[2021] UKUT 0030 (TCC)

Appeal number: UT/2019/0066 (V)

VAT – whether HMRC as a matter of EU law entitled to deny recovery of input tax claimed on invalid invoices - whether it was unreasonable for HMRC to refuse to exercise their discretion to allow the deduction of input tax in respect of the invalid invoices - Articles 168(a), 178(a), 180 & 226 Principal VAT Directive - Regulations 14 and 29 VAT Regulations 1995

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TOWER BRIDGE GP LIMITED **Appellant**

- and -

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

TRIBUNAL: Mr Justice Fancourt
Judge Timothy Herrington

Hearing conducted remotely by video conference deemed to be held in London on 14 and 15 December 2020

Nicola Shaw QC and Michael Jones, Counsel, instructed by Pinsent Masons, Solicitors, for the Appellant

James Puzey, Howard Watkinson and Joshua Carey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

that the carbon credits in question were actually provided as inputs by Stratex, as a taxable person, for the purposes of CFE's own transactions subject to VAT, in respect of which CFE has actually paid VAT. Tower Bridge has also satisfied HMRC as to the amount of VAT that was charged to and paid by CFE.

164. Accordingly, in these circumstances Ms Shaw submits that Tower Bridge has a directly effective right to deduct the input tax incurred in respect of the Stratex transactions, irrespective of the formal requirements for its exercise, and that that right must be given effect in domestic law. Insofar as UK law is inconsistent with that right, by requiring a person to hold a VAT invoice containing the particulars listed in Regulation 14 VATR notwithstanding that the substantive conditions for the deduction of tax have been shown to be met, it must be made to conform with EU law.

165. It follows, Ms Shaw submits, the FTT erred in law in concluding otherwise. In particular, Ms Shaw submits that the FTT made the three following errors of law in its reasoning.

166. First, at [198] where it said that there is no binding authority that domestic law under Regulation 14 VATR, as it implements Article 226 of the PVD, must be disapplied and that the FTT should give direct effect only to the substantive requirements of Art 168 in the circumstances of a case such as this. Ms Shaw submits that *Senatex*, *Ecotrade*, *Barlis*, *Polski Trawertyn* and *Vădan* are all authority for the contrary position.

167. Second, at [202], [204], [208] and [212] to [216] in placing the reliance it did on Henderson LJ's judgment in *Zipvit*. In particular:

(1) It was a central part of the FTT's reasoning that the fact that Stratex did not account for the VAT shown on the Stratex Invoices was relevant to the right to deduct input tax. However, it is irrelevant to the right to deduct input tax that Stratex did not account for the VAT. The FTT was, therefore, wrong to conclude that payment of the VAT by the supplier is a fundamental requirement of the right to deduct.

(2) The FTT was wrong to conclude that Tower Bridge's general proposition that once the substantive requirements are met the right to deduct can be exercised regardless of failures to comply with the invoicing requirements is inconsistent with Henderson LJ's judgment in *Zipvit.*

(3) The FTT was wrong to say that a failure to comply with a fundamental requirement relating to payment of the relevant tax cannot be dispensed with and that provision of an invoice that complies with those fundamental requirements is essential to the proper performance by HMRC of their monitoring functions in relation to VAT and is needed as evidence that the supplier has duly paid or accounted for the tax to HMRC.

(4) The FTT understood Henderson LJ to be laying down as a "necessary precondition for the exercise of the right to deduct" a requirement that the taxpayer evidence payment by its supplier of the relevant VAT. That

requirement was one that Tower Bridge could not satisfy, and it was wrong to read Henderson LJ's judgment in this way. What Henderson LJ should be taken to be saying is that information as to the rate of VAT and amount of VAT payable is necessary in circumstances where it was clear that no output tax would have been paid, since both parties considered the supplies in question to be exempt and the invoices reflected that. He should not be taken to be saying that the right to deduct is dependent upon the supplier accounting for the VAT or on the taxpayer evidencing the same. Indeed, he expressly accepts that it is not.

168. Third, in its conclusions at [209] and [210] that including the VRN and the customer's name were "fundamental" requirements of VAT invoices, and that those requirements which are necessary for the taxing authority to monitor payment by the supplier of the tax in question have not been met, with the consequence that a necessary precondition for the right to deduct remains unsatisfied.

169. Ms Shaw submitted in that regard:

(1) Unlike in *Zipvit*, the requirements of Article 226(9) and (10) were met. Further, HMRC were provided with the information necessary to establish that the substantive requirements for the right to deduct were met.

(2) *Senatex* was specifically concerned with the requirement in Article 226(3) for an invoice to show the supplier's VRN. It is clear CJEU authority that the absence of that particular, like those particulars in Article 226(6) and (7), cannot be used to deny deduction if the tax authorities are supplied with the information necessary to establish that the substantive requirements of the right to deduct are satisfied. There is no authority for the proposition that the inclusion of the VRN, which is a technical requirement, can never be dispensed with. Likewise, as regards the requirement to identify the customer (Article 226(5)), the CJEU has confirmed that it is of a similar nature: see *Polski Trawertyn***.** Accordingly, there is clear authority that the requirements in issue in this case can be dispensed with, as per the principle set out in *Barlis*.

(3) The purpose of the formal conditions is to enable the revenue authorities to monitor payment of the tax due and the existence of the right to deduct VAT. As such, where the revenue authorities have the information necessary to establish that the substantive conditions have been satisfied, the right to deduct cannot be denied solely on the basis that the invoice does not satisfy some of the formal conditions in Article 226.

(4) The Stratex Invoices recorded the name and address of the supplier and identified the goods which had been supplied to CFE as well as the VAT rate applied and the VAT amount payable. As such, and notwithstanding the absence of a VRN and the name of the customer, HMRC were still in a position to audit the transactions, as they in fact did.

170. It will be readily apparent from our distillation of the principles to be derived from the authorities, as summarised at [160] above, that in substance Ms Shaw's submissions are not supported by the authorities on which she relies.

171. In essence, Ms Shaw's submissions are predicated on the proposition that where a taxable person holds a non-compliant invoice, once evidence has been provided that the substantive conditions that give rise to the right to exercise the right to deduct have been satisfied, the taxable person must be permitted to exercise that right without more, except in a case like *Zipvit* where it is clear that no VAT was charged by the supplier.

172. As we have said that proposition is not established by the authorities relied on by Ms Shaw. On the contrary, as we have said, the authorities make it clear that the requirements for a valid VAT invoice are mandatory, subject to the domestic authority's power to accept other evidence instead of a compliant invoice. The "formal" requirements in Article 226 have twin objectives, first to prove the existence of the taxpayer's right to deduct and second to perform an "insurance function" of ensuring correct accounting for the tax, because of the need to counter irregularity and fraud: the invoice assists the tax authority in carrying out its verification and monitoring duties and ensure that the tax due is paid.

173. That second function clearly emerges from the passages from the Advocate General's opinion in *Barlis*, which we have quoted above at [109] and which were approved by the Court in that case. As we have observed, the Advocate General drew a distinction between fundamental details such as the identity of the supplier, including its VRN, which are needed to verify payment of the tax by the supplier, and other details that are relevant to the amount of tax due.

174. As we have observed at [148] above, that distinction was also made by Henderson LJ in *Zipvit*, relying on *Barlis*. In our view, *Zipvit* is binding authority for the proposition that, in relation to the "insurance function" of the VAT invoice, there are some fundamental requirements which cannot be dispensed with, even if the taxpayer can demonstrate satisfaction of the substantive conditions of the right to deduct. In the *Zipvit* case the missing information was the amount of a standard-rated charge to VAT and there was no alternative evidence that VAT had been charged and correctly accounted for. In such circumstances, Henderson LJ said that there was no difference between saying that there was no discretion for HMRC and saying that the statutory discretion could only be exercised one way.

175. It is also clear from our review of the authorities that the CJEU has stressed the "essential" or "pivotal" role of the VRN. We endorse the reasoning of the FTT at [211] of the Decision, as set out at [54] above, as regards this requirement and the requirement to state the customer's name as being "symmetrical requirements that cumulatively mirror the operation of the principle of fiscal neutrality" and which are therefore fundamental.

176. As Mr Puzey for HMRC submitted, in none of the cases relied on by Tower Bridge did the CJEU consider the discretion afforded to Member States by the PVD

and domestic legislation where there were no corrected VAT invoices, where the invoices did not name the customer and did not show the supplier's VRN where the supplier was not registered for VAT. In all the cases cited, the missing details were capable of being completed either belatedly, by amendment, or by the provision of alternative evidence, whereas in this case the VRN cannot be provided because Stratex was never registered for VAT and Tower Bridge has no evidence that the VAT was being properly accounted for by Stratex.

177. As Mr Puzey also submitted, the CJEU has stated in none of the judgments relied on that the particular requirement for a supplier's VRN to appear on a VAT invoice is a merely formal condition the absence of which cannot justify a decision to deny input tax deduction.

178. We therefore agree with the FTT's rejection of the broad proposition advanced by Tower Bridge in this case at [208] of the Decision. EU law is not that the right to deduct can be exercised provided only that evidence of the substantive right is adduced. It therefore follows, as the FTT found at [209] of the Decision, once it is accepted that Tower Bridge's broad proposition is unsustainable, that it is necessary to consider whether the particular deficiencies in the Stratex Invoices are such that the "fundamental" requirements of VAT invoices, that is those necessary for the taxing authority to monitor payment by the supplier of the tax in question, have been met. As the FTT said, where those requirements have not been met, and the person seeking to reclaim the input tax cannot provide other evidence that the necessary requirements to monitor the proper operation of the VAT system exist, namely a VAT registration number for Stratex, it is apparent that a necessary precondition for the right to deduct remains unsatisfied.

179. In this case, as Mr Puzey submitted, there was no VAT number by which Stratex's identity and VAT history could be checked because it was never registered. Nor was there other evidence of proper accounting for and payment of the tax. As the FTT found, by the time that Tower Bridge had filed its VAT return and was making its claim for deduction, Stratex could not be traced. In these circumstances, it is no answer to say, as Ms Shaw submitted, that in the event HMRC obtained sufficient details as to the identity of the customer which enabled it to identify the supplier.

180. Neither do we accept Ms Shaw's submission that the absence of the identity of the customer on the invoices was a failure to comply with a mere technical requirement, as was found to be the case in *Polski Trawertyn*. One can see why, on the facts of that case, the absence of the customer's name could be regarded as a technical matter, where the partnership and its members were effectively one and the same person. That is not the situation in this case and, as the FTT observed, the absence of the customer's name gives rise to a clear risk of fraud, with the possibility of the invoice being used more than once, particularly where the supplier's VRN is absent.

181. We do, however, accept Ms Shaw's submission that the FTT was wrong to place the emphasis it did on the fact that Stratex did not account for the VAT that Tower Bridge paid. We think in that regard the FTT did misinterpret Henderson LJ's judgment in *Zipvit*. In our view, what emerges from the authorities is that what is

relevant is the opportunity that a valid invoice provides for the tax authority to monitor the payment of the tax. A valid invoice is in itself evidence of proper accounting for the tax. The question as to whether in fact the tax has been paid is only relevant in that context.

182. However, the conclusions that the FTT came to at [208] to [211] of the Decision, as set out at [54] above and which we endorse, are sufficient to support its conclusion that HMRC were lawfully entitled to deny Tower Bridge the right to deduct input tax upon the Stratex Invoices in conformity with domestic and EU law. In those circumstances, Tower Bridge's exercise of the right to deduct input tax in relation to the Stratex Invoices is wholly dependent upon HMRC exercising its discretion under Regulation 29(2) VATR.

183. We therefore determine the EU Law Issue in favour of HMRC.

The Discretion Issue

Relevant Law

184. Neither party took issue with the FTT's summary of the powers of the FTT and the approach to be taken in relation to appeals against the exercise of HMRC's discretion under Regulation 29(2) VATR, as set out at [56] and [57] above.

185. In short, the exercise of HMRC's discretion can only be challenged by the taxpayer on the ground that it was a decision that no reasonable body of Commissioners could have reached: see *CEE v Peachtree Enterprises Ltd* [1994] STC 747 at 752 and *Kohanzad v CEE* [1994] STC 967 at 969.

Discussion

186. The discretion in issue is that contained in the tailpiece to Regulation 29(2) VATR, which for convenience we reproduce here with emphasis added:

> "… provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a)…above, *such other documentary evidence of the charge to VAT* as the Commissioners may direct."

187. The dispute between the parties centres around the question as to what documentary evidence Regulation 29 (2)VATR is directed at.

188. Tower Bridge contends that the evidence concerned is, as the Regulation states, "evidence of the charge to VAT". That means, it contends, evidence that the substantive conditions of Article 168(a) have been met. Therefore, HMRC's discretion is limited to a discretion to accept alternative evidence that the substantive conditions have been met, i.e. evidence that CFE was a taxable person, that the goods supplied were used for its own taxable transactions, and that they were supplied by another taxable person. Accordingly, Tower Bridge contends that if HMRC took into

account factors that do not relate to those conditions, then its discretion will have been improperly exercised.

189. Tower Bridge contends that the matters HMRC took into account in refusing to exercise their discretion in this case were irrelevant and accordingly they failed properly to exercise their discretion. Specifically, HMRC had regard to the fact that (i) the Stratex Invoices were invalid; (ii) Stratex was not registered for VAT; (iii) the transactions were connected with fraud; and (iv) CFE did not carry out a reasonable level of due diligence.

190. Tower Bridge contends that none of the facts set out at [189] above were relevant considerations because they do not undermine the other evidence of the charge to tax. In other words, they do not detract from the fact that the substantive conditions for the right to deduct have been met.

191. HMRC contend that the discretion extends to acceptance of evidence of compliance with the formal requirements of Article 178(a), as implemented by Regulation 14 VATR, since apart from this discretion compliance with those requirements is mandatory. HMRC is therefore necessarily not restricted to considering evidence about whether the substantive requirements of the right to deduct are established. In that context, bearing in mind the "insurance function" of the invoice and the particular importance of the VRN, HMRC are entitled to take into account the matters specified at [189] above.

192. In the light of our conclusions on the EU Law Issue we can deal with this issue relatively briefly.

193. If read literally, the wording in Regulation 29(2) VATR might suggest that HMRC's discretion is of limited application. Evidence of the "charge to VAT" can be construed as evidence that the transaction concerned is a taxable transaction in that the supply is made by a taxable person in the course of its business and the recipient of the goods is a taxable person who uses the goods or services for the purpose of its own taxable transactions. If that is the right interpretation the discretion would, as Ms Shaw submits, be limited to accepting other documentary evidence that the substantive conditions giving rise to the right to deduct have been met.

194. However, in our view that submission is unsustainable in the light of the CJEU's jurisprudence as to the important role of the compliant VAT invoice in making it easier for the tax authorities to carry out effective oversight of the VAT system, in particular in ensuring the payment of the tax and in minimising the risk of fraud.

195. In conformity with that jurisprudence, our view is that evidence of the "charge to tax" must be construed as extending to evidence establishing the formal requirements of Regulation 14 VATR, implementing Article 226 of the PVD. Regulation 29(2) VATR allows alternative evidence to be accepted, which in context must mean evidence in place of a fully compliant VAT invoice, not merely evidence of a taxable transaction. We are unable, in view of the EU jurisprudence, to accept Ms Shaw's submission that the formal requirements in Article 226 and Regulation 14 VATR go

no further than what is necessary to evidence the substantive right to deduct input tax. They go further because they are performing a different function from merely showing that the transaction is taxable.

196. We are reinforced in that view by Henderson LJ's judgment in *Zipvit*, where as he found at [117] of his judgment the inability of Zipvit to produce a compliant VAT invoice in support of its claim to deduct input tax was "fatal". That was not because of any failure to provide alternative evidence that the substantive conditions giving rise to the right to deduct were satisfied, but because evidence of the requirements of Article 226(9) and (10), viz "details of the VAT rate applied" and "the VAT amount payable", coupled with evidence of payment of that amount by Royal Mail, had not been provided: see [108] of the judgment, as set out at [147] above.

197. Henderson LJ regarded Articles 226(9) and (10) as "fundamental requirements" because they were essential to the proper performance by HMRC of their monitoring functions and were needed to prove that the supplier had duly paid or accounted for the tax to HMRC: see [114] of the judgment. Although the right to deduct is not dependent on the tax in fact being paid, that point in itself demonstrates why compliance with the fundamental requirements of Article 226 and the corresponding domestic legislation is important, in the context of the "insurance function" of the VAT invoice. That is why Henderson LJ said at [113] of *Zipvit* that the fact that the right of deduction is unaffected by the question whether the tax has been paid "misses the point" that a valid VAT invoice is a "necessary precondition" for exercise of the right to deduct.

198. Although in *Zipvit* there had in fact been no VAT charged or paid, whereas in this case CFE paid VAT to Stratex and so has the right to deduct it, exercise of that right is dependent on possession of a valid invoice or other documentary evidence of satisfaction of the formal conditions. As with the evidence of the amount of VAT payable and the rate charged in *Zipvit*, so in this case we consider that the VRN is a fundamental requirement, because of its importance to the exercise by HMRC of its monitoring function: see [178] to [180] above. We have also said that the absence of the customer's name gives rise to a clear risk of fraud. In the absence of a valid invoice or evidence of payment of the tax by Stratex, there would need to be some other sufficient evidence of proper accounting for the tax charged to CFE for HMRC to exercise its discretion under Regulation 29(2) VATR in favour of allowing deduction.

199.The question is therefore whether in those circumstances, it was open to HMRC to deny the right to deduct where it was not possible to produce evidence of the VRN and, in coming to that decision, to take account of the factors that it did.

200. It follows from our analysis of the importance of the VRN that HMRC were, in our view, fully entitled to have regard to the fact that in this case the Stratex Invoices were invalid (which was only the starting point for exercise of the discretion) and that one aspect of that invalidity, the failure to include the VRN, could not be rectified by the provision of alternative evidence. It is clear on the facts found by the FTT that the

absence of the VRN impaired HMRC's ability to trace Stratex before it had defaulted on its obligations to pay the VAT.

201.For the reasons given by Henderson LJ in *Zipvit*, the failure to pay the VAT was also a relevant factor to the exercise of discretion in circumstances where a valid VAT invoice performed an "insurance function". The non-payment was because of fraud, the risk of which was heightened by the absence of a VRN on the Stratex Invoices, indicating the non-registration of Stratex. HMRC were therefore, in our view, fully entitled to take that factor into account when considering whether (in effect) to waive the requirement for the VRN.

202.Likewise, the failure on the part of CFE to undertake the basic check of Stratex's VAT status before it traded meant that it thereby failed to identify a clear indication of possible fraud. We agree with Arnold J's conclusion in *Boyce*, as set out at [61] above, to the effect that the fact that there was a real and obvious risk of fraud as a result of the invoices not complying with the formal requirements was a relevant factor to be taken into account when deciding whether to exercise the discretion, in contrast to the position where the question is whether the right to deduct has arisen. That is also consistent with the Advocate General's observations in *Geissel*, referred to at [132] above.

203. It follows that we can detect no error of law in the FTT's reasoning on this issue, as set out at [62] above, and we fully endorse it. On the facts of this case, the decision of HMRC not to exercise its discretion under Regulation 29(2) VATR in favour of Tower Bridge was one that was reasonably open to it.

204. We therefore determine the Discretion Issue in favour of HMRC.

Reference to the CJEU

205. Tower Bridge submitted that the law was not *acte clair* in HMRC's favour so that we should not determine the EU Law Issue in favour of HMRC without making a reference to the CJEU.

206.Under the terms of the United Kingdom's withdrawal from the EU, any such reference had to be made before 1 January 2021. Accordingly, we informed the parties of our decision on the reference question immediately after the conclusion of the hearing of this appeal.

207.On the basis of our analysis of the relevant EU jurisprudence and our finding that the relevant issues have been fully considered in *Zipvit* on the basis of that jurisprudence, a decision which is binding on us, we are satisfied that the relevant principles of EU law are sufficiently clear from existing CJEU decisions, and we have therefore been able to resolve the issues on this appeal without doubt about the effect of EU law. We therefore decided not to refer any question to the CJEU.

Disposition

208. The appeal is dismissed.

Signed on Original

MR JUSTICE FANCOURT **JUDGE TIMOTHY HERRINGTON**
UPPER TRIBUNAL JUDGES

RELEASE DATE:
12 February 2021