive"). It also claimed to have sold the alcohol on to PWG Micro Brewers Limited ("PWG") and declared output tax due of £400,659.88 in respect of those supplies.
>
> (3) Korum issued PWG with one or more VAT invoices purporting to evidence VAT of £400,659.88 arising on Korum's purported sales of the alcohol.
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> (4) The principle in *Kittel* applied to Korum's alleged purchases. Those transactions were connected to fraudulent evasion of VAT and Korum knew this to be the case. Accordingly, Korum was not entitled to credit for the input tax it claimed in connection with those transactions.
>
> (5) Korum's claim for input tax involved "inaccuracies", consisting of excessive claims for input tax credit, being present in its VAT returns for

the relevant periods. Those inaccuracies were both deliberate and concealed for the purposes of Schedule 24 with the result that the applicable penalty percentage was 100%.

(6) The requirements necessary for Mr Donnelly to be made personally liable for the penalty under paragraph 19 of Schedule 24 were all met. In particular, the deliberate inaccuracies in Korum's VAT returns were "attributable to" Mr Donnelly, who was the sole director of Korum at material times.

10. A recurring theme running through the Decision was the FTT's perception that certain of the matters that it needed to decide depended on whether there had actually been supplies of goods from Beehive to Korum, and from Korum to PWG. Accordingly, the FTT determined several issues on an "either/or" basis. For example:

(1) In paragraph [132], the FTT separated its analysis of whether Korum was entitled to the input tax credit it had claimed in its VAT returns, into the situation where supplies of the goods had taken place, and the situation where it had not. The FTT concluded that, in either situation, Korum was not entitled to that input tax credit.

(2) In paragraphs [136] to [155], the FTT considered the question of whether the "inaccuracies" in Korum's VAT returns (consisting of claiming input tax to which Korum was not entitled) were deliberate or not. At [155], it concluded that, whether or not the supplies had taken place, the inaccuracies were deliberate.

(3) Similarly, in paragraphs [157] to [160] the FTT considered the question of whether the inaccuracies were "concealed" under two subheadings : "(a) if there was no supply" and "(b) if there was a supply". At [161], the FTT concluded that whether or not the supplies had taken place, the inaccuracies were "concealed".

11. Thus far, the FTT's analysis produced the same answer whether the supplies had taken place or not. However, that was not the case with the determination of the "potential lost revenue". The FTT dealt with that issue at [165] to [228] of the Decision, also on the "either/or" basis that we have described, concluding:

> *Potential Lost Revenue – Conclusion*
>
> 227. As a result we conclude that if there was no supply there was no potential lost revenue and the maximum amount of the penalty is nil.
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> 228. On the other hand if there were supplies but *Kittel* applied, output tax remained due on KW's supplies and there was no overstatement within paragraph 6(2). On that basis the potential lost revenue was the amount of input VAT claimed and the maximum penalty was correctly calculated.

12. Therefore, the determination of a central issue in the proceedings, the calculation of the "potential lost revenue" that was a key ingredient in the determination of penalty chargeable depended, in the FTT's view, on whether the alcohol had been supplied or

not. At [112] to [124], the FTT addressed the question "Were the goods purported to have been sold actually supplied?" and concluded:

> 124. We find that the evidence does not show that it is more likely than not that KW made (or received) the supplies described in the 11 Deals.

13. The reasoning that we have set out thus far drove the FTT to set out its conclusions on the appeal as a whole on an "either/or" basis. At [245], it dealt with the position if "each Deal involved a supply of goods by KW". In that case, the FTT said that it would dismiss Mr Donnelly's appeal (see [246]).

14. At [247], the FTT set out its conclusions "[o]n the basis that each of the Deals did not involve a supply of goods by or to KW". In that case, the FTT said that it would allow the appeal (see [248]) for two essential reasons:

> (1) In such a case, as well as making an inaccurate understatement, Korum had made an inaccurate overstatement which, by operation of paragraph 6 of Schedule 24, caused the penalty assessable to be nil (see [247(7)] and [247(8)]).
>
> (2) In any event, if there had been no supply of the alcohol either to or by Korum, it would be disproportionate to impose a penalty because Korum's true net VAT liability was nil, reasoning by analogy with the decision of the Court of Justice of the European Union in Case C-712/17 *EN.SA Srl* v *Agenzia Delle Entrate–Direzione Regionale Lombardia Ufficiio Contenzioso*.

15. The FTT concluded the operative part of its decision at [249] and [250]:

> 249. The onus is on HMRC to prove the amount of the penalty in an appeal of this nature. They therefore need to prove that there was a supply. For the reasons given above we were not persuaded that it was more likely than not that the Deals did involve a supply of goods. Therefore we conclude that no penalty can be apportioned to Mr Donnelley.
>
> 250. The appeal is allowed.

The process by which the Decision was made

16. Before the hearing before the FTT, neither party had sought to argue that supplies of the alcohol had not taken place.

17. Mr Donnelly's case before the FTT was set out in his Notice of Appeal dated 24 November 2016. His pleaded case was entirely inconsistent with an assertion that no supplies of the goods had taken place. Indeed he positively averred, in paragraph 5(i) of his Notice of Appeal, that the alcohol had been transported direct from Korum's supplier, Beehive, to its customer PWG. He stated, in paragraph 5(iii) that the alcohol was stored in a bonded warehouse and covered by a policy of insurance while so stored.

18. HMRC's case before the FTT was pleaded in its Statement of Case dated 27 February 2017. In that Statement of Case, HMRC positively averred that the supplies had taken place. For example in paragraph 66, HMRC pleaded that:

> Korum made 11 purchases over three quarterly VAT periods, 04/14, 07/14 and 10/14 which traced back to fraudulent tax losses.

19. Clearly, if no supplies of the alcohol had actually been made, those supplies, being non-existent, could not be "traced back" to anything. Moreover, if HMRC were averring that there had been no supply of alcohol to Korum, it would not need to invoke the principle in *Kittel* to establish that Korum had no entitlement to input tax credit associated with those supplies. HMRC's positive reliance on the supplies taking place is demonstrated by paragraph 77 of their Statement of Case:

> 77. The transactions were undertaken on a back-to-back basis for the same amount of goods and the same product. Korum was able in a short period of time to match its customers' order to its supplier's available stock and was never left holding excess stock.

20. The FTT gave the parties warning, before releasing the Decision, that it was considering reaching a conclusion that the supplies had not taken place. The oral hearing before the FTT ended on 30 April 2019 with closing submissions to be made in writing. On 4 May 2019, the FTT gave the parties a note setting out some issues on which it would particularly like to receive submissions. Point 3 of that note read:

> 3. Some of the evidence might support a contention that some of the goods which were the subject of some of the invoices in relation to which HMRC have denied input tax did not exist. We assume that the Appellant contends that the goods existed: is that correct? Does HMRC argue to the contrary or in the alternative? On whom does the burden of proof lie?
>
> If the goods did not exist no VATable supply was made by or to KWTL. In such a case, do HMRC contend the amount of the inaccuracy in respect of which the penalty was charged is the amount of the input tax notwithstanding that there was an equal and opposite overdeclaration of output tax?

21. HMRC dealt with some, though not all, of these points in their written closing submissions delivered on 21 May 2019. They confirmed that they were not arguing that the goods did not exist. They submitted at 2.120 of their written closing submissions that, even if it was found that a supply did not take place, Korum would still have made no overdeclaration of output tax because, in such a case, paragraph 5 of Schedule 11 meant that output tax would still be due because of Korum's issue of VAT invoices. HMRC did not, however, deal fully with the FTT's question about the burden of proof. They accepted that they bore the burden of establishing that there was a "deliberate and concealed" inaccuracy in Korum's VAT returns. However, they did not say whether, if the amount of penalty did depend on whether a supply had taken place or not, HMRC or Korum bore the burden of proving that the supply had taken place.

22. Mr Donnelly's written closing submissions did not engage at all with the FTT's point 3. They did not contradict the FTT's "assumption" that Mr Donnelly was asserting

that the goods did exist. They did not seek to contradict any assertions that Mr Donnelly had raised in his Notice of Appeal. Indeed Mr Donnelly stated at 1.39 of his written closing submissions that:

> From the evidence given by Mr Matthew J Eaton, it is clear that Global Foods Limited did in fact receive goods which were supplied by PWG.

That was a statement as to a supply by PWG. However, if PWG had not received the alcohol from Korum, it plainly could not have supplied the alcohol to its own customer, Global Foods Limited.

23. On 12 August 2019, while the FTT was still considering its decision, it issued directions requesting further submissions from the parties. Paragraph 3 of those directions started:

> 3. The parties are asked to provide their views on the following argument which is based on the proposition that it was not shown to the satisfaction of the tribunal that it was more likely than not that there were supplies to, or by, KWTL in any of the 11 deals.
>
> > (1) In HMRC's opening submissions it is accepted that the burden of proof as regards the amount of the penalty rests on HMRC. Thus HMRC have the burden of proof that the amount of the penalty is correct even it is not shown that there were such supplies.

24. Paragraph 3 then continued with a detailed analysis of a line of reasoning, similar to that ultimately contained in the Decision, to the effect that, if there was no supply by Korum, then Korum would have overstated its liability to output tax with the result that the "potential lost revenue" for the purposes of the penalty would also be nil. Paragraph 3 also set out an analysis to the effect that paragraph 5 of Schedule 11 of VATA did not alter this conclusion, effectively giving notice to HMRC that the FTT was minded to reject HMRC's arguments based on paragraph 5.

25. HMRC responded to these directions reiterating their position that supplies of the alcohol had been effected. They also addressed the FTT's detailed analysis of the determination of "potential lost revenue" and of paragraph 5. Mr Donnelly made no submissions in response to the FTT's directions.

The grounds of appeal against the Decision

26. HMRC applied to the FTT for permission to appeal. They gave their grounds of appeal in narrative form ordered under four headings:

> (1) Ground A was developed under the heading of "Procedural Irregularity and Unfairness". An aspect of HMRC's argument was that it was "wrong in principle for the FTT to decide [the amount of "potential lost revenue"] on a basis that neither party was advancing".
>
> (2) Ground B was developed under the heading of "The Burden of Proving the Existence of the Goods". In their submissions, HMRC observed:

> 13…The FTT held that the Commissioners bore the burden of proving the existence of the goods (FTT §249) and had failed to do so. The Commissioners had accepted in their opening submissions that they bore the burden of proving that the VAT returns of Korum were inaccurate. This acceptance was repeated in the written closing submissions of the Commissioners dated 21 May 2019. In the circumstances of this case, however, that could not have been properly taken to be an acceptance of responsibility to prove the existence of the goods. This is because that had never been an issue between the parties before; it was a matter within Mr Donnelly's direct knowledge and, in any event, the Commissioners are not, as a matter of law, required to prove that a particular supply has taken place…
>
> 18. This ground of appeal is linked to the procedural unfairness point raised above. If the Commissioners had understood at the outset of the hearing that the very existence of the goods was a live issue for the Tribunal and that by accepting the burden of proving an inaccuracy they were accepting the burden of proving that the goods existed, the whole focus of the Commissioners' case would inevitably have been different. Further evidence could and would have been sought to address the concerns of the FTT.

(3) Ground C was developed under the heading of "Whether There Are Two Inaccuracies or One?". This ground involved a challenge to the FTT's conclusions that, if there had been no supply of the alcohol, Korum's VAT returns contained an overstatement of output tax due on its non-existent supplies of that alcohol.

(4) Ground D was developed under the heading of "The Proportionality of the Penalty" and involved a challenge to the FTT's conclusion that the penalty was disproportionate that we have set out in paragraph [14(2)] above.

27. The FTT gave permission on Grounds B, C and D. However, it refused permission on Ground A and HMRC did not renew their application for permission to appeal on Ground A to the Upper Tribunal. It follows that HMRC's permissible arguments before the Upper Tribunal are limited to those comprised within Grounds B, C and D.

HMRC's Grounds of Appeal considered

Ground B

28. In their written and oral submissions HMRC put forward two distinct but related propositions in support of their Ground B. First, they argue that the FTT was wrong to allocate the burden of proving that supplies had taken place to HMRC since this was a matter within Mr Donnelly's knowledge, rather than their own. They submit that, by paragraph 16 of Schedule 24, an appeal against a penalty is to be treated as an appeal against an assessment and that, on an appeal against an assessment, a taxpayer rather than HMRC would have the burden of proving that supplies took place. Those were submissions about the allocation of burden of proof in general. Second, HMRC argue that, in the circumstances of this case, it was common ground between the parties that

the supplies had taken place. In those circumstances, it was wrong for the FTT to allocate the burden of proving that fact to HMRC and also wrong for the FTT to conclude that the burden was not met.

29. Mr Donnelly characterised HMRC's second strand of argument as an impermissible attempt to advance arguments of procedural unfairness, falling within Ground A on which permission was refused. We reject that submission and conclude that HMRC are entitled in this appeal to advance both arguments set out in paragraph [28] above.

30. We acknowledge that there is an overlap between HMRC's second argument and Ground A since both involve HMRC expressing dissatisfaction with the FTT's conclusion that HMRC's failure to prove a fact that was common ground between the parties resulted in the penalty not being due. However, the fact that there is an overlap does not mean that HMRC's second proposition falls exclusively within the province of Ground A, on which permission to appeal was refused. Ground B entitles HMRC to challenge the way the FTT allocated the burden of proof. That Ground necessarily requires an examination of what precise burden the FTT allocated. HMRC's second argument summarised in paragraph [28] appropriately focuses on the nature of the burden being allocated. In essence, HMRC say that the FTT was wrong to impose on HMRC the burden it did because that burden required HMRC to prove a factual proposition that had hitherto been common ground between the parties.

31. We consider that this argument falls within a fair interpretation of Ground B on which HMRC have permission to appeal. We are reinforced in that conclusion by the fact that HMRC expressly mentioned in their grounds of appeal that Ground B involved, in part, arguments to the effect that it was common ground that supplies of the alcohol had taken place. Mr Donnelly could have been in no doubt that, even though permission to appeal had been refused on Ground A, these arguments would feature prominently in HMRC's submissions on Ground B.

32. We consider HMRC's second argument set out in paragraph [28] to be compelling. As we have demonstrated in paragraphs [16] to [19] above, in advance of the hearing, both parties were positively asserting that such supplies had taken place. The parties both confirmed this to be their position even after the FTT gave the parties its note of 4 May 2019: HMRC by continuing to make a positive assertion to this effect and Mr Donnelly by submitting closing submissions that did not correct the FTT's "assumption" to this effect and indeed referred specifically to the existence of the alcohol.

33. In short, the parties' common position throughout was that supplies of the alcohol had taken place. Accordingly, that fact was established without any need for proof. No proof being needed, there was no "burden of proof" to be allocated on this issue. The proceedings before the FTT were adversarial and accordingly it was for the parties to decide which issues of fact and law they wished to contest. It was for the tribunal to decide the contested issues, not the agreed ones. Where the parties to adversarial proceedings agree an issue it is not the function of the tribunal to go behind that agreement and undertake its own investigation or reach its own independent

determination about the issue. The FTT should not place an onus on one or other party to prove an agreed fact.

34. Mr Donnelly argues that the FTT's actual finding was that HMRC bore the burden of proving that there was a supply of the goods, rather than of proving that the goods existed. He submits that the question whether there was a supply involved propositions of law, whereas the question whether the goods existed was one of pure fact. Therefore, he argues that a proper reading of the Decision demonstrates that HMRC lost before the FTT, not because they failed to prove factual matters on which they had the burden but rather because their legal submissions failed to persuade the FTT. We agree with HMRC, however, that this argument involves the advancement of a distinction without a difference.

35. As we have explained, at [112] to [124] of the Decision, the FTT considered the question "Were the goods purported to have been sold actually supplied?". It answered this question by examining factual evidence. It had earlier concluded, at [48], again as a factual matter, that both Mr Galvin (a director of PWG) and Mr Donnelly knew that the goods did not exist and were lying in saying otherwise. The FTT's conclusion at [124] was that it was not satisfied that "KW made (or received) the supplies described in the 11 Deals". The FTT's conclusion as to the absence of a supply was therefore driven by its conclusion on factual matters and not by an evaluation of the strength of the parties' submissions on legal issues. In any event, whatever the precise reasoning that led the FTT to its conclusion does not matter greatly. What is significant is that the FTT's conclusion was completely at odds with the agreed position of the parties.

36. Mr Donnelly argued that, read properly, the Decision allocated to him, rather than to HMRC, the burden of proving the existence of the goods. We consider that this submission misses the basic point that there was no proper role for any burden of proof on an issue which was common ground between the parties. We also consider that argument flies in the face of the decision the FTT actually made. It is true that the FTT based its factual conclusion, that the goods did not exist, on its conclusion that Mr Donnelly was giving untrue evidence. But it does not follow that the FTT was allocating the burden of proof on Mr Donnelly. The reasoning in the Decision is clear. The FTT considered that it mattered greatly whether supplies of the alcohol had taken place or not. If those supplies had taken place, HMRC were entitled to the penalty they had charged ([245] and [246]). If the supplies had not taken place, HMRC were entitled to no penalty ([247] and [248]). It was for HMRC to prove the correct amount of penalty. Since they could not prove that the supplies had taken place, they could not prove they were entitled to any penalty ([249]). It is not arguable that this involved an allocation of any relevant burden of proof to Mr Donnelly.

37. Nor do we accept Mr Donnelly's submissions that HMRC voluntarily assumed the burden of proving that supplies took place, in the process of engaging with the FTT's two rounds of questions sent after the oral hearing. As we have explained, HMRC could not have done so as, since no proof was needed of matters that were common ground, there was no burden that they could assume, voluntarily or otherwise. Moreover, the dialogue between the parties and the FTT took place after all evidence had been submitted and tested in cross-examination. HMRC did not in their post-hearing

submissions assume the burden of proving that there had been supplies. Proving this did not arise as it was common ground that there had been supplies. That was the agreed basis on which the dispute had proceeded and the FTT was wrong to go behind it.

38. We allow HMRC's appeal on Ground B.

Other Grounds

39. In his oral submissions on behalf of Mr Donnelly, Mr Wong suggested that we should determine the other grounds of appeal, even if we allowed the appeal on Ground B, as that would help us to remake the Decision in exercise of our powers under s12 of the Tribunals, Courts and Enforcement Act 2007. We do not agree. In this case, the FTT has stated expressly at [245] and [246] of the Decision how it would have determined the case if the supplies had taken place. Grounds C and D involve no challenge to that aspect of the FTT's reasoning and Mr Donnelly has not made any challenge to the reasoning in those paragraphs in a Respondent's notice. Accordingly, we agree with HMRC's submission that any consideration of Grounds C and D would be purely academic in the circumstances and we will not deal with those grounds of appeal.

Disposition

40. For the reasons set out above, we allow the appeal. We will set the Decision aside and remake the Decision with the outcome set out in paragraph [245] and [246] of the Decision, namely that Mr Donnelly's appeal against the penalty is dismissed.

Signed on Original

MR JUSTICE MILES
JUDGE JONATHAN RICHARDS

RELEASE DATE: 26 November 2021