



[2014] UKUT 0061 (TCC)

Appeal number: FTC/29/2013

VALUE ADDED TAX — input tax — whether supplies made — whether First-tier Tribunal's decision provided adequate reasons for finding that supplies not made — yes — appeal dismissed

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

REDDROCK LIMITED

Appellant

- and -

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

Respondents

**Tribunal: Hon Mr Justice David Richards
Judge Colin Bishopp**

Sitting in public in London on 27 January 2014

Oliver Powell, counsel, instructed by Altion Law Limited, 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

1. This is an appeal by the taxpayer, Reddrock Limited (Reddrock), against a decision of the First-tier Tribunal (FTT) (Judge John Walters QC and Julian Stafford) dated 12 January 2012. By its decision, the FTT rejected Reddrock's appeal against the decision of the Commissioners for HM Revenue and Customs (HMRC) to disallow claims for input VAT in a total amount of about £273,000.

2. Although the initial decision of HMRC to disallow the claims was based primarily on the ground that the relevant invoices did not comply with the applicable VAT regulations, a further ground for the decision was that HMRC was not satisfied that the supplies to which the relevant invoices related had in fact taken place. Before the FTT and in the preparation of the appeal to it, this latter ground became the principal issue and it was on this ground that the FTT rejected Reddrock's appeal.

3. Permission to appeal was refused by the FTT and was refused on paper by the Upper Tribunal (Judge Berner). Following a renewed oral hearing in March 2013, Judge Sadler granted permission to appeal, limited to the following two grounds:

1. That the First-tier Tribunal erred in law in that in reaching its decision (including evaluating the evidence of Richard Galvin) it failed to give proper consideration to the witness evidence of those witnesses (other than Richard Galvin) produced by the Applicant and to give adequate reasons for rejecting such evidence.

2. That the First-tier Tribunal erred in law in granting an order in respect of costs against the Applicant under Rule 10(1)(b) of the FTT Procedure Rules.

4. Reddrock was incorporated on 16 February 2007 and registered for VAT with effect from 1 June 2007. In its application to register for VAT, its main business activity was described as property refurbishment and development. In response to a request from HMRC its activities and supplies or intended supplies were described as "general builders, plant hirers and material suppliers, e.g. aggregates/ducts (materials kept at out buildings)". It is common ground that in respect of the period relevant to the present case, Reddrock had not undertaken any construction or refurbishment activity.

5. At all material times the sole director of Reddrock was Richard Galvin.

6. The disputed claims for input tax were made in Reddrock's VAT returns for the five quarters commencing in February 2008. The claims were made in respect of 54 invoices rendered by a total of 4 companies. It is common ground that there was a close connection between Richard Galvin and each of those companies. Brief details of the invoices and companies are as follows.

7. Cable Contract Services Limited (CCS), which later changed its name to Altion Limited, was named as the company issuing three invoices in June, July and August 2007. The invoices were stated to be in respect of "Plant Hire at Various Locations", and charged for specific hours for specific items of plant and also "Consumables".

The total input VAT is shown at approximately £44,000. The directors and shareholders of CCS were Richard Galvin and his son Anthony Galvin.

8. J Fowler (Pinner) Limited (Fowler) was named in 21 invoices bearing dates between December 2008 and February 2009. The invoices were in respect of the supply of listed builders' materials and "gas oil". The total amount of input tax shown on these invoices is approximately £51,500. The owner and director of Fowler was Michael Galvin, Richard Galvin's brother.

9. One Vision Corporation Limited (One Vision) was named in 19 invoices with dates between May 2008 and November 2008. Four of these invoices were stated to be in respect of "negotiation/consultancy work carried out to assist in the purchase of" four separate properties. The rest were in respect of "materials and plant supplied". The total amount of input tax involved was approximately £128,000. One Vision was owned by Stephen Donnelly and its directors were or included Mr Donnelly and Richard Galvin. Mr Donnelly and Richard Galvin are friends who have known each other for about 27 years.

10. MJJ Electrical Services Limited (MJJ) was named as the supplier in 11 invoices dated between December 2007 and August 2008. The invoices were stated to be variously for the supply of plant and materials or materials. They showed a total amount of input tax of approximately £49,000. At all material times MJJ was owned by Mr Donnelly.

11. The onus of establishing its entitlement to recover input tax in respect of these supplies rested on Reddrock before the FTT. It was therefore necessary for Reddrock to establish, on the balance of probabilities, that the relevant supplies had in fact been made.

12. There was no direct documentary evidence to support the validity of the invoices, other than the invoices themselves and, in some cases, the written record of orders made. The FTT commented in its decision at [12] that it would have expected to see other contemporaneous documentary evidence of the supplies and orders and that, in the absence of sufficient satisfactory documentary evidence, Reddrock needed to rely on the evidence of its witnesses, and in particular the evidence of Richard Galvin, in order to discharge the burden of proof as to the validity of the invoices. There is no challenge to this conclusion.

13. Reddrock served statements from five witnesses: Richard Galvin, Michael Galvin, Anthony Galvin, Mr Donnelly and Philip Harris. Mr Harris is a chartered accountant who has acted for some time for Richard Galvin and his wife and their companies. Three of these witnesses gave oral evidence and were cross-examined: Richard Galvin, Anthony Galvin and Mr Donnelly.

14. As regards the evidence of Michael Galvin and Mr Harris, the FTT at [9] stated that they had not been called by Reddrock to give evidence and that therefore counsel for HMRC had no opportunity to cross-examine them. The FTT continued, "In all the circumstances of the case we afforded little weight to their written evidence."

15. We do not consider that there can be any valid criticism of this approach. The witness statement of Mr Harris in fact contained no evidence which went directly to whether the relevant supplies had been made and whether the invoices were valid. The three-page statement of Michael Galvin contained in one paragraph (paragraph 5 15) evidence which concerned the supplies and the invoices. He there stated that Richard Galvin had supplied him with copies of the 21 invoices in which Fowler was named and that “I can confirm that all of the materials were supplied” to Reddrock’s yard at an address which is given. HMRC do not accept that Reddrock had a yard at the address given by Michael Galvin and they would for that and other reasons have 10 wished to cross-examine Michael Galvin on this brief evidence. Michael Galvin was available to give evidence and indeed was present for two out of the three days of the hearing. No explanation has been given as to why he was not tendered for cross-examination. In a case which turns almost exclusively on the evidence of the witnesses, the FTT was in these circumstances right to afford “little weight” to 15 Michael Galvin’s written evidence.

16. The only written evidence giving more than the most cursory account of the relevant supplies was contained in the statement of Richard Galvin. Even then the great bulk of the statement is taken up with matters which are not directly relevant to the issue. Richard Galvin was cross-examined by counsel for HMRC, Michael Jones, 20 who has also appeared on their behalf on this appeal.

17. The FTT found Richard Galvin’s evidence “unsatisfactory and unreliable in a number of respects”, analysing it in detail in [15]-[26] and in [27] and [32] of the Decision. There is no challenge to this analysis of Richard Galvin’s evidence nor to the conclusion that it was unsatisfactory and unreliable.

25 18. The appeal therefore boils down to a challenge to the treatment of the evidence given orally and in writing by Anthony Galvin and Mr Donnelly.

19. Anthony Galvin is a non-practising barrister. He worked with his father in CCS. In 2006/07 they decided to split the development and construction business being carried on by CCS from its legal and consultancy work. The latter continued in CCS, 30 re-named Altion Limited, which was run by Anthony Galvin. Reddrock was established to carry on the refurbishment and development business, run by Richard Galvin. Anthony Galvin’s statement runs to 8 pages and 33 paragraphs. None of it, however, deals directly with the disputed supplies and invoices. In answer to a question put to him early in cross-examination, he confirmed that he could offer no 35 direct evidence on the issue whether the supplies in question had been made. It was nonetheless submitted to us that Anthony Galvin’s evidence was relevant because it established that Reddrock had been involved in projects relating to four properties. This was said to be relevant because a number of the invoices in issue related to the supply of materials, plant and machinery to those properties. However, it was 40 accepted by Reddrock that the projects in question had never come to fruition and no construction work had taken place. Accordingly, the evidence as to the existence of the projects did not help to establish that the disputed supplies had in fact taken place.

20. While it is true that the decision of the FTT does not expressly address the evidence given by Anthony Galvin, we can see no good reason why it should have done. Anthony Galvin gave no evidence which was germane to the issue which the FTT had to decide.

5 21. The witness statement of Mr Donnelly runs to 7 pages and 30 paragraphs. The great bulk of it is irrelevant to the issue in this case and is notable mainly for its invective against HMRC in general and one of their officers in particular. The only paragraph of any relevance is as follows:

10 “27. As to the questions regarding supplies to Reddrock, I can see from his files and his witness statement that Richard [Galvin] has explained this over and over again. I have plenty of experience of Mr Wells [the HMRC officer] not listening to explanations so this doesn’t surprise me. All I can say is that supplies were made and what Richard has said to date is correct. If I need to clarify anything else I will do so in the hearing under oath.”

15 It is the barest of assertions and it provides no corroborative detail at all. While Mr Donnelly does not expressly say so, the supplies to which he there refers must presumably be those made by the companies run by him, namely One Vision and MJJ, as he would not obviously have any knowledge relevant to supplies said to have been made by CCS or Fowler.

20 22. The decision of the FTT does address the evidence given by Mr Donnelly in relation to the alleged provision of a report by One Vision to Reddrock. His evidence is considered at [23] and rejected. The FTT found that the report which Mr Donnelly alleged had been provided by One Vision never existed.

25 23. In these circumstances, is the absence of any express consideration by the FTT in its Decision of the corroboration of Richard Galvin’s evidence given in one sentence of paragraph 27 of Mr Donnelly’s statement such as to amount to an error of law, undermining the decision of the FTT and requiring the case to be remitted for re-hearing?

30 24. Both counsel referred us to a number of authorities concerning challenges to decisions on the grounds that inadequate reasons for the decision had been given. Some of those authorities are concerned with alleged insufficiencies in findings of fact, which lie at the heart of this appeal. It is the primary task of a fact-finding tribunal to make findings on the issues of fact arising in the case before it and to express its conclusions on the evidence before it necessary to reach the relevant findings of fact. This, we consider, is encapsulated in a statement made in one of the authorities to which we were referred. In *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, Lord Phillips of Worth Matravers MR said at [19]:

40 “It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues

the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

25. In its decision in the present case, the FTT identified clearly and in detail the reasons why it rejected the evidence given by Richard Galvin. It also considered in some detail a specific piece of evidence given by Mr Donnelly going to a relevant matter and, for the reasons given in the Decision, it rejected his evidence on that matter. The criticism that remains is that the FTT did not expressly address the brief statement of corroboration given by Mr Donnelly in his statement. He was cross-examined and his evidence was challenged but there has been no suggestion that he gave any further evidence on the issue of the disputed invoices which the FTT should have addressed in its Decision. Nor was any reliance placed on his brief corroboration in the closing submissions of Reddrock to the FTT. In fact, it was HMRC which drew attention in their closing submissions to passages in Mr Donnelly's oral evidence which contradicted Richard Galvin's evidence.

26. We are satisfied in these circumstances that Mr Donnelly's very general statement did not add materially to the evidence in support of Reddrock's case. Having considered in detail Richard Galvin's evidence and rejected it and having rejected Mr Donnelly's oral evidence on the report allegedly supplied by One Vision to Reddrock, his general statement was neither "vital" nor "critical" (to use the words of Lord Phillips) to the FTT's decision. Having identified at the start of the Decision the witnesses who gave evidence, and having expressly rejected Mr Donnelly's evidence on the question of the report, no reader of the FTT's decision could be in any doubt that, having comprehensively rejected Richard Galvin's evidence, the FTT found no support for Reddrock's case in the evidence of Mr Donnelly.

27. While it would no doubt have prevented this unmeritorious appeal if the FTT had specifically referred to and rejected Mr Donnelly's general statement of corroboration, we are satisfied that it provides no ground for setting aside the FTT's decision. We therefore dismiss Reddrock's appeal on this ground.

28. The second ground for the appeal relates to the order for costs made by the FTT. While in general orders for costs are not made by the FTT, rule 10(1) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 gives the tribunal a discretion to make an order in respect of costs in the cases there specified. The case specified in paragraph (b) of rule 10(1) is:

"If the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings."

29. The ground on which the FTT made an order for costs in favour of HMRC was that Reddrock acted unreasonably in bringing the appeal in circumstances where it

knew that the supplies in issue had not in fact taken place. This appears to us to be a compelling ground on which to exercise the discretion to order costs. As Reddrock has failed in its appeal on the substantive ground and we have upheld the decision that the alleged supplies in fact never occurred, there is no basis for interfering with the exercise by the FTT of its discretion to make an order for costs against Reddrock.

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30. Accordingly, we dismiss the appeal.

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Hon Mr Justice David Richards

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**Colin Bishopp
Upper Tribunal Judge
Release Date: 10 February 2014**

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