



TC03702

Appeal number: TC/2011/08110

VAT – input tax – no VAT invoice – s 47 VATA 1994 – whether input tax of taxpayer – reg 29 VAT Regs 1995 – alternative evidence – whether HMRC’s decision reasonable – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GOLD STANDARD TELECOM LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE PETER KEMPSTER
MRS BEVERLEY TANNER**

Sitting in public at Priory Courts, Birmingham on 8-11 July and 27 November 2013

Mr Robert Holland (Dass Solicitors) for the Appellant

Mr Joshua Shields of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant (“the Company”) appeals against a decision of the Respondents (“HMRC”) dated 23 September 2011 refusing a deduction of VAT in relation to transactions in the VAT period 05/11. The net amount refused was approximately £127,500 and the transactions were the purported purchase of large quantities of Apple iPhones and iPads.

2. The Company’s notice of appeal also disputed a refusal of VAT in respect of road fuel but that matter was withdrawn and thus was not before the Tribunal.

10 Law

3. Section 24 VAT Act 1994 provides (so far as relevant):

“... (6) Regulations may provide—

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

...

(6A) Regulations under subsection (6) may contain such supplementary, incidental, consequential and transitional provisions as appear to the Commissioners to be necessary or expedient.”

4. Regulation 29 of the VAT Regulations 1995 (SI 1995/2518) provides (so far as relevant):

“... (2) At the time of claiming deduction of input tax ... a person shall, if the claim is in respect of—

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;

...

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct.”

5. Regulation 13 of the VAT Regulations provides (so far as relevant):

“(1) Save as otherwise provided in these Regulations, where a registered person—

(a) makes a taxable supply in the United Kingdom to a taxable person,

...

he shall provide such persons as are mentioned above with a VAT invoice ...

...

5 (5) The documents specified in paragraphs (1), (2), (3) and (4) above shall be provided within 30 days of the time when the supply is treated as taking place under section 6 of the Act, or within such longer period as the Commissioners may allow in general or special directions.”

6. Regulation 14 of the VAT Regulations stipulates the contents of a VAT invoice, including (reg 14(1)(e)): “the name and address of the person to whom the goods or 10 services are supplied”.

7. Section 47 VAT Act 1994 provides:

“(1) Where—

15 (a) goods are acquired from another member State by a person who is not a taxable person and a taxable person acts in relation to the acquisition, and then supplies the goods as agent for the person by whom they are so acquired; or

(b) goods are imported from a place outside the member States by a taxable person who supplies them as agent for a person who is not a taxable person,

20 then, if the taxable person acts in relation to the supply in his own name, the goods shall be treated for the purposes of this Act as acquired and supplied or, as the case may be, imported and supplied by the taxable person as principal.

25 (2) For the purposes of subsection (1) above a person who is not resident in the United Kingdom and whose place or principal place of business is outside the United Kingdom may be treated as not being a taxable person if as a result he will not be required to be registered under this Act.

30 (2A) Where, in the case of any supply of goods to which subsection (1) above does not apply, goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and as a supply by the agent.

35 (3) Where services are supplied through an agent who acts in his own name the Commissioners may, if they think fit, treat the supply both as a supply to the agent and as a supply by the agent.”

HMRC Statement of Practice

8. HMRC’s policy on the exercise of their discretion under reg 29 in relation to “such other evidence of the charge to VAT as the Commissioners may direct” was revised in April 2007 and the revised Statement of Practice on “VAT Strategy: Input 40 Tax deduction without a valid VAT invoice” includes the following:

“2. These changes were made to address the increasing threat to VAT receipts by the use of invalid VAT invoices and are part of the

5 Government's strategy to address fraud, avoidance and non-compliance in the VAT system. They are a proportionate and necessary response to a systematic and widespread attack on the VAT system, where the use of invalid VAT invoices is becoming an increasing pressure on revenue receipts, particularly in those business sectors involved in the supply of the goods listed at Appendix 3. In addition to the revenue loss, this has led to distortion of competition.

10 3. For the vast majority of business there will be no change, and for businesses trading within the targeted sectors the measure will only impact if you have an invalid invoice. If you are a VAT registered business, and you have been issued with an invoice that is invalid, you should be able to return to your supplier and ask them for a valid VAT invoice that complies with the legislation. If for some reason you cannot, this Statement of Practice sets out whether or not you may be entitled to input tax recovery. In most cases, provided businesses continue to undertake normal commercial checks to ensure their supplier and the supplies they receive are 'bona fide' prior to doing any trade, it is likely they will be able to satisfy HMRC that the input tax is deductible.

20 ...

What do I do if I have an invalid VAT invoice?

25 11. The simplest thing is to ask your supplier to issue a valid VAT invoice (suppliers are legally obliged to do this). If a taxable supply has taken place but a revised invoice cannot be obtained HMRC may apply their discretion to allow recovery of input tax.

...

Invalid Invoice and HMRC's Discretion.

30 A proper exercise of HMRC's discretion can only be undertaken when there is sufficient evidence to satisfy the Commissioners that a supply has taken place.

Where a supply has taken place, but the invoice to support this is invalid, the Commissioners may exercise their discretion and allow a claim for input tax credit.

35 For supplies/transactions involving goods stated in Appendix 3 HMRC will need to be satisfied that:

- The supply as stated on the invoice did take place
- There is other evidence to show that the supply/transaction occurred
- The supply made is in furtherance of the trader's business
- 40 • The trader has undertaken normal commercial checks to establish the bona fide of the supply and supplier
- Normal commercial arrangements are in place - this can include payment arrangements and how the relationship between the supplier/buyer was established

45 ...

How will HMRC apply their discretion?

5 17. For supplies of goods not listed at Appendix 3, claimants will need to be able to answer most of the questions at Appendix 2 satisfactorily. In most cases, this will be little more than providing alternative evidence to show that the supply of goods or services has been made (this has always been HMRC's policy).

10 18. For supplies of goods listed at Appendix 3, claimants will be expected to be able to answer questions relating to the supply in question including all or nearly all of the questions at Appendix 2. In addition, they are likely to be asked further questions by HMRC in order to test whether they took reasonable care in respect of transactions to ensure that their supplier and the supply were 'bona fide'.

15 19. As long as the claimant can provide satisfactory answers to the questions at Appendix 2 and to any additional questions that may be asked, input tax deduction will be permitted.

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

...

Appendix 2

Questions* to determine whether there is a right to deduct in the absence of a valid VAT invoice

25 1. Do you have alternative documentary evidence other than an invoice (e.g. supplier statement)?

2. Do you have evidence of receipt of a taxable supply on which VAT has been charged?

3. Do you have evidence of payment?

30 4. Do you have evidence of how the goods/services have been consumed within your business or their onward supply?

5. How did you know that the supplier existed?

6. How was your relationship with the supplier established? For example:

35 • How was contact made?
• Do you know where the supplier operates from (have you been there)?

• How do you contact them?
• How do you know they can supply the goods or services?

• If goods, how do you know the goods are not stolen?

• How do you return faulty supplies?

40 *This list is not exhaustive and additional questions may be asked in individual circumstances

Appendix 3

Supplies of goods subject to widespread fraud and abuse

...

- 5 b) Telephones and any other equipment, including parts and accessories, made or adapted for use in connection with telephones or telecommunications.

...”

Evidence considered

10 9. There was a formal trial bundle of several binders of documents. Each of the witnesses listed below confirmed and adopted their respective formal witness statements and gave oral testimony. Below is summarised the pertinent evidence of each witness.

(1) For the Company:

- 15 (a) Mr Steve Davies – director of the Company.
 (b) Mr William Mycroft – an employee and former director and shareholder in the Company.
 (c) Mr Lee Blackburn – a former employee of the Company.

(2) For HMRC:

- 20 (a) Mrs Ruth Sorsby – the officer who took the decision to deny the disputed repayment of VAT.
 (b) Mrs Kathryn Stephenson – an officer with earlier involvement with the VAT affairs of the Company.
 (c) Mrs Kulvinder Kumar – an officer who visited Noon 2000 Limited (“Noon”) in connection with HMRC’s scrutiny of the Company.
25 (d) Mrs Frances McGurl – an Inspector who had prepared an analysis of the Company’s bank account.
 (e) Mr Roderick Stone – an officer in HMRC’s Organised Crime National Coordination Unit.

30 10. Witness statements were also submitted on behalf of the Company by Mr Austin Mawbey and Mr Dhavalkumar Patel (former employees of the Company) and Mr Kayur Shah (former employee of Noon). HMRC had formally objected to those statements and the witnesses were not present for cross-examination or to answer questions from the Tribunal. We have noted the contents of those statements but we have been able to reach our determinations in this appeal without reliance on those
35 statements.

11. There were several contested applications by both sides for admission of extra documents. We ruled on those during the course of the hearing but do not consider it necessary to detail those matters here, as we have been able to reach our determinations in this appeal without reliance on such documents as were admitted

and without any prejudice having been suffered by the relevant party in relation to such extra documents as were not admitted.

Appellant's Witnesses

Evidence of Mr Steve Davies

5 12. Mr Davies is a director of the Company. The Company started trading in 2007, buying ex-retail stock from sister company Comment Retail Services Ltd, and exporting that stock. Comment bought the stock from major retailers such as Woolworths. In 2008 the company moved to box breaking – buying stock from retail
10 outlets and combining those purchases into onsales. In August 2010 the Company started buying Apple iPhones. There was a huge overseas demand for these phones, which were not readily available from mobile phone distributors. These were high-value items at a cost of £500 each.

13. Mr Davies and Mr Mycroft had known and traded with Noon since 2004. They had visited Noon's premises in Middlesex on numerous occasions and met the
15 owners: Mr and Mrs Bacai. They also met other employees of Noon and Mr Davies was in daily contact with the main contact, Jabeen. Noon wished to buy large numbers of iPhones but they did not have the bank facility to withdraw large amounts of cash.

14. Most big Apple retail outlets were in London and the Company employed
20 “runners” who would buy the iPhones on the Company's behalf. Noon recommended runners to the Company. The Company had formal employment contracts with the runners. The runners were usually in the UK on temporary student visas and most had now left the UK.

15. Mr Davies would talk to Jabeen at Noon every day and ask how much stock
25 Noon wanted. Invariably, she wanted far more than the Company could obtain. Prices were agreed on a deal by deal basis.

16. Mr Davies ordered the cash every week from Barclays and this was collected by
30 himself and Mr Mycroft from the branch in Chesterfield or Sheffield. Barclays would tell him what cash they had available along with which days the cash was going to be available. Sometimes he was in daily contact with Barclays. The amount of cash drawn from Barclays each week was between £150,000 and £180,000.

17. The cash was given to Mr Blackburn and Mr Mawbey, who took the cash down
35 to Noon's premises. Both Mr Davies and Mr Mycroft had known Mr Mawbey and Mr Blackburn for several years and had complete trust in them. Mr Blackburn & Mr Mawbey would travel to Noon about three times per week. Mr Davies did not know if the company's insurance policy covered loss of cash in transit. Mr Davies trusted Mr Blackburn and he trusted Jabeen – there had never been any problems.

18. Noon would give Mr Blackburn a receipt for the cash. The cash receipt was returned to Sheffield by Mr Blackburn, together with the original receipts for the

iPhones which had been purchased in the preceding days. In addition to these trips Mr Blackburn would more frequently travel to Noon in order to collect receipts, but without leaving any cash.

5 19. The runners dropped off the iPhones – purchased from Apple's retail outlets – at Noon's premises. Noon inspected the iPhones. On occasions, the physical stock had been miscounted and credit notes were raised. Noon did not raise purchase orders as they always purchased whatever stock the runners had been able to acquire. The stock which Noon purchased was evidenced by the receipts from Apple. Mr Davies subsequently raised invoices to Noon.

10 20. Noon did not have a warehouse. There was some small storage space at the premises that Mr Davies had not seen. There was an office with several rooms, which he trusted was secure. He did not know what insurance arrangements were in place. There were probably three or four staff at Noon. The Company had been trading with Noon since 2008 without any problems.

15 21. The prices changed and were negotiated with Noon. The margin changed from day to day but the Company always had a gross margin on the products. Noon always paid a day or two after being invoiced. The risk of the Company being left with stock was hypothetical as Noon always bought all the stock available. Mr Davies raised invoices intermittently, whenever Noon had an overseas order.

20 22. Mr Davies would order as much cash from the bank as possible. It was not possible to predict how much stock would be available. Sometimes some of the cash would be retained temporarily by Mr Davies at his home.

25 23. The receipts for signature by Noon were written at the Company's office or at Mr Davies' home. He might have told Mr Blackburn to write it out if Mr Davies was busy - he did not consider this was important. Some receipts had been lost. The receipts were just for the Company's benefit and there had never been any dispute.

30 24. Noon looked after the cash and he assumed they had a secure place of safety, such as a safe. If cash been stolen that was the Company's risk but this had never been a concern. There were no written terms of business as they had traded with Noon for a long while and trusted them.

25. Noon gave to Mr Davies details of how many hours were being worked by the runners. The Company prepared wage slips and gave them to Noon. There were never any formal timesheets. Cash did not go missing.

35 26. Noon made the decisions concerning giving money to the runners. Noon knew what stock was available and would distribute the cash to the runners – probably not all to one person. He was not aware that there was any record of who had how much money – as far as he was concerned, all the cash was with Noon.

40 27. It was the Company's decision to give large quantities of cash to the individuals and there had never been any problems. If staff were out late then on occasions some might have brought the iPhones and any spare cash back to Noon the following day.

Noon checked all the stock and there had been no problems. It was correct that some runners may have had cash overnight. No money had gone missing, although a couple of phones were lost, but that was not unexpected in the mobile phone business. The only defalcation the Company had ever experienced was with a runner based in Sheffield – who had been required to make good the loss, but had not been fired.

28. Cash was used instead of credit cards because if a credit card was used for the same amount repeatedly then a security feature would block payments. This method had been tried earlier. There were problems with using the runners' own credit cards because then the Company would need to see their statements.

29. The runners were recommended by Noon. Some may have been relatives of Noon's staff. Noon also had runners, and Mr Davies believed they were different people, although some of the Company's staff may have worked for Noon. The Company asked Noon to make people available, and the Company was shown nothing in relation to the staff. The Company had complete trust in Noon. Mr Davies did not interview the runners, although he did meet a couple when he went to Noon to hand over wage slips. Signed employment contracts were sent to Mr Davies. The Company had P45s and work permits but did not carry out any checks on the individuals. The Company had an address for each individual in case there was any problem but it had not checked the addresses. Mr Davies had assumed that the Job Centre checked addresses for the individuals. The Company employed up to 15 people. Nothing went missing. The Company's accountant had not queried anything and wage slips had been prepared. Mr Davies relied on Noon and the accountant, who was responsible for wages. The accountant had since moved to a larger firm. The form of employment contract used was that used for other staff, and as it was a generic contract, not all the details might be relevant. The work to be undertaken by the runners was obvious. All the individuals had now left the UK. Although some worked for only a few months, others worked for over a year. It was a good job for students.

30. Asked to consider the documentation for one employee, Mrs Rao, Mr Davies stated he did not see her original passport, only a photocopy. He did not know what the message "no employment as a doctor in training" meant, or what a Tier 4 visa was. Mr Davies accepted that another runner, Mr Patel, had a student visa.

31. The runners were paid approximately £6 per hour. PAYE had been operated by the Company on the wages. The runners were paid travel expenses and they were allowed to take cash out of the money provided to them. No receipts or vouchers were required for the travel expenses. Staff were paid hourly rates according to timesheets that were submitted. Jabeen would provide the details for the wages. It was done on trust. The hours claimed appeared reasonable. There was no record of which runner bought which phone. The phones would have been purchased within one or two days of the cash being provided. Noon did not provide a record of what cash had been paid to which runner. Noon gave the wage slips to the runners.

32. Apple had released Sim-free stock in the UK but not elsewhere. In late 2010 Mr Davies had gone to the Apple Store at the Meadowhall Centre in Sheffield and

asked to buy a large quantity of iPhones. He bought eight or ten, two on each receipt. The shop would not sell 100 through the till. Other companies would buy even larger amounts – there were lots of companies doing this. The runner would not have told Apple who they were working for. Apple thought they were just selling stock to the runner. It was not possible to buy the stock from Apple direct. The distributors would not sell Sim-free stock. The Company did not approach Apple – even the Irish distributors could not get stock. Another company (Cellular Trading) had tried to obtain an invoice from Apple but the manager was reluctant to do that because of the number of receipts. Mr Davies thought that Apple UK would not consider issuing a receipt. Cellular Trading did not get anywhere and so Mr Davies thought that avenue was not available.

33. Mr Davies was told by Noon how much to invoice. The Company would invoice Noon for what Noon were selling - so only some of the purchases may have been invoiced, by agreement. He did not invoice until all the till receipts had arrived. There was no necessary connection between the invoices and when the phones had been purchased. There had never been any situation where Noon had not paid for goods.

34. Mr Davies maintained a running record of the stock, tracking cash out and stock in. The Company might ask for prompt payment from Noon, or might extend credit. There were rare occasions when Noon would lend £20-£30,000 to the Company for a couple of days.

35. The phones belonged to the Company, but were held by Noon. Noon did inspect the stock because they were exporting to customers in Eastern Europe, Dubai and elsewhere. The goods were covered by a standard Apple warranty. Gift cards were occasionally purchased.

36. Royal Etihad was an associate of Noon. Some of the iPads were exported to that company in Dubai. The deal was arranged by Noon. Mr Davies was not aware of the company's financial status. The customer paid the freight forwarding costs.

37. The Company's trade practices had been clearly explained to Officer Stevenson at the HMRC visits, together with documentation, and there had been no problems. There could not be a VAT problem because the Company was buying the stock from Apple and paying VAT – there were no other people in the deal chain.

38. Mr Davies had formerly been an employee of Limitmaze UK Limited (“Limitmaze”) and had at that time only recently started working for Mr Mycroft; he had previously been a child protection social worker. With the benefit of hindsight there had been an elaborate fraud and he was flabbergasted at the extent of what the other traders were doing. He had known nothing of that. The trading pattern of the Company was completely different from Limitmaze; there could be no problem because the Company was buying from Apple and paying VAT, with no other people in the chain.

39. In cross-examination by Mr Shields:

(1) *It was apparent that Noon got the staff, paid the staff, took delivery of the phones and so on – the only role of the Company was to send the cash and take the receipts – why would Noon not do everything directly? Noon would struggle to get the necessary cash.*

5 (2) *If Noon had the money to lend to the Company, why did Noon not just use that to buy the stocks themselves? It may have been near the end of their VAT quarter – also they used an Islamic bank.*

10 (3) *It appeared that the arrangements were merely a loan – why bother with all the rest? The Company was a phone dealer, not a bank. The Company gave credit for stock purchased. If Noon had just wanted to borrow, they would have gone to the bank.*

Evidence of Mr William Mycroft

15 40. Mr Mycroft was an employee of the Company at the relevant times. He and his father had owned 40% each in the Company and he was a director until 2008. On his bankruptcy in 2010 he had transferred his shares to his father. Mr Mycroft confirmed that as a term of his bankruptcy he had given an undertaking not to act as a company director. He was prohibited from involvement in the management of the Company. His only involvement after that point was to give advice.

20 41. The Company originally purchased goods from Comment Retail Services Ltd, which was owned 30% by Mr Mycroft. After Comment became insolvent because of Woolworths' insolvency, the Company purchased stock from retailers. Phones and modems would be purchased, made up into consignments and sold onwards.

25 42. Apple had been very successful in making the iPhone the phone of choice. It was not possible to buy direct from Apple in large quantities. They would only sell through retail chains. There was a limited number of Apple stores around the country. The Company's first purchase of iPhones was in September 2010.

30 43. Noon was a contact of Mr Davies. Noon would find buyers in London and they also had a customer base abroad. Mr Mycroft knew Mr Noon [The Tribunal understood that the gentleman referred to by Mr Mycroft as Mr Noon was the person Mr Davies called Mr Bacai.] The day-to-day running of Noon was done by Jabeen. Mr Mycroft visited Noon once during the time of these transactions, when Mr Noon was over from Dubai, and they had lunch at a local curry house. Mr Mycroft did not inspect the premises or storage and did not know what the insurance arrangements were for stock held on the premises. The Company had dealt with Noon for some time without any problems. He did not know the staffing arrangements or opening hours for the shop, or the stock in the shop. He did not know if Noon had self-funded any of transactions.

40 44. Demand for iPhones was greater than supply and Noon took all the products that the Company could buy. There was a huge demand for the products abroad and Noon had overseas contacts, so was a natural outlet. He did not discuss prices or stock with Noon – that was done by Mr Davies.

45. He accompanied Mr Davies to Barclays Bank in Chesterfield or Sheffield to collect cash which been ordered. The cash was collected by Mr Davies and himself together, for security. He and Mr Davies gave the cash to Mr Mawbey and Mr Blackburn. He did not know how the money was passed by Noon to the runners. He
5 did not have anything to do with choosing the staff or paying them - he did not even speak with them.

46. The Company did not speak to Apple. There was only one UK official dealer (and one in Ireland) and the Company was not allowed to buy these products – there was no point in asking. For years these purchases had been made and the VAT had
10 been repaid by HMRC. The Company had not approached Apple for a receipt, but he knew people who had done. There were no names on the Apple invoices. People would never give their names because then they would be on the database so Apple would not sell to them. It was not in their interest. Apple did not want to be seen selling wholesale. However, the volume of purchases meant that Apple must have
15 been aware of what was going on. He had friends who had asked for Apple invoices, but only one got a VAT invoice. It was too much trouble for the managers in the shops, which were very busy. The managers must have known that there were multiple purchases being made by individuals – there were big queues outside many shops – but it suited the managers to make the sales in order to meet their targets.

20 *Evidence of Mr Lee Blackburn*

47. At the time of the events in question Mr Blackburn was 20 years old. He had known Mr Davies and Mr Mycroft since 2007. For around a year he had been a buyer, buying phones around Sheffield from Argos, Morrisons etc using money provided by Mr Davies. The amount varied but on average was around £3,000. Mr
25 Davies would specify certain models, but not colour or accessories. His instructions were to buy as many as he could get. He was paid around £735 per month.

48. Starting around January 2011 he started driving to London. He travelled to London with Austin Mawbey. They had been schoolfriends. He would go to the Company's office and receive cash in an envelope with the amount written on the
30 outside. He would count the money in front of Mr Davies and sign for it. Mr Mawbey was also present when the money was counted. The cash was in £20 notes arranged in thousands and held together by rubber bands. Around £30,000 - sometimes up to £50,000 - was taken. Mr Davies had a bank statement showing how much money had been withdrawn, although Mr Blackburn did not see this on every
35 occasion.

49. They travelled to London around three times each week. They used a company car. They bought fuel using some of the money from the envelope and put the fuel receipt in the envelope. When travelling to London they would start at around 9
40 o'clock for the 160 mile journey to Noon in Greenford. Only Mr Blackburn, not Mr Mawbey, was insured to drive the car. When they were not driving to London they would help with paperwork in the Company's office.

50. Arriving at Greenford they would park in back of the property, where there was access to the office. A lady called Jabeen was mostly there, and there were around three staff. Jabeen or one of the other staff would give them access. The office was behind a closed door at the end of a hallway. He never went into the shop at the front of the property. While he was there, runners would also come in the same entrance. The runners brought the phones to Noon in white Apple shop bags. Mr Davies had told him that the runners were the Company's staff.

51. He obtained a receipt for the cash from Noon, prepared by Mr Davies. On occasions that got lost, so Mr Blackburn or Mr Mawbey would prepare one. That would have to be done the next day as the Company notepaper was held in Mr Davies' office. Mr Blackburn accepted that there was one receipt which had been prepared by Mr Mawbey which was on blank paper. He said that there were occasions when they did not get a receipt. He would be criticised by Mr Davies if he came back without a receipt. Occasionally the amount of cash would be wrong - only by a few pounds - and Mr Davies would take that up with the bank.

52. They would take back from Noon till receipts for iPhones and iPads. They would count the receipts then tell Mr Davies that they were returning. It was written on the back of the cash receipt how many till receipts were to be expected. They did not add up the till receipts, just noted the number of receipts. He accepted that a number of the receipts produced in evidence did not have the information on the back as he had described.

53. His only role was as a driver and cash courier. He carried out Mr Davies' instructions. He did not know why he was being asked to do all this, travelling up and down the motorway with large amounts of cash, but he thought it was because most Apple shops were in London.

Respondents' Witnesses

Evidence of Mrs Ruth Sorsby

54. Mrs Sorsby became involved in the Company's VAT affairs in June 2011 but from the HMRC case file she was aware of the Company's previous VAT dealings. These included the former involvement of both Mr Mycroft and Mr Davies with companies that had been denied VAT repayments after verification exercises, and the fact that Mr Mycroft had been declared bankrupt in December 2010 and was subject to a Bankruptcy Restrictions Undertaking.

55. The Company's VAT return for the period 05/11 was submitted on 9 June 2011, showing a large repayment claim. On 8 July the Company delivered to Mrs Sorsby its records for the 05/11 period, including the Apple receipts and the Company's invoices to Noon.

56. On 15 July the Company was informed that the 05/11 return had been selected for verification.

57. On 18 July Mrs Sorsby wrote to the Company requesting a schedule listing the names and addresses of all employees of the Company.

58. On 22 July Dass Solicitors for the Company replied attaching a “payroll document listing our client’s employees”.

5 59. On 4 August Mrs Sorsby wrote to the Company requesting extensive information in connection with her verification of the 05/11 return. The text of that letter is set out in full as the Appendix to this Decision Notice.

60. On 15 August Dass replied addressing all the questions, including the following statements:

10 (1) In relation to the Apple receipts: “Customer details are not mandatory. If names had been provided, it may well have been the case that buyers would not have been allowed to purchase telephones continuously.”

15 (2) In relation to the runners: “Interviews are not conducted. There is no way to ensure that cash will be used for its intended purpose. In the past, cash has been stolen. On this occasion, our client ensured that it was paid back from wages. How our client sources its buyers is irrelevant.”

The information in the remainder of that letter is broadly in line with the evidence of Mr Davies explaining how the Company operated.

20 61. On 19 August Mrs Sorsby wrote to the Company stating that she considered some of her earlier questions had not been adequately answered, and reiterating them or raising additional queries. She cited the statutory requirements for valid VAT invoices; concluded that the Apple receipts were not valid VAT invoices; and stated, “I am therefore offering [the Company] the opportunity to obtain relevant tax invoices from Apple and submit them for verification”.

25 62. On 26 August Dass replied addressing all the questions. In relation to the Apple receipts the letter stated:

“Apple iPhones Receipts

30 Are you really suggesting that our client should go back to Apple to obtain what you regard as being valid tax invoices? It is a wholly impractical suggestion. If you do not believe that the invoices comply with the relevant legislation, you have a discretion to allow the input VAT deduction. Invoices have been submitted, evidence has been provided that our client purchased the telephones with its own money. Most importantly of all, the Commissioners will have evidence that
35 Apple has accounted to them for the tax paid on the invoices by our client. Officers have previously attended at our client's premises and gone through Apple's receipts e.g. visit by Mrs Kay Stephenson on 29 December 2010. They have not said to our client that it should go back to Apple to obtain proper tax invoices. They have repaid to our client
40 the VAT claimed on Apple's receipts. In light of all of this, if you

exercise your discretion and refuse our client's claim for VAT credits, this refusal will be overturned in subsequent court proceedings.”

63. On 16 September Mrs Sorsby wrote to the Company stating:

5 “My letter of the 18th July 2011, (copy enclosed) requested a schedule listing all names and addresses of all employees of Gold Standard Telecom Limited.

10 In response, you forwarded, by return, via your agent, .a payroll document (employee history report (detailed)). The dates on this payroll document show a process date from the 6th May 2011 to the 5th June 2012.

15 Unfortunately, this does not confirm addresses (as requested) of any of your employees, nor does it provide a comprehensive picture of Gold Standard's employees in the period in question. Your agent is of the opinion that records held by HMRC provide the details we have requested. Unfortunately, this is not the case.

For clarity, I am now requesting the following information, as a matter of urgency and to further assist in the consideration of your re-payment return currently under verification.

20 1. Please provide records of payments made to each of your employees in the period (VAT return ending 05/11) for clarity, I require you to list how much cash was given to each employee in the period, including how much money was given to them to purchase stock and separately itemise the wages you paid to each individual employee. I also require you to list the name of each employee against the cash that was given to them.

25 2. In addition, I require the record of expenditure made by each individual employee, on behalf of the company.

30 3. I require you to confirm the hourly rates of pay for each individual employee and their role within your company.

4. I require any other PAYE records that you hold in respect of your company, including back-up information held on SAGE.

35 5. I also require all Gold Standards' Bank Statements, (from the company's date of effective date of registration). I acknowledge receipt of bank statements covering the dates 23rd February 2011 to the 22nd June 2011.

6. Finally, please confirm if Gold Standard has now ceased to trade. If it has, please give the date of cessation.”

40 64. On 21 September Dass replied questioning why the last three years' bank statements should be relevant to the verification of one quarter's VAT return; objecting to what they described as the drip-feeding of questions; and protesting the delays in HMRC's making a decision on the verification of the return.

65. On 23 September Mrs Sorsby issued the denial of input tax decision which stated:

“The reasons for this are:

- 5 • You have not provided satisfactory evidence to show that Gold Standard Ltd received taxable supplies of iPhones and iPads from Apple retail stores. Where a taxable person fails to provide sufficient evidence of the taxable supply then it will not be authorised to deduct.
- 10 • The purchases were not supported by full VAT invoices, the contents of which are set out in Regulation 14(1) VATR 1995. My correspondence dated the 19th August 2011 sets out the particulars required on a full VAT invoice. Without a valid VAT invoice there is no right to deduct.
- 15 • All input tax in respect of road fuel purchases has been denied. There is no indication as to how the business mileage has been calculated. No scale charge has been applied there is no apparent information available in respect of company or employee vehicles.

I have not challenged your input tax deduction in respect of other general business expenses or input tax deducted under the reverse charge mechanism.”

20 66. Mrs Sorsby considered that insufficient alternative evidence had been produced by the Company, and much that had been produced was unsatisfactory. She had attempted to establish the facts of how the Company had conducted its business in the relevant period but had encountered difficulty in finding those facts. She did not accept that the transactions had happened as claimed by the Company. She could not
25 match the bank statements to the purchases so as to be satisfied that the iPhones were being purchased by the Company with its own money. Before issuing the denial decision she had submitted a lengthy submission to the Technical Team at Specialist Investigations.

30 67. HMRC had been informed that Noon entered creditors’ voluntary winding-up on 27 February 2012.

68. In response to questions in cross-examination by Mr Holland:

35 (1) Mrs Sorsby accepted that the terms of the verification letter issued on 15 July were more appropriate to an MTIC enquiry and that, for example, references to *Kittel* were inappropriate to the verification she had been tasked with.

(2) Mrs Sorsby accepted that there may have been a discrepancy in her working papers as to whether the quantity of iPhones purchased in the period was 1,435, 1433 or 1,431.

40 (3) Mrs Sorsby accepted that the Apple receipts had been batched and attached to the sales invoices, and that a small check she had made of the invoices had revealed no errors.

(4) Mrs Sorsby accepted that the total cash withdrawals from the bank in the period were sufficient to cover the aggregate of all the till receipts, but she

considered she had insufficient evidence that the cash had been spent on the iPhones.

(5) Mrs Sorsby accepted that there was no good reason why Noon would pay for goods if it had not received them.

5 (6) Mrs Sorsby accepted that repayment claims by the Company had been paid in earlier periods, but she did not feel able to comment on the work performed by other officers on other occasions.

(7) Mrs Sorsby confirmed that she was aware of the outcome of Mrs Kumar's visit to Noon before she issued her decision.

10 (8) Mrs Sorsby stated that although her letter dated 4 August 2011 had made extensive information requests, it was not the case that repayment would not be authorised until all the questions were answered; she merely needed to establish the Company's method of trading and had tried very hard to obtain adequate information.

15 (9) Mrs Sorsby confirmed that the verification had been expedited because Dass had threatened judicial review proceedings.

Evidence of Mrs Kathryn Stephenson

69. In December 2010 Mrs Stephenson visited the Company to make a check concerning the VAT return for the period 11/10. It was a routine visit, prompted because the Company had a "MTIC User Interest" alert on its file, because of the previous involvement of Mr Davies with "other MTIC companies", and the 11/10 return claimed an unusually large refund (£115,000).

70. Mr Davies had explained that the Company was buying Apple iPhones which were available SIM-free in the UK cheaper than retailers who would sell with an airtime contract. The Company's sales did not attract VAT because of the reverse charge mechanism and thus there was a repayment claim.

71. She checked the sales and purchase invoices pertaining to 16 deals and compared them to the spreadsheet prepared by Mr Davies which detailed these sales and purchases. She checked through 989 receipts. These checks were restricted to confirming that the receipt dates were in line with the VAT period and to counting handsets to confirm that the quantities of handsets tallied with the corresponding input tax claim and onward sale. She did not carry out a detailed examination of each receipt. Of £114,557.30 input tax claimed on the return relating to Apple iPhone purchases, the deals she checked covered £78,356.62 of this. She noted that all receipts were for individual purchases of Apple iPhones (16 GB or 32GB) from Apple stores only. She was satisfied that the VAT detailed on the Apple iPhone receipts presented to her was consistent with the input tax claimed against these deals as noted on the spreadsheet prepared by Mr Davies; also, that the number of handsets purchased matched the number of handsets sold.

72. During her check, she noted that the Apple iPhone receipts were not addressed to the Company but, apart from this, all other invoice requirements appeared to have

been met by the receipts. In spite of the fact that the invoices were not addressed to the Company and so were incomplete tax invoices, because she was able to trace all of the selected purchases to a corresponding sale she accepted the Apple iPhone receipts as satisfactory evidence for input tax deduction. She was satisfied from the checks she had made on the records she had seen that the purchased phones had been used for the purpose of the Company's business, and that the claimed repayment was due to the purchase of higher value Apple iPhones that were subsequently sold on under the reverse charge procedures, with output tax declared by the customer.

73. As purchases were said to have been made using cash drawn from the bank she was not able to verify specific payment of the purchases through the bank account.

74. At the close of her visit, Mr Davies asked her if she was happy with the repayment claim. She said that the way he had filed the sales and purchase invoices/receipts in deal bundles had assisted her checks in tracing the purchases to sales. Based on what she had checked she was satisfied that the repayment return could be referred for authorisation. She asked him whether he expected the next return to be a repayment and, if so, what was its expected value. He said that it would be a repayment return and he expected it to be of a similar value to this claim. This information was routinely requested. There was no specific discussion about the acceptability of the Apple iPhone receipts for input tax deduction. She did not explain that she had accepted the iPhone receipts as evidence for input tax deduction on the basis of the checks she had made; she did not tell Mr Davies that the Apple iPhone receipts would be accepted as satisfactory evidence for input tax deduction in future claims.

75. In response to questions in cross-examination by Mr Holland, Mrs Stephenson stated that she did not recollect whether she raised with Mr Davies the point that the Apple receipts were not addressed to the Company.

Evidence of Mrs Kulvinder Kumar

76. Mrs Kumar's unit was involved in continuous monitoring of mobile phone dealers. She visited Noon in September 2011 at the request of one of her colleagues, to put questions to Noon concerning its dealings with the Company. Noon explained its method of dealing with the Company including that goods were delivered to Noon's premises by the Company; that the goods were not checked by Noon; that IMEI numbers were not transferred or held by Noon; and that payment was made to the Company against invoices, which were issued when Noon had agreed a deal with its customer.

Evidence of Mrs Frances McGurl

77. Using the information provided in Mr Davies' witness statement about the Company's bank account with Barclays, Mrs McGurl had prepared spreadsheets analysing the Company's cash flow and the cash available to purchase the iPhones.

78. Having entered all the information, her analysis showed that, when taken as a cumulative figure, the cash available for spending exceeded the cash said to have been given to the runners to make purchases. However, when taken chronologically on a transaction by transaction basis, the results produced were not possible in that they showed that the business was spending cash that was not available. There are many negative figures, which indicated that, on the basis of the information provided by Mr Davies, the business was spending cash that was not available to it at that time. That was not possible when looking purely at cash expenditure against cash available. In dealing with cash items only, if there was no cash available then it could not have been given to employees or used to make purchases. It is not possible for any business to operate on a negative cash basis as it cannot make cash purchases or give cash to anyone if it does not have that cash available to use.

79. Mrs McGurl accepted there were some necessary amendments and corrections to the spreadsheets she had prepared. Mr Holland submitted that Mr Davies had not had sufficient opportunity to consider the amended schedules and give any appropriate explanations.

80. For the reasons set out at [114] below concerning the very limited conclusions we have drawn from Mrs McGurl's evidence (and only for those reasons) we do not consider it necessary to summarise any of the details of Mrs McGurl's schedules or the challenges made thereto by the Company.

Evidence of Mr Roderick Stone

81. Mr Stone's evidence concerned the previous involvement of both Mr Mycroft and Mr Davies as directors of Limitmaze. HMRC had denied input tax totalling over £430,000 to Limitmaze for VAT periods 04/06 & 05/06. An appeal against that refusal had been dismissed by the Tribunal (under appeal number reference MAN/07/1318). The hearing was in December 2010 and June 2011; the decision was issued in March 2013; permission to appeal to the Upper Tribunal on a point of law was granted in June 2013. The First-tier Tribunal in its decision had made a finding that Limitmaze "did know there was a connection with fraud in respect of each of the relevant transactions" (at [106]).

Appellant's Case

82. Mr Holland for the Company submitted as follows.

83. It was accepted that the documents held by the Company did not meet the requirements of reg 14 and thus were not valid VAT invoices.

84. It was accepted that the Company bore the burden of proof, on the balance of probabilities. The Tribunal's jurisdiction in considering the exercise by HMRC of their discretion under reg 29 was stated by Schiemann J in *Kohanzad v Customs and Excise Commissioners* [1994] STC 967 as follows (at 969):

5 “It is established that the tribunal, when it is considering a case where
the commissioners have a discretion, exercises a supervisory
jurisdiction over the exercise by the commissioners of that discretion.
It is not an original discretion of the tribunal, it is one where it sees
whether the commissioners have exercised their discretion in a
defensible manner. That is the accepted law in this branch of the
court's jurisdiction, and indeed it has recently been decided that the
supervisory jurisdiction is to be exercised in relation to materials which
were before the commissioners, rather than in relation to later material.
10 The cases which establish these propositions are *Montalbano v
Customs and Excise Comrs* (LON/85/591, unreported), a tribunal
decision released on 19 June 1986; another tribunal decision, this time
released on 18 August 1986, *Morgan v Customs and Excise Comrs*
(LON/86/165, unreported); and a very recent decision of Dyson J only
15 decided on 13 July 1994 called *Customs and Excise Comrs v
Peachtree Enterprises Ltd* [1994] STC 747.

It is, of course, well established that in this type of case, the burden of
proof lies on an appellant to satisfy the tribunal that the decision of the
commissioners was incorrect.”

20 85. The Company’s case is that in exercising their discretion by refusing the
Company’s claim for input tax credits in relation to the Apple receipts, HMRC
exercised their discretion unreasonably.

86. HMRC had visited the Company on several occasions and were well aware of
how the Company conducted its business. Unlike Mrs Sorsby, Mrs Stephenson had
25 actually met with the Company and had been satisfied that it was appropriate to
authorise a VAT refund. A full explanation had been given of why the Company
moved from box-breaking to purchasing iPhones. The relationship with Noon was
long-standing. Most Apple stores were in London and, as the Company was based in
Sheffield, it needed to employ runners who were in the London area. Noon
30 recommended these people to the Company and the Company employed them on
proper contracts. The Company was carrying on a business and the VAT was
incurred on the iPhone purchases in that connection. In the period in dispute the
Company purchased 1435 iPhones and 50 iPads. The sales to Noon were covered by
the special reverse charge provisions relating to mobile phones, and thus the
35 Company was in a reclaim position. If not all the Apple receipts were attached to the
sales invoices issued by the Company then any discrepancies were not significant, and
the Company had attempted to produce a reconciliation but had had insufficient time.
Despite the manner in which the Company’s witnesses had been cross-examined, this
was not an MTIC case. If the Company could have obtained VAT receipts in its own
40 name then it would have done so. Commercial and credible explanations had been
provided for why it had been necessary to transfer large amounts of cash across the
country.

87. There was ample evidence available to HMRC to satisfy them that the VAT had
been properly incurred.

45 (1) The Barclays bank statements showed the money being drawn out of the
Company’s account to pay for the iPhones and iPads. The Company withdrew

in the period as a whole £900,000, which was more than sufficient to purchase the iPhones and iPads which it claimed to have purchased.

(2) That money was provided to and spent by the runners, who were employees of the Company.

5 (3) The iPhones and iPads were purchased from Apple stores and HMRC had accepted that Apple would have accounted for the output tax on those sales – thus if the disputed repayment was made then HMRC would not be out-of-pocket.

10 (4) The Company sold the goods to Noon – that was supported by Officer Kumar’s evidence. It was more than coincidental that the Company sold exactly the same number of iPhones and iPads as it asserts were supplied to it by Apple during the relevant period.

15 (5) The Barclays bank statements showed money being received from the customers - namely Noon and Royal Etihad - for the onward supply of the iPhones and iPads.

88. If HMRC had considered the evidence objectively then they would have exercised their discretion by allowing the Company the input tax credits claimed. Instead, HMRC had acted unreasonably and had taken into account factors which they should not have.

20 89. The Tribunal had requested submissions on s 47(2A) VATA 1994.

(1) The runners did not disclose to Apple that they were purchasing the goods on behalf of the Company and thus it was accepted that the runners were not acting as disclosed agents of the Company. The Tribunal was required to make a finding as to whether the runners when buying the goods were acting as employees of the Company or as undisclosed agents of the Company.

(2) The rationale for s 47 was given in *Metropolitan Borough of Wirral v Customs and Excise Commissioners* [1995] STC 597 at 599:

30 “The issue raised by this appeal concerns the true construction of s 32(4) of the Value Added Tax Act 1983 (the 1983 Act) which provides:

‘Where goods or services are supplied through an agent who acts in his own name the Commissioners may, if they think fit, treat the supply both as a supply to the agent and a supply by the agent.’

35 In the absence of s 32(4) of the 1983 Act difficulties would arise when an agent contracted with a contractor in his own name on behalf of a principal for a supply of goods or services. The agent would be unable to treat the tax on the supply from the contractor as his input tax (because the supply had not been made by him), and the principal would be unable to treat the tax as his input tax (because the contractor's invoice had not been addressed to him). The purpose of s 40 32(4) is to meet these difficulties. The commissioners (as they did in the instant case) may treat the supply to the agent as both a supply to

the agent and a supply by the agent to his principal. Thus, the receipt of services by the agent gives rise to recoverable input tax, and the 'treated' supply by him gives rise to an output tax liability for which he must account."

5 (3) The mandatory nature of s 47(2A) in respect of goods was to implement art 14(2)(c) Directive 2006/112:

"1. 'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner.

10 2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

...

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale."

15 The legislation was intended to assist in resolving commercial difficulties rather than in disturbing the neutrality of the tax.

(4) In determining whether the runners were employees or undisclosed agents, the Company relied on the Court of Appeal decisions in *Julian Smith v Reliance Water Controls Limited* [2003] EWCA Civ 1153 and *Mercantile International Group plc v Chuan Soon Huat Industrial Group Limited* [2002] EWCA Civ 288. Those cases were authority for the proposition that the way in which parties draw up a contract and express it is a very important factor in defining what is the relationship between them. The runners had contracts of employment with the Company and the fact that the contract described the relationship as employer and employee cannot be ignored.

25 (5) The concept of making a supply for VAT purposes is not identical to the performance of an obligation for the purposes of contract law, and it may be necessary to look beyond the contract to determine the nature of the VAT supply – see *A1 Lofts Limited v HMRC* [2010] STC 214.

30 **Respondents' Case**

90. Mr Shields for HMRC submitted as follows.

91. The alleged VAT invoices produced by the Company to support its disputed claim are invalid (*inter alia* they do not comply with reg 14(1)(e)), and no satisfactory alternative evidence has been produced by the Company to support its claim.

35 92. Mrs Sorsby's evidence (a) set out the steps she took prior to the issue of the denial in September 2011 to afford the Company the opportunity to provide alternative evidence of supply, and (b) detailed the evidence provided by the Company to HMRC prior to the denial that supplies took place.

93. The evidence provided by the Company comprised:

(1) A payroll report on the Company's employees covering the period 6 June 2011 to 5 June 2012 – that did not cover the period of the disputed transactions, nor did it give addresses for the employees or their periods of employment.

5 (2) Banking records showing large withdrawals and deposits of cash – but with no information (despite requests) enabling the invoices produced as evidence of sales to be linked to the movements of cash, nor to link the cash to employees of the Company.

94. In preparation for the hearing HMRC had attempted to schedule the cash, the invoices and the Apple receipts but the Company had objected to that document as
10 being presented too late for Mr Davies to analyse it. For that reason the Tribunal had refused permission for the schedule to be admitted in evidence, but it was telling that the Company had never attempted to produce itself such an obvious and necessary document.

95. Mrs Sorsby had raised with the Company legitimate questions about the conduct
15 of the Company's business but no satisfactory answers had been provided. She was not satisfied on the evidence provided that the contended taxable supplies had been made to the Company. The evidence provided was wholly inadequate to substantiate the Company's contention that it had received those supplies.

96. Details of the earlier verification visits conducted by HMRC (including the
20 evidence of Mrs Stephenson) had been produced at the request of the Company, but had no relevance to the current appeal.

97. The Company's evidence of how its business ran was unsatisfactory, and in some respects simply incredible.

25 (1) Given his previous experience with Limitmaze, an honest businessman in Mr Davies' position would be very circumspect in his dealings.

(2) The way in which cash was passed to Noon relied on an immense amount of trust. The Company had not explained how this trust had developed or what persuaded the Company that it could rely on Noon to the extent that it did. Apart from Jabeen, Mr Davies admitted he knew nothing about Noon's staff.
30 He knew nothing about Noon's arrangements for storage of the Company's cash or the Company's goods, or the insurance arrangements. Nor did he make any attempt to find out at the time.

(3) The runners were recruited by Noon, instructed by Noon, given cash by Noon, reported to Noon, and were paid by Noon. The Company was simply
35 sent information by Noon, most of which was taken on trust (for example, there were no timesheets).

(4) The level of trust purportedly placed in the runners was simply not credible. Mr Davies did not check visas or addresses for young people who were only temporarily in the UK. These were people who could disappear
40 without trace in a matter of hours, yet the Company claimed they were given thousands of pounds of its money at a time. On 28 April 2011 Noon handed over £30,000 to individuals who were being paid around £300 per month, but

5 did not record who received what. Apparently, runners were allowed to retain money and goods at least overnight. All this contrasted with the Company's behaviour towards Mr Blackburn and Mr Mawbey – who were well known to Mr Davies – but were required to count the money in Mr Davies' presence and sign for it.

10 (5) The commercial arrangements between the Company and Noon were peculiar. Apparently, Noon would buy unlimited stock with no prior agreement as to price, delivery date or payment date. The dates on which invoices were raised did not link to the number of telephones held at that time. It was not possible to determine at any particular time what items of stock belonged to the Company and which to Noon.

15 (6) There was even further financial confusion because apparently on occasions Noon would give its own money to the runners; and occasionally Noon would advance money to the Company. Mr Davies' evidence on this was incoherent.

(7) Overall, there was no convincing explanation of the commercial rationale between the Company and Noon. Even accepting the Company's factual descriptions, an alternative analysis of what was happening was that the relationship was merely one of lending of money

20 98. There was no audit trail to connect the Company to the Apple receipts. In the case of a business dealing with large quantities of cash and high value/low volume goods, a robust audit trail following the path taken by the cash and the goods would be expected. The Company's explanation was that the following steps were involved:

25 (1) Mr Davies and Mr Mycroft withdrew cash from the Company's bank account.

(a) Bank statements had been produced but with no attempt to carry out a reconciliation showing what the cash had been used for.

(2) Cash was sent to Noon.

30 (a) The bank withdrawals do not match the cash receipts signed by Noon.

(b) Mrs McGurl's schedules indicated that at times more cash had been given to Noon than had been withdrawn.

(c) The Company had kept no record of how much cash had been sent, other than the assertion that it had been counted before being sent.

35 (3) Noon distributed the money to runners employed by the Company.

(a) There is no documentary evidence of how much money was given to whom – or indeed if any money was ever given to the runners.

(4) The runners purchased products from Apple.

(a) The till receipts do not record who purchased the goods.

40 (b) In some instances the till receipts record that Apple Gift Cards were used to purchase goods.

(c) There is no evidence linking the phones or the receipts to the Company.

(5) The runners delivered the products to Noon.

(a) There is no evidence about the delivery of the goods or the receipts to Noon.

(b) Mr Davies never saw the goods.

(c) There is no evidence as to the whereabouts of the goods pending their alleged onward sale.

(6) Noon paid the Company.

(a) The invoices did not match the till receipts.

(b) There was, of course, no evidence from Noon. Officer Kumar's evidence on the operations of Noon made it surprising that the Company's purported business dealings with Noon were so informal.

99. The Company bore the burden of proving that it received a taxable supply of the iPhones and iPads, and it had failed so to prove.

100. The Tribunal had requested submissions on s 47(2A) VATA 1994. Where goods were supplied through an agent who acts in his own name, then there was a deemed supply to the agent and a deemed supply by that agent. An employee is as much an agent as is a normal commercial agent. The concept of "an agent who acts in his own name" includes an agent who makes a purchase in a retail shop without disclosing that he is doing so on another person's behalf. In such a case the goods are sold to the person presenting themselves in the shop. The weight of the evidence was that the runners did not disclose that they were acting as agents of the Company; thus they received the supply from Apple and there was no VAT on the supply by the runners (who were not registered for VAT) to the Company. Thus there could be no claim for repayment by the Company.

Consideration and Conclusions

101. We set out first our jurisdiction in this dispute, and the approach we have adopted. We then address a matter concerning the applicable statutory provisions. We then make some limited observations on the Company's method of trading, before determining the reasonableness of HMRC's decision to refuse to accept the evidence produced by the Company in support of its input tax claim.

Jurisdiction and Approach

102. The Company accepts that it does not hold VAT invoices (as defined in regs 13 & 14 of the VAT Regulations) to support the disputed purchases. The Company relies on HMRC's discretion under reg 29 to allow "such other evidence of the charge to VAT as [HMRC] may direct". The Company claims that HMRC's decision to refuse to accept the evidence provided by the Company was unreasonable, given the

contents of the 2007 Statement of Practice on “Input Tax deduction without a valid VAT invoice” (quoted at [8] above).

103. From the caselaw in *Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd* [1980] STC 231, *Peachtree Enterprises* and *Kohanzad* (both *op cit*) we derive the following approach, which we understand is uncontroversial:

- (1) The jurisdiction of the Tribunal in this matter is only supervisory.
- (2) The Tribunal cannot substitute its own discretion for that of HMRC.
- (3) The question for the Tribunal is whether HMRC’s decision was unreasonable in the sense that no reasonable panel of Commissioners properly directing themselves could reasonably reach that decision.
- (4) To enable the Tribunal to interfere with HMRC’s decision it would have to be shown that HMRC took into account some irrelevant matter or had disregarded something to which they should have given weight.
- (5) In exercising its supervisory jurisdiction the Tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of HMRC was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected.
- (6) The burden of proof lies on an appellant to satisfy the Tribunal that the decision of HMRC was unreasonable.

Section 47 VAT Act 1994

104. We invited both parties to make additional submissions in their closing statements relating to s 47(2A). The concern that we put to the parties was:

- (1) In relation to “an agent who acts in his own name”, s 47(3) grants a discretion to HMRC to treat a supply of *services* as being both a supply to the agent and a supply by the agent. Thus s 47(3) permits HMRC alternatively to treat a supply of services by such an agent as being a supply direct to the principal (ie not as being both a supply to the agent and a supply by the agent).
- (2) However, in relation to a supply of *goods* by such an agent, there is no such discretion – s 47(2A) is mandatory that “the supply *shall* be treated as both a supply to the agent and a supply by the agent” (emphasis added).
- (3) Thus, given that in the current appeal the supplies were of goods (iPhones and iPads), if the runners had acted in the capacity of “an agent who acts in his own name” then any supplies to the Company would not have been by Apple, but instead by the runners (who were not VAT-registered) and thus there was no input tax consequence for the Company.
- (4) We find that the runners did not disclose to Apple that they were purchasing as agents of the Company. Indeed we understand that is fully accepted by the Company – as Mr Holland stated in his closing submissions, “It was essential to the Appellant’s trading method not to disclose to Apple that it

was buying the Telephones, for, had such a disclosure been made, Apple would not have been prepared to sell the Telephones to the Appellant.”

(5) Accordingly, if that finding results in each runner being “an agent who acts in his own name”, there would appear to be no input tax being charged to the Company (and thus no reclaim possible).

105. Mr Holland for the Company submitted in effect (see [89] above) that the runners had one of three possible statuses: disclosed agents, undisclosed agents, or employees. He accepted that the runners were not disclosed agents but maintained that the correct status was that of employees – not undisclosed agents. We find that, on balance on the evidence available to us, the runners were employees of the Company: there were signed contracts of employment between the Company and the runners; the wages of the runners were borne by the Company; and the Company operated PAYE procedures in respect of the runners (although we understand there are or were unpaid PAYE liabilities). However, we are not convinced that Mr Holland’s distinction between employees and undisclosed agents is correct, for the following reasons.

106. We do not gain any assistance from the authorities cited by Mr Holland. *Metropolitan Borough of Wirral* concerned a previous version of the legislation whose wording is preserved in s 47(3) for supplies of services but has been replaced for supplies of goods by s 47(2A) – a distinction pointed out by the VAT Tribunal in *Express Medicare Ltd* (2000) VAT Decision 16969 (at para 38). *Reliance Water Controls* concerned whether an employee’s legal status had changed to a self-employed contractor; here, we have found that the runners were employees of the Company. *Mercantile International* concerned whether a person was buying as an agent or on its own behalf; here the distinction is irrelevant to the VAT result – if the runners were buying on their own behalf then there is no input tax for the Company, as is also the case if they were buying as undisclosed agents (because of s 47(2A)).

107. The reason why an employee can bind his employer (for example, in a contract of sale and purchase of goods) is because he is an agent of his employer. There is not, in our view, a status of “employee agent” separate and distinct from “non-employee agent”. Normally this agency status creates in practice no VAT problem. A driver filling-up his company vehicle if questioned by a garage attendant, “Are you buying that fuel yourself or on behalf of your employer?” would simply answer that it was on behalf of the company; he is a disclosed agent. But if the driver knew that the garage would refuse to serve him if he was buying on behalf of the company and so he (falsely) states that he is buying on his own behalf, then he is acting as an undisclosed agent and (by s 47(2A)) the garage is making a supply of goods to the driver not the employer, and thus the VAT on the fuel is not input tax for the employer. That second situation is the one that applies to the current appeal.

108. Our conclusion is supported by the decided caselaw, so far as we have researched:

(1) In *BBC v CCE* [1974] VATTR 100 (which concerned services rather than goods) the VAT Tribunal stated:

5 “I should also point out that, whichever method is employed, all travel and accommodation arrangements are normally made by the staff member concerned, and this was so in the present case. Occasionally, for special reasons, the Corporation may itself arrange accommodation for a member of its staff, but we are not concerned with such a case. In our case the Corporation was in no way concerned with making any of the arrangements, and there is no evidence that anyone who supplied Mr Kirwan [ie the employee] with goods or services had any reason to know that he was a member of the Corporation's staff.”

10 The VAT Tribunal concluded:

15 “The mere fact that the hotel accommodation was supplied to Mr Kirwan in the course of his duties for the Corporation does not, in our view, mean that the supply was made to the Corporation. In our view that is a question of fact and, on the facts of this case, we do not think the hotel accommodation can in ordinary language be said to have been supplied to the Corporation.”

(2) In *Stirlings (Glasgow) Ltd v CCE* [1982] VATTR 116 the VAT Tribunal stated:

20 “The solicitor for the Appellants argued that in the present case the petrol had been supplied to the Appellants direct or alternatively to the travellers [ie the employees] as agents for the Appellants. In our opinion the supply was clearly made to the travellers themselves. The contracts of supply were between the travellers and the respective garages. It was they who had the choice of garage and who purchased such petrol as they required (not necessarily six gallons per week) from one or more garages. They were not agents, and had no authority to purchase in the name of the Appellants. If they had obtained the petrol on credit, the garages clearly could not have sued the Appellants for the price but would require to seek recourse from the other party to the contract of sale, namely the traveller. The terms of section 3(3)(a) of the Act [now s 24 VATA 1994] are therefore not satisfied and on this short ground alone the appeal must fail.”

35 (3) In *Stormseal (UPVC) Window Co Ltd v CCE* [1989] VATTR 303 (which actually concerned a self-employed contractor rather than an employee) the supply was found to have been made to the company, but only because of a finding that the agent was a *disclosed* agent:

40 “Applying these provisions to the present facts it is plain that there was at the outset a supply of the hotel accommodation by the hotel properly charged to tax. It is equally plain in our judgment that the supply was made to Stormseal not to its representative, whether he was an employee or self employed. It was Stormseal which required and ordered the accommodation, Stormseal which was thereby liable to pay for it. It was to Stormseal that the hotel looked for payment and Stormseal who in fact paid the bill.”

45 109. Mr Holland reminded us of the words of Sedley LJ in *Royal & Sun Alliance Insurance Group plc v Customs and Excise Commissioners* [2001] STC 1476 (at [54]): “Beyond the everyday world, both counsel have explained to us, lies the world of value added tax (VAT), a kind of fiscal theme park in which factual and legal

realities are suspended or inverted.” However, we are not persuaded that s 47(2A) should not be applied on its terms to the facts as we have found them.

110. The runners were undisclosed agents of the Company and thus (by s 47(2A)) the supplies of goods were not to the Company but to the runners. The result of our analysis is that the VAT stated on the Apple receipts was not input tax of the Company.

111. In case our interpretation of the relevant statutory provisions above is incorrect, we have in any event below determined the appeal according to our jurisdiction as stated in [103] above (ie reasonableness of HMRC’s decision to refuse to accept the alternative evidence provided by the Company).

Method of Trading

112. Before moving to the reasonableness of HMRC’s decision, we comment briefly on the Company’s method of trading. During the hearing we received a considerable amount of evidence that went beyond the information that was available to Mrs Sorsby when she made her decision on 23 September 2011. While much of that was useful background, we are reluctant to make findings that go beyond considerations relevant to Mrs Sorsby’s decision in September 2011. As Mr Shields stated in his closing submissions, “Given the burden of proof, the Tribunal does not need to make a positive finding as to how the trade was in fact carried on.” Accordingly, we confine ourselves to three relevant observations.

113. First, in relation to the previous involvement of Mr Davies and Mr Mycroft with Limitmaze. The First-tier Tribunal dismissed Limitmaze’s appeal against an input tax denial on the grounds of actual knowledge of connection with fraud. We are aware that permission to appeal to the Upper Tribunal has been granted. The only conclusion we draw from Mr Davies’ previous involvement is that he would have been acutely aware in early 2011 that HMRC’s requirements for record-keeping by mobile phone dealers were detailed and rigorous - justifiably, in view of the presence of serious organised fraud in the trade sector. Yet he did not keep adequate records; the Company did not even keep a log of the IMEI numbers of the phones passing through its hands - a piece of information that would have been clear from the packaging and/or the till receipt. Mr Davies’ explanation (he did not use these very words) was that since the Company was buying from Apple retail stores it was insulated from any risk of MTIC fraud, and thus the usual HMRC requirements were not applicable. Whatever the justification offered, the fact is that when pressed by Mrs Sorsby for details of the purchases Mr Davies could produce little other than handfuls of Apple till receipts.

114. Secondly, in relation to the bank reconciliation schedules prepared by Mrs McGurl. These were after-the-event exercises which were not, of course, available to Mrs Sorsby when she made her denial decision. Accordingly, and only for that reason, we have placed no weight on the detailed content of Mrs McGurl’s schedules. The only conclusion we have drawn is that the exercise of reconciling (so far as possible) the bank statements to the purchases and sales was feasible and could have

been performed by Mr Davies or by the Company's accountant, or by another accountant retained for the task, but no such work was attempted by the Company either in response to Mrs Sorsby's questions or in preparation for the hearing of the appeal.

5 115. Thirdly, in relation to the method of trading generally. Even having heard the detailed explanations of the Company's witnesses as to why and how the business was conducted as they claim it was, we share at least some of the concerns listed by Mr Shields in his submissions (see [98] above). We conclude that Mrs Sorsby was fully entitled to be sceptical of the description of events given to her by the Company
10 in the weeks leading up to her decision in September 2011.

Reasonableness of refusal decision

116. The reasons given for Mrs Sorsby's decision are quoted at [65] above. The position of Mrs Sorsby, which she repeated several times during her oral testimony, was that at the time of issuing the denial decision she was not satisfied from the
15 information provided to her that the Company had purchased the goods using its own money.

117. The conclusion we have reached is that Mrs Sorsby's decision was reasonable and took into account all, and only, the evidence available to her at the time of making the decision.

20 118. The goods relevant to the input tax claim were mobile phones and other electronic devices which were the sort of goods susceptible to "widespread fraud and abuse" (to quote Appendix 3 of the HMRC Statement of Practice). Mr Davies was aware of that (see [113] above) and, of course, so was Mrs Sorsby. It was correct of Mrs Sorsby to require the enhanced checks set out in Appendix 2 of the HMRC
25 Statement of Practice and ask the comprehensive questions set out in her letter dated 4 August 2011.

119. The Company contended to HMRC that very large amounts of the Company's cash had been spent on the goods described on the Apple till receipts, which had subsequently been sold to Noon (and Royal Etihad). But there was no meaningful or
30 plausible audit trail to support the description given by the Company. The Barclays bank statements showed the cash withdrawals going out, and also the invoice payments from Noon coming in; but there was little or nothing to track the money or the goods between the two ends of the purported transactions.

35 (1) There was no definitive link between the cash withdrawn and the money delivered by Mr Blackburn to Noon – Mr Davies stated that sometimes he would send a different amount to Noon and temporarily retain the rest at his house; also the cash receipts were occasionally lost in transit; further Mr Blackburn would take the fuel costs out of the envelope.

40 (2) There was no definitive link between the cash delivered to Noon and the money handed to the runners – the distribution of the cash seems to have been performed wholly at the discretion of Noon, with no details reported to the

Company; some of it seems to have been spent on travel expenses; apparently Noon occasionally gave its own money to the runners.

5 (3) There was no definitive link between the cash handed to the runners and the Apple till receipts – the receipts do not identify the purchaser; they do identify the phone (by IMEI number) but apparently these were not recorded.

10 (4) There was no definitive link between the Apple till receipts and the Company's stock in hand – although the till receipts were ferried from Noon, the Company did not make any log of the IMEI numbers of the phones being added to stock; if Noon had been burgled then there would have been no way of anyone knowing if the stolen goods (being phones worth £500 each) had been the property of Noon or the Company.

15 (5) There was no definitive link between the Apple till receipts and the sales invoices – although the limited tests performed by Mrs Sorsby did not reveal any discrepancies, Mr Davies accepted that there was no necessary correlation between the identity of the goods sold and the till receipts (in other words, an invoice recording the sale of, say, 84 iPhones did not necessarily refer to the 84 iPhones recorded on the multiple till receipts stapled to that invoice when produced to Mrs Sorsby).

20 120. We conclude that Mrs Sorsby was fully entitled to reach the conclusion that she was not satisfied from the information provided to her that the Company had purchased the goods using its own money. Thus her decision that there was not adequate alternative evidence of the Company having incurred the input tax claimed was a reasonable one.

Decision

25 121. The appeal is DISMISSED.

30 122. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

35

**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 11 June 2014

APPENDIX

Text of HMRC letter dated 4 August 2011

5

You are aware that I am currently examining your VAT repayment claim for the period ending May 2011. You are also aware officers have been examining your business records, examination and scheduling of these records continues. I am writing to request further information arising out of my examination to date.

10

In order to progress the verification, I require clarification and further information on a number of aspects, trading patterns and activities of your business. Could you therefore please address the following points?

15

(1) Please provide me with an explanation of the background of your history in this trade, why you opted to enter into this particular trading activity in preference to any other.

Please provide evidence of the research you have carried out prior to the commencement of, and during the subsequent trading period of your company.

20

Please forward a copy of your business plan and associate documentation.

25

(2) Please provide details of any capital investment made into the company and the source of any such investment.

Please provide bank statements for the business bank account (or accounts if there is more than one) for the period in question.

30

If capital investment has been made prior to the period under verification, then the bank statements showing the relevant capital introduced should also be furnished.

(3) My examination of your business records scrutinised to date, suggest that the majority of purchases appear to have been made by cash and Apple Gift card.

35

Please provide the following information on Cash Handling procedures and obtaining Gift Cards:

40

- How are the gift cards obtained and who obtains them?
- Who reaches the decision as to whether purchases are mad by Cash or by Gift card, and on what basis is this decision made?
- Do you hand cash to your employees directly?
- Do you transfer cash to your employees' bank?

- When cash is being withdrawn from the bank then how has that cash reached your account in the first instance?
 - What arrangements do you have with your bank in respect of the draw down of such substantial sums of cash?
- 5
- If you have received a loan for initial investment or subsequent capital, then please provide the relevant contracts and all related correspondence in respect of that- loan. In the event that you have received a loan without a contract, then what are the re- payment terms and why was a loan advanced without any method of enforcing its re- payment?
- 10
- If you have received funding from any third party source, then I require documentary evidence of the source of those funds.
 - In respect of the purchases made on Apple Gift cards, please provide the names specified on each of the gift cards used and the details of any additional card holders.
- 15
- If the gift cards are obtained from the Apple on-line shop, then how are they paid for?
 - In the event that you have purchased gift cards on-line, then payment must have been made either via bank transfer, debit or credit card. If a credit card has been used, then in whose name is that card and what is the cards credit limit? Please provide the details of the relevant on-line user name. Is any security being offered in respect of the cards limit value and, if so, what is that security and who is it being made by and to whom? If the gift cards are being purchased via a private account, then I will require the original statements of that personal account showing the payment to that credit card, plus evidence
- 20
- of payment into the personal- account sufficient to cover the credit card bill. If the re-payment of the credit card is made via a third party, then I will require full details of who that third party is and the reasons why they are paying that credit card bill.
- 25
- Please provide evidence of stock of gift cards kept and receipts and/or
- 30
- documents in respect of the gift cards purchased.
- (4) I have noted that almost all of the receipts examined to date do not have any customer details entered, why is this? Apple stores generally request customer details when a purchase is made.
- 35
- What do your buyers say to the sales assistants when asked for their details?
- (5) Please confirm precisely who is buying the phones on your behalf.

Were all the employees as per your employee history report engaged in the purchase of phones in the period in question?

- 5 In the event that anyone other than those indicated on your employee history report purchase phones, then I will require you to provide me with that person/s National Insurance number and date of birth.

10 Have you checked that all your employees are entitled to work in the UK? Do the directors engage in the procurement of the phones personally?

(6) Could you explain why the majority of the phones are purchased (of those examined to date) from the South of the U.K when your company is based in Sheffield?

15 Why have you decided to buy phones from the particular stores used rather than any other Apple store?

(7) Please clarify what instructions are given to the employees buying the phones. If instruction is given to them in writing, then please provide with me with a copy.

25 Have you provided training? If so please provide information on the training provided along with copies of any literature.

(8) Please confirm how you source your buyers.

Did you conduct interviews?

30 How do you ensure that the cash handed to the buyer will be used for its intended purpose and not stolen?

35 Have you ever had cash sums stolen? If you have, then please tell me who did it and confirm what you did about it?

Have you put in place any process to prevent this from happening in a first instance or again if you have experienced cash theft in the past?

40 How are your employees paid, is it say, a daily rate or per phone?

Do you engage the services of a buying agent and task them .in obtaining a set number of phones, if you do, then how is this organised?

45 Do you make payment once the required number of phones has been obtained or do you pay the money up front?

If payment is made on the delivery of the phones then how is this payment made?

What level of profit have you negotiated with your buyers? Is it a flat rate for the service or is it per phone bought?

(9) Expenses

5

Please provide details of other expenses in relation to the purchase of the phones.

I have noted that (from the receipts scrutinised to date) that the majority of your purchases are made in the south of the UK but your company is based in the north (Sheffield) Can you provide me with details of expenses paid to your employees/buyers in addition to the fuel receipts that you have already submitted, for example, travel, subsistence etc. Any further expenses evidence you hold should be submitted to me for verification.

15 Are there any public transport costs and if so, who pays for this cost.

If your buyers use their own vehicles, then please provide parking receipts, I note that a large number of phones have been obtained from stores in central London and therefore the parking expenses will be substantial.

20

If your employees use their own vehicles, please provide details of adequate insurance.

25 If you use the services of a buying agent, does his fee include all expenses or are these paid separately?

What checks do you put in place to ensure that you are only reimbursing genuine expenditure?

30 What expenses are incurred in transporting the goods bought from the point of purchase to your storage facility?

Do you have insurance to cover the products once they have been purchased? If you do, then please provide me with a copy of your insurance policy.

35

(10) Stock

Once the buyers have purchased the products what happens to them? What are your storage arrangements?

40

Where is your storage facility? Is your facility rented? If yes, then please provide details of whom it is rented from and how the rental payment is made? Please provide me with a copy of your rental agreement.

45 What are the security arrangements at your storage facility given that you may have a large number of very high value goods on site?

What insurance do you have to cover the storage of your merchandise? Please provide copies of any relevant policies.

5 What system do you have in place to record stock and what stock records are kept? Please provide copies of the stock records that you keep.

Are any modifications carried out on the phones purchased? If yes, I will re-visit this issue accordingly.

10 (11) Sales

From the records scrutinised to date, your onward sales appear to have been made exclusively to Noon 2000 Ltd, however, please note my scrutiny of all your records submitted to date is not yet complete.

15 Please confirm how you became introduced to Noon 2000 Ltd. What was the time line of the introduction?

20 Did you have the sale arranged before you purchased the phones or did you buy to order?

Do you know why your customer did not buy direct from Apple? If you do, then please explain.

25 Please provide details of any other customers you have other than Noon 2000 Ltd and furnish me with any contracts you have with your customer/s.

30 Is there any correspondence, including e-mails, detailing any negotiations with your customer/s about what is being supplied and the price to be paid?

I have noted that a various range of mark-ups apply to your sales to Noon 2000 Ltd in the period, could you explain the reason for this?

35 How do you set the price you are charging for your products?

Are you aware of what happens to the products once they have been sold to Noon 2000 Ltd? If yes, please provide details.

40 Please tell me how stock is physically moved from your storage facility to your customer/s. Do you have your own vehicles? If yes, please provide details of registration, insurance, maintenance etc. If you hire vehicles, please provide details of your contract.

45 (12) Finally, please give me details of the insurance arrangements for the stock that has been purchased whilst in transit. If you have separate insurance cover, then please provide me with the relevant documents/policy. In the event the insurance is the

responsibility of the customer, then please provide me with a copy of your contract that stipulates this and what assurances you have that the stock is adequately insured?

5 I am aware that that you have employed a solicitor to act on your behalf. In respect of this, I would ordinarily have copied your agent into all correspondence that I issue. However, I have not yet received a signed authority from you as requested in letter of the 20th July 2011.

10 For completeness, I have made you aware that your solicitor has not been sent a copy of this correspondence and you should supply him with a copy of this letter directly if you require his involvement in respect of this matter.

15 This request for information is not exhaustive, as you know my enquiries continue. Once the current examination of the records and subsequent analysis has been undertaken, there may well be further questions. I do however feel that it is expedient to put the above queries to you now.