Neutral Citation Number: **[2025] EWHC 2312 (Admin)**

Case No: AC-2023-LON-000068

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/09/2025

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

THE KING (on the application of HOTELBEDS UK LIMITED)	**Claimant**
- and -	
COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Defendant**

- -
- -

Sarabjit Singh KC (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Howard Watkinson (instructed by **HMRC Solicitor's Office & Legal Services**) for the **Defendants**

Hearing dates: 16-17 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 14:00 on 9th September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER

Mrs Justice Foster DBE:

The issue

1. The issue in this case is whether the Claimant, who was established in 1974, a wholesale supplier of hotel rooms, is entitled to deduct input tax on a series of supplies which were the subject of two Error Correction Notices ("ECNs") submitted to HMRC but refused by a Decision Letter dated 9 May 2023. The ECNs were dated 3 September 2021 for VAT periods March 2020 – June 2021 (in the amended sum of £416,977.11), and 25 January 2023 for VAT periods July 2021 – November 2022 (in the amended sum of £9,768,327.58). Two earlier ECNs were honoured by HMRC and the Claimant says the second two ECNs, based upon evidence of the same sort as the first two, ought to be paid in the same way; that is to say, they argue, consistently with HMRC's published policy.

2. It is the Claimant's case that they are entitled to a mandatory order that HMRC must follow their Guidance contained inter alia in a document known as VIT31200 from HMRC's Manual, and the relevant Statement of Practice '*VAT Strategy: Input Tax deduction without a valid VAT invoice*'. There is also a passage in Notice 700 with the heading "*Guidance VAT guide (VAT Notice 700) The guide to VAT rules and procedures*" headed **"***16.8 Invalid invoice procedure* with two sections: *16.8.1 What to do if you hold an invalid VAT invoice*" and "*16.8.2 When and how HMRC will exercise its discretion.*" Each of these supports the proposition that in the present circumstances input tax deduction should have been allowed they argue. Alternatively, HMRC is they say to respect the Claimant's legitimate expectation by repaying to the Claimant the input tax claimed in the third and fourth ECNs.

3. To understand the context of the decision-making requires the setting out of a fairly substantial body of written material.

Framework

4. The Principal VAT Directive (PVD) provides the framework for the EU and domestic law underpinning the right to deduct input tax and the entitlement to exercise that right. It is described by Lewison LJ in *Tower Bridge GP Ltd v Revenue and Customs Commissioners* [2022] STC 1324. Where emphasis appears it has throughout been added.

> *"…*
> *[15] … The supply of goods for a consideration within the territory of a member state by a taxable person acting as such, is subject to VAT: art 2. The VAT is payable by the taxable person carrying out a taxable supply of goods or services: art 193. Every taxable person who carries out supplies of goods or services in respect of which VAT is deductible must be identified by an individual number: art 214. Where a taxable person makes a taxable supply, he must issue an invoice: art 220.*
>
> *[16] The recipient of a taxable supply, if he is also a taxable person, is entitled to deduct the amount of VAT he paid in relation to that supply. Thus art 167 provides*
>
> *'A right of deduction shall arise at the time the deductible tax becomes chargeable.'*
>
> *[17] Article 168(a) provides:*
>
> *'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:*
> *(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person …'*
>
> *[18] These articles establish the principle. Other articles deal with how the right to deduct is to be exercised. Article 178 relevantly provides:*
>
> *'In order to exercise the right of deduction, a taxable person must meet the following conditions:*
> *(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240*
> *…*
> *(f) when required to pay VAT as a customer where Articles*

194 to 197 or Article 199 apply, he must comply with the formalities as laid down by each Member State.

...

[20] Article 179 provides:

'The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.'

[21] Article 180 provides:

'Member States may authorise a taxable person to make a deduction which he has not made in accordance with Articles 178 and 179.'

[22] Article 182 provides:

'Member States shall determine the conditions and detailed rules for applying Articles 180 and 181.'

[23] Chapter 3 section 2 of the PVD deals with invoices. Article 218 defines what is meant by an invoice; and art 219 provides:

'Any document or message that amends and refers specifically and unambiguously to the initial invoice shall be treated as an invoice.'

[24] The contents of the invoice are laid down by art 226 which relevantly provides:

'Without prejudice to the particular provisions laid down in this Directive, only the following details are required for VAT purposes on invoices issued pursuant to Articles 220 and 221:

...

(3) the VAT identification number referred to in Article 214 under which the taxable person supplied the goods or services;

...

(5) the full name and address of the taxable person and of the customer;

(6) the quantity and nature of the goods supplied or the extent and nature of the services rendered;

(7) the date on which the supply of goods or services was made or completed or the date on which the payment on account referred to in points (4) and (5) of Article 220 was made, in so far as that date can be determined and differs from the date of issue of the invoice;

...

(9) the VAT rate applied;

(10) the VAT amount payable, except where a special arrangement is applied under which, in accordance with this Directive, such a detail is excluded ...'

[25] Article 228 provides:

'Member States in whose territory goods or services are supplied may allow some of the compulsory details to be omitted from documents or messages treated as invoices pursuant to Article 219.'

[26] The PVD is transposed into domestic law by the Value Added Tax Act 1994 ('VATA') and regulations made under it. The relevant regulations for the purposes of this appeal are the VAT Regulations 1995, SI 1995/2518 ('VATR').

[27] Section 24(1)(a) VATA defines 'input tax' in relation to a taxable person as:

> *'VAT on the supply to him of any goods or services ... being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.'*

[28] Section 24(6)(a) VATA provides that regulations may provide for VAT to be treated as 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'*

[29] Section 25(2) VATA provides that a taxable person shall be:

> *'... entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.'*

[30] Section 26 VATA relevantly provides as follows:

> *'(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.*
>
> *(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—*
>
> *(a) taxable supplies; ...'*

[31] ***Regulation 29 VATR provides:***

> ***'(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.***
>
> ***(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, 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, instead of the document or invoice (as the case may require) specified in sub-paragraph (a) … above, such other … evidence of the charge to VAT as the Commissioners may direct.'***

[32] Regulation 13(2) VATR provides that the particulars of the

VAT chargeable on a supply of goods must be provided on a document containing the particulars prescribed in reg 14(1) VATR. Regulation 14(1) VATR states, in so far as is relevant:

'(1) Subject to paragraph (2) below and regulation 16 and save as the Commissioners may otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars— ...

...

(d) the name, address and registration number of the supplier,

(e) the name and address of the person to whom the goods or services

are supplied,

[...]

(g) a description sufficient to identify the goods or services supplied, (h) for each description, the quantity of the goods or the extent of the

services, and the rate of VAT and the amount payable, excluding VAT, expressed in [any currency]

...

(l) the total amount of VAT chargeable, expressed in sterling,

...'

5. The importance of the right to deduct and the neutrality of the tax has been expressed in a number of cases. In particular in *Barlis 06 —Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira (Case C-516/14) [2016] BVC 43*, a case concerning the sufficiency of detail on invoices and the overall purpose of an invoice. Paragraphs [37] to [39] of the CJEU's judgment emphasise the importance of these principles:

"37.It should be recalled that, according to settled case-law of the Court, the right of taxable persons to deduct from the VAT which they are liable to pay the VAT due or paid on goods purchased and services received by them as inputs is a fundamental principle of the common system of VAT established by EU legislation (judgment of 13 February 2014, Maks Pen. C-18/13. EU:C:2014:69, paragraph 23 and the case-law cited).

38.The Court has repeatedly held that the right to deduction of VAT provided for in Article 167 et seq. of Directive 2006/112 is an integral part of the VAT scheme and in principle may not be limited. The right is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, to that effect, judgment of 13 February 2014, Maks Pen, C-18/13. EU:C:2014:69, paragraph 24 and the case-law cited).

39.The deduction system is intended to relieve the operator entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT therefore ensures that all economic activities, whatever their purpose or results,

provided that they are in principle themselves subject to VAT, are taxed in a neutral way (judgment of 22 October 2015, PPUH Stehcemp. C-277/14. EU:C:2015:719. paragraph 27 and the case-law cited)".

6. The court made reference to the Member States' powers to penalise non-compliance with formalities consistently in particular with the objectives of preventing evasion and the neutrality of the tax.

7. In *Vădan v Agenţia Naţională de Administrare Fiscală—Direcţia Generală de Soluţionare a Contestaţülor* (Case C-664/16) [2018] BVC 48, the taxpayer had no invoices at all in support of his claim for input tax on purchases of goods and services used in a construction project. His till receipts were illegible. The Romanian court asked the CJEU whether the taxpayer could exercise the right to deduct tax in reliance on a court-commissioned expert report, in which the expert would assess how much VAT was likely to have been incurred. The first question the Romanian Court asked was whether the right to deduct could be exercised without invoices – the problem here was that such original material as was available was of such poor quality it could not prove the basic underpinning of the right to deduct.

8. AG Tanchev said in para [31]:

" ... Articles 167, 168, 178 and 226 of the VAT Directive, taking due account of the principles of VAT neutrality and proportionality, must be interpreted as precluding the exercise of the right of deduction by a taxable person who does not hold any invoices or any other suitable supporting documents attesting to his right to deduct input VAT.".

9. At para [80] he said it was logical

"*to refuse to deduct input tax where the infringement of formal requirements 'is so great that it makes it impossible or overly difficult to ascertain whether the substantive conditions for entitlement to a deduction have been met*"'.

Not only was there no actual invoice, there was also no other suitable supporting documentation; it was also relevant that there was a "*lack of minimal diligence*" on the part of the taxpayer in retaining invoices [83], and at [84] that there was:

"*nothing in the case file before the Court to suggest that, in the light of a 10-year lapse of time and the lack of any invoices or usable equivalent documents, an expert report could accurately re-record each relevant transaction with respect to which deduction of input tax is claimed."*

10. The Court repeated the importance of neutrality to the system of VAT:

"37[The] system is designed to relieve the trader entirely of the burden of the VAT due or paid in the course of all his economic activities. The common system of VAT consequently ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way (judgment of 9 July 2015, Salomie and Oltean, C-183/14, EU:C:2015:454, paragraph 57 and the case-law cited).

…

" *42… the strict application of the substantive requirement to produce invoices would conflict with the principles of neutrality and proportionality, inasmuch as it would disproportionately prevent the taxable person from benefiting from fiscal neutrality relating to his transactions.*

43 Nevertheless, it is for the taxable person seeking deduction of VAT to establish that he meets the conditions for eligibility (judgment of 15 September 2016, Barlis 06 — Investimentos Imobiliários e Turísticos, C-516/14, EU:C:2016:690, paragraph 46 and the case-law cited).

44 Accordingly, the taxable person is required to provide objective evidence that goods and services were actually provided as inputs by taxable persons for the purposes of his own transactions subject to VAT, in respect of which he has actually paid VAT."

11. That evidence

"45 … *may include, inter alia, documents held by the suppliers or service providers from whom the taxable person has acquired the goods or services in respect of which he has paid VAT*".

12. A report could supplement but not replace such evidence. The CJEU concluded at [48]

that

"*a taxable person who is unable to provide evidence of the amount of input tax he has paid, by producing invoices or any other document, cannot benefit from a right to deduct VAT solely on the basis of an assessment resulting from an expert report commissioned by a national court"*

13. In *Zipvit Ltd v HMRC* (ECJ) [2022] 1 WLR (Advocate General) a more nuanced view was propounded. This was a case where there were invoices at the relevant time, but they were in respect of an exempt supply, indeed, the invoices did not refer to VAT on the relevant supplies because they were understood at the time, wrongly, by the tax authority and parties, to be exempt. There were other complications including of limitation and recovery. There AG Kokott reflected (at para 50) that

"According to the court's settled case law, the fundamental principle of VAT neutrality requires the deduction or refund of input VAT if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. The only exception should be where non-compliance with such formal requirements has effectively prevented the production of conclusive evidence that the substantive requirements were satisfied"

14. But in that case she emphasised that the law linked exercise of the right of deduction to holding an invoice and characterised the possession of an invoice as a substantive rather than a formal requirement. She characterised an invoice (at para 81 of her Opinion) as a document that

" … *charges for a supply of goods or services* [as] *... in fact an invoice within the meaning of article 178(a) of the VAT Directive if it enables both the recipient of the supply and the tax authorities to establish which supplier has passed on to which recipient of the supply which amount in VAT for which transaction, and when it has done so. That means it needs to state the supplier, the recipient of the supply, the goods or services supplied, the price and the VAT, which must be stated separately"*

and

"if those five essential items of information are provided, the spirit and purpose of the invoice are fulfilled and the right of deduction ultimately arises.

15. The gravamen of her Opinion, relevant to the particular facts of that case, was that "*The recipient of the supply cannot claim relief from a charge to VAT by means of an invoice showing an exempt supply*." Further, in para 85 under "*(d) Interim conclusion*"

"… a right of deduction in a given amount requires the recipient of the supply to have held at some point an invoice separately stating the VAT passed on in that amount."

16. The exercise of the right to deduct beyond circumstances in which the taxpayer is in possession of a document called an invoice has been more recently described by the Supreme Court in *RCC v NHS Lothian Health Board* [2022] UKSC 28, [2022] 1 WLR 4888 where Lady Rose commented on the AG Opinions in *Vadan* and in *Zipvit*:

"The insistence on the production of the VAT invoice in Advocate General Kokott's opinion [in Zipvit] is tempered by the power conferred on member states to accept alternative evidence; a power that has been exercised by the United Kingdom in section 24(6)(a) of the VATA and the proviso at the end of regulation 29(2)…"

17. The discretion given to HMRC by Regulation 29

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

(and also in bold type in the extract from *Tower Bridge*) is the subject of the three pieces of written Guidance from HMRC available to the taxpayer, and upon which the Claimant relies in this case.

18. With regard to policy, as Laws LJ *in R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68] said:

"Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."

19. Thus a person has a right to the determination of his application in accordance with policy. This is well-recognised as being a principle related to the doctrine of legitimate

expectation but free-standing. In other words (those in fact of Lord Dyson in *R (WL (Congo)) v Secretary of State for the Home Departmen*t [2012] 1 AC 245) the executive may adopt any policy, provided that the adopted policy is a lawful exercise of the discretion conferred by the statute, and a decision-maker must follow his policy unless there is a good reason to depart from it.

20. In common with many cases centring on the application of policy, there is a prior question as to what the policy properly construed actually means. Here there are three pieces of policy documentation- the Claimant relies more heavily on the VIT extract, whereas HMRC refers to VAT Notice 700.

21. The meaning of policy, it is also well-established, is a question of interpretation and interpretation is a matter of law which the court must therefore decide for itself: *R (SK (Zimbabwe)) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2011] 1 WLR 1299. The starting point for meaning is of course the natural and ordinary meaning of the words used, viewed in their particular context and in the light of common sense. A document for public guidance should be seen through the eyes of the reasonable reader who should be assumed to start by taking it at face value.

22. These principles guide the determination of this application.

Policy Guidance documents

23. The totality of the potentially relevant policy Guidance is contained in three documents. Each is accepted by HMRC as being current at the relevant time. These are (in the order relied upon by the Claimant):

VIT31200 which is headed "- *How to treat input tax; alternative evidence for claiming input tax*". This is stated to be published 13 April 2016 and last updated on 14 December 2022.

HMRC's Statement of Practice ("SOP") dated March 2007 entitled 'VAT Strategy: Input Tax deduction without a valid VAT invoice'.

VAT Notice 700 The Guide to VAT rules and procedures section 16.8 stated to be published 17 December 2004 and last updated 9 June 2023.

VIT31200

24. The VIT 31200 statement of policy is headed "*How to treat input tax: alternative evidence for claiming input tax*" and is part of the VAT Input Tax section of the manual. It has a hot-link contents list as follow:

> *-The use of discretion*
> *-Factors for HMRC staff to consider when exercising discretion where the supply is not of goods specified in the Invalid Invoice Statement of Practice*
> *-Factors for HMRC staff to consider when exercising discretion where the supply is of goods specified in the Invalid Invoice Statement of Practice*
> *-When HMRC staff must make a submission to the VAT Fraud Team*
> *-Kittel Principle: knew or should have known of connection with fraud*"

Its relevant parts, following those headings, state as follows:

> **VIT31200**
>
> "*The use of discretion*
>
> *In the UK, under regulation 29 of the Value Added Tax Regulations 1995, the Commissioners have discretion to allow claims that are not supported by the correct evidence…*

> ***Where claims to deduct VAT are not supported by a valid VAT invoice HMRC staff will consider whether or not there is satisfactory alternative evidence of the taxable supply available to support deduction.*** *HMRC staff will not simply refuse a claim without giving reasonable consideration to such evidence.* ***HMRC has a duty to ensure that taxpayers pay no more tax than is properly due. Nevertheless this obligation must be balanced against a duty to protect the public revenue*****"**

[emphasis added]

25. A passage on dissolved companies follows. The Guidance continues:

> ***"Factors for HMRC staff to consider when exercising discretion where the supply is not of goods specified in the Invalid Invoice Statement of Practice***
>
> *HMRC staff should refer to the VAT input tax deduction without a valid VAT invoice: Revised Statement of Practice (link is external).*
>
> *The factors will vary depending upon the individual circumstances of the taxpayer.* ***Example questions are contained at Appendix 2 of the Statement of Practice and are listed below.*** *These are only examples, they are not absolute and not all questions will be appropriate to all taxpayers****.*** *HMRC staff should prepare bespoke questions that suit the individual circumstances of the taxpayer's business.*
>
> *Invalid Invoice Statement of Practice: Appendix 2*
>
> ***Questions to determine whether there is a right to deduct in the absence of a valid VAT invoice***
>
> ***• Do you have alternative documentary evidence other than an invoice (for example a supplier statement)?***
>
> ***• Do you have evidence of receipt of a taxable supply on which VAT has been charged?***
>
> ***• Do you have evidence of payment?***
>
> ***• Do you have evidence of how the goods/services have been consumed within your business or evidence about their onward supply?***
>
> ***• How did you know the supplier existed?***
>
> ***• How was your relationship with the supplier established? For example:***
>
> ***• 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 they are not stolen?***

• How do you return faulty supplies?

Where:

• the supply is of goods not specified as subject to widespread fraud and abuse; and

• the taxpayer can provide satisfactory alternative evidence of the supply (questions 1-4); and

• there are no grounds to suspect abuse or fraudulent intent on the part of the claimant

HMRC staff should normally exercise their discretion to allow the taxpayer to deduct the input tax.

Where a taxpayer fails to provide satisfactory alternative evidence of the taxable supply then it will not be authorised to deduct. Where HMRC staff intend to deny a taxpayer its right to deduct, and the supply is not specified, they can proceed without seeking endorsement from VAT Fraud Team (VFT) except in SI cases covered by the SI VAT governance process.

Factors for HMRC staff to consider when exercising discretion where the supply is of goods specified in the Invalid Invoice Statement of Practice

Goods subject to widespread fraud and abuse are listed in Appendix 3 of the Invalid Invoice Statement of Practice. This list differs from the statutory definition used when considering Joint and Several Liability (see Notice 726 (link is external)) Joint and several liability for unpaid VAT.

Invalid Invoice Statement of Practice: Appendix 3

Supplies of goods subject to widespread fraud and abuse [etc a list is given – not relevant here]

…

Where:

• an invalid VAT invoice is held; and

• the supply is of specified goods

as well as providing alternative evidence of the taxable supply taxpayers also have to show that they took reasonable commercial steps to ensure that their supply and supplier were genuine. HMRC expects taxpayers dealing in specified goods to be able to answer behavioural questions such as (although not limited to) example questions 5 and 6 in Appendix 2 of the Statement of Practice.

Note that these example questions will not necessarily be appropriate in every case. HMRC staff need to ask any and all relevant questions necessary to establish

whether the taxpayer took reasonable precautions to check the integrity of its supply. Further examples include what payment arrangements had the taxpayer agreed with its suppliers (see VAT input tax deduction without a valid VAT invoice: Revised Statement of Practice (link is external)) .

Where the taxpayer was advised to carry out VAT number checks on its trading partners, HMRC staff will normally consider whether or not such checks were carried out.

Where:

• the taxpayer has provided at least some alternative evidence of the supply; but

• HMRC is not satisfied that the taxpayer took reasonable steps to ensure the integrity of their supply and supplier

then generally the taxpayer will not be authorised to deduct. Before issuing a decision HMRC staff must first seek approval from VFT. Only where an endorsement is given by VFT can such a denial of input tax proceed.

When HMRC staff must make a submission to the VAT Fraud Team"

[etc]

26. Those parts in bold are particularly relied upon by the Claimant.

27. By the breadth of its title therefore, this Policy statement appears to apply to any claims that are made where a compliant invoice is not held- i.e. both where the taxpayer holds a non-compliant invoice and also claims where there is no invoice held at all. The wording of the document elsewhere however directs the reader to "Invalid Invoice" procedures and documents, suggesting that it may be intended only to deal with cases where an invalid invoice itself is held.

28. The Claimant suggests that the wording of this document comes closest to applying in the present circumstances, both in terms of the generality of the heading and the coherence of the requirements of which HMRC require proof which HB says chimes with the purpose of the invoice and the law as to the minimum requirements of such a document. HMRC say the policy document does not apply to the present circumstances.

The SOP

29. The SOP Policy Guidance document is headed "*VAT Strategy: Input Tax deduction without a valid VAT invoice Statement of Practice*". It provides by its introductory paragraphs:

> "*1. This Statement of Practice explains and clarifies HMRC's policy in respect of claims for input tax supported by invalid VAT invoices. It also explains why amendments were made to section 24(6)(a) and paragraph 4(1) of Schedule 11 to the Value Added Tax Act 1994 (VATA), and regulation 29(2) of the Value Added Tax Regulations 1995 to introduce new measures. These changes were effective from* ***16 April 2003*** *and apply to supplies made on or after this date. The statement of practice was first issued in July 2003 and has now been revised to provide clearer guidance and the updated legal position. This guidance does not apply to situations where HMRC may deny recovery of input tax for other reasons such as "abuse" of the right to deduct.*
>
> ***Why were changes needed?***
>
> *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 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.*
>
> *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.".*

30. The document then sets out the basics of the right to deduct and continues:

> *"6. If you are a taxable person, in order to exercise your basic right to deduct input tax, you must hold* ***a valid VAT invoice.*** *Without a valid VAT invoice, there is no right to deduct input tax. However, in the absence of such an invoice, you may still be able to make claims for input tax, but these claims are subject to HMRC's discretion. This of course assumes that a taxable supply has taken place. Where HMRC question the fact that an underlying supply has taken place, these provisions do not apply."*

[Emphasis in original]

31. An explanation of why the changes referred to in paras 2 and 3 were made appears at para 7, namely the expansion of the category of evidence acceptable to support deduction without a valid VAT invoice to include non-documentary evidence. Paras 8 to 10 explain what a valid invoice contains (name of supplier, VAT number etc etc), and what an invalid invoice is. The Guidance then goes on to a heading "*Invalid Invoice and HMRC's Discretion*" and paragraphs that are unnumbered on the policy guidance document but are likely intended as numbers 13 and 14 state:

"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."

32. A further unnumbered part next deals with certain "*supplies/transactions listed at Appendix 3*". Appendix 3 is headed "*Supplies of goods subject to widespread fraud and abuse*". It refers to telephones and computers and other goods and is of no relevance here. The document labelled Appendix 1 is a decision flow chart which indicates a series of questions. After the box "*DO YOU HOLD A VALID VAT INVOICE*", the answer "*YES*" leads to a box saying "*YOU HAVE A RIGHT TO DEDUCT INPUT TAX*". The answer "*NO*", on the basis it is not a case of goods subject to widespread fraud, leads to another question box "*CAN YOU SATISFACTORILY ANSWER MOST OF THE QUESTIONS AT APPENDIX 2*" which, where a positive answer is given, leads to "*WHILE YOU HAVE NO BASIC RIGHT TO DEDUCT, THE COMMISSIONERS WILL PERMIT INPUT TAX DEDUCTION*". The capitals are in the original.

33. The questions at Appendix 2 appear as follows:

> *"**Questions* to determine whether there is a right to deduct in the absence of a valid VAT invoice***
>
> *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?*
>
> *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:*
>
> - *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?*
>
> **This list is not exhaustive and additional questions may be asked in individual circumstances."*

34. The document continues:

> ***"How will HMRC apply their discretion?***
>
> ***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).***
>
> *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'.*
>
> ***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. Decisions on when to disallow VAT claims will only be made after an independent central review of the case has been carried out."

35. The passages in bold are those upon which the Claimant particularly relies. Further (presently irrelevant) details follow on the availability of a challenge to a decision made under this SOP.

36. It is to be noted that by its title this policy guidance document at first appears to apply to any claim made where a valid invoice is not held- whether because what is held is an invalid invoice, or because what is held is not an invoice at all, however, by the first paragraph it states it is only the "*policy in respect of claims for input tax supported by invalid VAT invoices".* The phrase "*in the absence of a valid invoice*" is of course broad enough to cover both circumstances.

37. Similarly, in para 6, the document states that in order to *exercise the right* to deduct you must hold a valid VAT invoice. Immediately thereafter it states that without a valid invoice there *is* no right to deduct. Neither of these statements is strictly accurate, of course. In fact, as the caselaw above suggests, and importantly, as is not disputed in this case, in order to exercise *automatically* a right to deduct, a valid invoice must be held. The burden of authority shows that the right to deduct exists when the substantive conditions for deduction have arisen, it may be given effect to either *automatically*, when a valid invoice is held, or as a matter of *discretion* in other circumstances. The position is made clear later on in para 16 by reference to the case of invalid invoices.

38. The reasoning for the legislative amendment to which reference is made is explained as the

"*threat to VAT receipts by the use of invalid VAT invoices …* [which] *are part of the Government's strategy to address fraud, avoidance and non-compliance in the VAT system.*"

VATN 700

39. The third policy Guidance document is VAT guide (VAT Notice 700). It too has a hot-linked contents section. It is as follows:

> ***"Contents***
>
> • *— 1 . Overview*
>
> • *— 2. Administration of VAT*
>
> • *— 3. Introduction and liability to VAT*
>
> • *— 4. The basic rules for VAT*
>
> • *— 5. VAT imports and exports. Movement of goods between Northern Ireland and EU, and Great Britain and Northern Ireland*
>
> • *— 6. Registering for VAT*
>
> • *— 7. Introduction to output tax*
>
> • *— 8. Output tax for particular situations*
>
> • *— 9. Output tax for business and non-business use*
>
> • *— 10. Introduction to input tax*
>
> • *— 11. Input tax when VAT paid on goods and services received before VAT registration*
>
> • *— 12. Input tax effect on subsistence, staff entertainment and domestic accommodation expenses"*

40. The totality of the relevant Guidance in this document is in the following terms:

> *"**16.8 Invalid invoice procedure***
>
> ***16.8.1 What to do if you hold an invalid VAT invoice***

Valid VAT invoices provide evidence for claiming input tax. An invalid invoice is one which falls short of any of the requirements set out in paragraphs 16.3 or 16.6. If you hold an invalid invoice the first thing you must do is go back to your supplier and request an invoice which meets these requirements. If you cannot do this, and can evidence why, you'll need to satisfy HMRC that the following conditions have been met:

• there's actually been a supply of goods or services

• that supply takes place in the UK

• it's taxable at the standard rate or reduced rate of VAT

• the supplier is a taxable person, that's someone either registered for VAT in the

UK, or required to be registered

• the supply is made to the person claiming the input tax

• the recipient is a taxable person at the time the VAT was incurred

• the recipient intends to use the goods or services for business purposes

You must also hold other evidence to show that the supply or transaction occurred.

16.8.2 When and how HMRC will exercise its discretion

HMRC's discretion to allow a claim for input tax can only be used when there's sufficient evidence to satisfy HMRC that a supply has taken place (read paragraph 16.8.1).

Where it's satisfied that the business has taken reasonable steps to comply with the legislation, and that the supply has taken place, HMRC may consider exercising its discretion. But, where a business has systematically failed to obtain a valid VAT invoice HMRC will not consider exercising its discretion.

Where a supply has taken place, but the invoice to support this is invalid, HMRC may exercise its discretion and allow a claim for input tax. But this will depend on the evidence held to show that the supply or transaction occurred and that the supply has been made to the person claiming the input tax.

16.8.3 What evidence you'll need to be provide

Your evidence should show that a supply occurred on which VAT was charged. There's no prescriptive list of the type of evidence required, as

circumstances will vary. Suitable evidence might include:

• bank statements clearly showing payment of the supply to the supplier

• purchase orders

• evidence of how you identified your supplier and your negotiations with them

• contracts between you and your supplier

• documents evidencing the transportation, storage or insurance of the goods

• any other documents that show a supply took place between you and your supplier

This list is not exhaustive."

41. HMRC state that *this* document is the operative or predominant applicable policy document. Their submission was that 16.8.2 applies to the current situation and they place particular reliance on the phrase "*where a business has systematically failed* to *obtain a valid VAT invoice*".

42. Again, however, the heading suggests the section applies only to situations where an invoice is held - it purports to describe an "*Invalid invoice procedure*", it refers in the first paragraph 16.8.1 to what an invalid invoice is, and how a taxpayer must go back to his supplier and ask for a valid one, and so forth.

43. The second paragraph which HMRC says is operative in the present case, explains how HMRC then exercises its discretion – and that it can only be exercised in someone's favour where there is evidence of the requisite matters – and reference is made back to 16.1.

44. It was this paragraph that the decision-maker said he applied when making the decision to refuse ECNs 3 and 4.

The Facts

45. The Claimant (referred to here variously also as "Hotelbeds", "the taxpayer", or "HB") which describe themselves as a "bed bank" are in the business of making wholesale supplies of hotel rooms. They purchase hotel accommodation from UK VAT registered hotels, and sell this to other suppliers of hotel accommodation, for example UK tour operators, events companies, or other entities in their corporate group, for onward distribution. The Claimant's competitors include Booking.com and Expedia, who operate on an agency model, and Webbeds, which operates on a principal to principal model although is not UK VAT registered. These competitors would not be affected by any failure by the hotels to comply with their requirement to render invoices, either because they are not the recipients of the supply of hotel accommodation (as in the agency model) or because they would not seek to recover UK VAT (as in the case of *Webbeds*).

46. The Claimant acts as principal and at the material time was a wholesale buyer and reseller of hotel rooms to, among others, tour operators. This supply when made by a UK VAT registered hotel, is standard rated. The Claimant operates on a "business to business" basis. Under general principles, therefore, where the Claimant paid VAT on the purchase of UK hotel rooms, it is recoverable because it was incurred for the purpose of making onward taxable supplies of hotel accommodation upon which VAT is payable and accounted for on the Claimant's VAT returns.

47. As seen, in order to exercise the right to deduction of input tax a taxpayer must generally hold an invoice containing certain prescribed information to enable verification of the supplier, the recipient of the supply, its value and so forth. However, in the present case the Claimant explained to HMRC it has had difficulty obtaining invoices from the

hotels who supply them with rooms. The Claimant believes that when their supplier hotels do not provide invoices it is because there is no incentive to do so-payment is not against invoice as in certain other sectors, and as used to be the norm for the Claimant and their suppliers. Now, as is now the industry norm, the Claimant pays the hotels by means of a virtual credit card when the hotel guest checks in or checks out of the hotel, and *not* following the issue of a VAT invoice to them from the hotels. The Claimant explained the changes and how they also moved to instant payment at the point of check in or check out when virtual credit cards began to be used in the sector in about 2015. The Claimant has asserted throughout that it was commercially impossible to avoid this payment method known as the Global Virtual Credit Card, which use increased from 2017.

48. Although legally obliged to issue a VAT invoice to the Claimant, in many cases the hotels or other suppliers do not. Receipt of invoices is rare since 2015- and when received they are often not fully compliant with the requirements for such invoices. The Claimant says it has continuously chased the hotels for valid invoices. It is not disputed the Claimant has made efforts to obtain invoices, in particular from December 2021 when a detailed, organised system of follow up was instituted and was evidenced to the Court. HMRC say they do not accept HB have acted sufficiently diligently or reasonably, and for this reason, among others they say repayment may be refused under policy.

49. The money at stake is a significant sum, running to many millions of pounds in total. The Claimant, noting that the hotels have rendered their output tax to HMRC and noting their own inability to reclaim the input tax with significant resultant cashflow issues,

characterise HMRC's current refusal to allow the corresponding input tax claim as affording a windfall to the Revenue.

50. The Claimant argues it relied upon HMRC's stated discretion to accept documents other than a compliant invoice in support of a claim for input tax as expressed in Regulation 29 of the VAT Regulations 1995 (SI 1995/2518), and relevant policy statements, however although HMRC accepted ECN 1 and ECN 2, the two later claims, made on the same basis, were refused. The Claimant argues the refusals show a misunderstanding of the effect of Regulation 29 and a misapplication of the policy set out in HMRC's documents, and there was an expectation that at least these two later ECNs would similarly be accepted.

51. The Claimant corresponded at length with HMRC between 3 December 2019 and 16 March 2020 regarding ECN1, explaining that between May 2017 and October 2018, the Claimant had sent over 5,000 emails and made over 800 calls to request invoices or chase for valid VAT invoices where invalid ones had been received.

52. On 10 June 2019 ECN 1 was presented, seeking recovery of input tax for the VAT periods 1 January 2017 to 31 March 2019 and was approved on 23 March 2020 following HMRC's checks. However, in accepting the First ECN, HMRC stated they *"had some serious concerns about the process going forward."*. The ability to use alternative evidence was described after the ECN acceptance had been communicated, as a "*concession to be used in certain circumstances*". The Claimant "*should have the correct processes in place"* to "*ensure invoices were obtained and held*". If they were unable to get this information, they were asked to write to the Written Enquiries Team "*to request any special input tax concessions*…".

53. On 7th April 2020 ECN 2 was submitted by the Claimant and approved on 11 May 2020.

54. Just before that, on 4 May 2020 the Claimants applied for non-statutory clearance as suggested by HMRC but this was rejected 7 months later on 22 December 2020. In terms that HMRC

> "*has decided not to exercise its discretion under Regulation 29 of the Value Added Tax Regulations 1995…to allow alternative evidence for the recovery of input tax. Therefore, your request to use this basis to determine input tax recovery on a temporary prospective basis is denied*".

55. The Officer reflected that the Claimant had changed the payment system voluntarily:

> " *… which has led to complications of obtaining VAT invoices. Although the GVCC prompt payment system does not directly facilitate the issue of a VAT invoice for the supply of the hotel room to HB UK Ltd and/or TSW Ltd there is still an obligation on the supplier to provide a VAT invoice. The fact that the GVCC system appears to discourage suppliers from doing so does not absolve them of this obligation. HMRC can find no reason why this responsibility should not be met"*

56. Additional comments were made by the officer with which the Claimant factually disagreed, including that they had chosen to go down this route rather than another payment practice because of the administrative burden. This they said was not so – in particular they had sought to arrange self-billing options but that required agreement with their suppliers which was not forthcoming. The pressure of the commercial environment was relied upon by the Claimant.

57. The Claimant submitted ECN 3 for the VAT periods 1 March 2020 to 30 June 2021 as stated on the same basis as ECNs 1 and 2. It contained a supporting Excel file with the back-up data covering all bookings subject to the claim. Further requested information was sent both written and in the course of telephone communications through the end

of 2021 and early 2022. The Claimant points to occasions when they corrected certain information - as to a small number (17 among 1000 plus suppliers) namely as to £2,007.07 in the claim of £472,989.82. This they characterise as minimal given the scale of operations, although HMRC have drawn attention to the error as justifying doubts they express about accuracy overall when refusing recovery.

58. In a call in July 2022 HMRC indicated they were minded to refuse ECN 3. There was no decision forthcoming at this time however. The Claimant indicated to them that another claim for the period from June 2021 was already in draft.

59. As stated the Claimant says that it sought to improve its receipt of actual invoices from suppliers and relies upon what it characterises as further implementation of an "*extensive regular and comprehensive process to pursue the hotels for valid invoices*", sending they say "*all that information that is required under Regulations to be contained within invoices"* to HMRC in support of their ECNs.

60. ECN 4 was submitted on 25 January 2023 for input tax during the VAT periods 1 July 2021 to 30 November 2022. HMRC asked further questions and further information was provided to them. HMRC indicated they were going to reject ECNs 3 and 4 so there was no point in continuing the ADR which had begun. The Claimant says that during this period as further information became available from hotel suppliers it was provided to HMRC.

61. Importantly, in correspondence, before the decision currently under challenge was perfected and reflecting earlier communication, the Claimant indicated to HMRC:

> "*As reported… on 22 March and communicated to you, HBUK has now adopted TOMS VAT treatment for its wholesale supplies from 1 March 2023, meaning that the issue does not extend beyond 28 February 2023*."

62. The Claimant has described this move as representing a loss to the business which they estimated at about £1.5m. The use of TOMS means, say Hotelbeds, they cannot recover the input tax charged to Hotelbeds on the full value of the supply made, rather, they pay VAT on the margin.

The Decision Letter

63. The decision notified to the Claimant on 10 May 2023 refusing to accept ECNs 3 and 4 related the history of communications between them and was in terms that highlighted the large number of transactions involved, and the fact that there had been some errors. In particular HMRC made reference to the fact the issue had been ongoing since a new payment system was introduced in about 2015. They stated that ECNs 1 and 2 were dealt with by a different section within HMRC. The Decision Letter referred to published Guidance but only relied upon para 16.8 of Notice 700. It stated that the Claimant had "systematically failed" to obtain an invoice and so HMRC would not consider exercising its discretion. It stated also that the decision-maker would however in any event consider whether it would exercise its discretion, but decided it would not where there was no invoice.

64. In refusing ECN 3 and 4 the decision stated materially:

> *"... In both ECNs, Hotelbeds UK is requesting that HMRC apply its discretion under Regulation 29 of The Value Added Tax Regulations 1995 (SI 1995/2518) to allow input tax to be recovered without a valid VAT invoice. This is in relation to circa 43,000 individual transactions (ECN3) and circa 255,000 individual transactions (ECN4).*
> *You have stated that where payment is made by Hotelbeds by bank transfer to suppliers (hotels) that valid VAT invoices are received as the VAT invoice is received prior to the payment being made by Hotelbeds.*
> *Where payment to suppliers is made by Virtual Credit Card (VCC) when the end guest checks in or out of the respective hotel then subsequently either:*
> *(1)No invoice is received by Hotelbeds UK*

(2)An invalid VAT invoice is received:
a. In the name of the Guest
b. In the name of another Hotelbeds entity (e.g., Hotelbeds Spain)
c. Made out to Hotelbeds UK but containing supplies received by the end Guest (e.g., food and drink)
d. Mixture of the above
(3) A valid VAT invoice is received

This issue has been ongoing since 2015 when Hotelbeds first introduced payment by a similar mechanism to VCC.
There were two Error Correction Notices (ECNs) submitted on 10 June 2019 (ECN1) and 7 April 2020 (ECN2) respectively which were repaid to Hotelbeds group of companies. These ECNs were dealt with by officers outside of Large Business. Both ECNs contained errors and the amounts repaid differed to the original amounts.
In July 2022 and August 2022, HMRC indicated that we would not apply our discretion in relation to ECN3 and would reject it. At this point, Hotelbeds requested that rather than a decision be issued to them that the issue be progressed via Alternative Dispute Resolution (ADR) .

On 28th September 2022 a request for ADR for Hotelbeds UK was submitted. At the ADR meeting on 26 January 2023, HMRC and Hotelbeds were unable to reach an agreement on the matter.
You have raised the issue that ECN3 and ECN4 were made on the same basis as ECN1 and ECN2 which were repaid.
In relation to invalid VAT invoices, HMRC's published guidance on when and how HMRC will exercise its discretion is available at 16.8 of VAT Notice 700 which I have reproduced here.
...
[The officer then set out 16.8.1 and 16.8.2 of the Guidance section entitled "Invalid Invoice Procedure" from Notice 700.] He continued

"This guidance is clear that where a business has systematically failed to obtain a valid VAT invoice HMRC will not consider exercising its discretion. The first step if a business has received an invalid VAT invoice is to go back to the supplier and request one. If you cannot do this, then you need to evidence why.

Evidence for Input Tax-Legal Position

The default position is that for a taxable person to exercise their right to deduct input tax, they must hold a valid VAT invoice, i.e., one that meets the full legal requirements as set out in regulations 13 and 14 of the Value Added Tax Regulations 1995 (Statutory Instrument 1995/2518). In the absence of a valid VAT invoice, there is no right to deduct input tax.

However, article 182 of the Principal VAT Directive provides that, where a valid VAT invoice is not held, 'Member States shall determine the conditions and procedures whereby a taxable person may be authorized to make a deduction'. Provision for this is made in UK law under Regulation 29 of the Value Added Tax Regulations 1995. This outlines that the Commissioners of HMRC have the discretion to allow claims that are not supported by the correct evidence, i.e., they can allow the use of alternative evidence to support claims to input tax.

ECN 3 and ECN 4

In the vast majority of transactions, no invoices have been received and when invoices are received by Hotelbeds, some are invalid.
It is not known how many of the invoices now received relating to ECN3 and ECN4 are invalid VAT invoices.
You have stated that when VCC is used to make payment for hotel rooms that Hotelbeds receive very few invoices.
This is clearly a systematic issue with ECN 4 covering invoices not received from 909 separate VAT registrations.

You have referred to ***HMRC's VAT Strategy: Input Tax deduction without a valid VAT invoice - Statement of Practice dated March 2007*** *and in ECN 4 stated that HB UK believes it can continue to provide answers to the questions outlined in Appendix 2 of the Statement of Practice and is therefore entitled to input tax recovery on the basis of alternative evidence covering supplies received between 1 July 2021 and the 30 November 2022.*

At paragraph 1 – it states that "This Statement of Practice explains and clarifies HMRC's policy in respect of claims for input tax supported by invalid VAT invoices." From the information provided to date, the vast majority of transactions have no invoice at all rather than an invalid one.

When you were notified on the 23rd of March 2020 that ECN1 was to be repaid, the following comments were made by HMRC:

> *"HMRC have some serious concerns about the process going forward. The ability to use alternative evidence should be a concession to be used in certain circumstances. It should not be available to be used as an ongoing way to claim your input tax. The company should have the correct processes in place to ensure that the invoices are obtained and held.*
> *If you do feel that the company is unable to get this information then please write to our Written Enquiries Team to request any special input tax concessions"*

The decision then gives some history of the previously allowed claims. It states with

relation to ECN2 (it is not contested that this was stated for the first time to the taxpayer in this letter):

"At this time, the UK was under Covid-19 restrictions and within HMRC there was a pause on compliance work within certain sectors. The Tourism industry was included in this compliance pause and repayments to customers were being prioritised. This explains why the ECN was repaid without any checks at that time."

The decision then records that HB applied for clearance to use alternative evidence going forward but "*this was denied in December 2020 with HMRC choosing not to grant permission*".

65. The decision then cites caselaw, in particular *Tower Bridge GP Ltd v Revenue and Customs Commissioners* [supra] in support of the proposition that the primary purpose of HMRC's discretion under reg 29 of the VAT Regulations was to allow defective invoices to be corrected by the subsequent supply of information that ought to have been in the invoices in the first place. This citation appears to be in support of the (unspoken) proposition that recovery other than with an invoice is not a purpose or not a primary purpose of the secondary legislation. Indeed, the decision continues:

"*For ECN 3 and ECN4, the primary purpose of regulation 29 does not apply for the vast majority of the transactions as no invoice is held at all rather than a defective one.*

My Decision

The guidance in VAT notice 700 is clear that where a business has systematically failed to obtain a valid VAT invoice HMRC will not consider exercising its discretion. However, I have considered whether to exercise discretion and do not think it is appropriate for the majority of the transactions within ECN 3 and ECN 4 i.e., those where no invoice is held.

While the payment mechanism of VCC ensures that suppliers (hotels) are paid promptly, there is still an obligation on the supplier to provide a VAT invoice. The fact that payment by VCC appears to discourage suppliers from doing so does not absolve them of this obligation. There is no apparent reason why Hotelbeds cannot obtain VAT invoices from their suppliers.

This reasoning is confirmed in the First Tier Tribunal ('the Tribunal') decision in the case of Everycar Contracts Ltd and Sabrina Hammon t/a SJM Group (UKFTT 405 (TC)). In that decision the Tribunal accepted our argument that:

'... it is fundamental to HMRC's proper supervision of VAT that taxable persons are required to issue, and to hold, when claiming input tax deductions, regular VAT invoices ... there is no apparent reason why the appellants in this appeal should not be able to obtain regular VAT invoices from dealer-suppliers. There is an obligation on them under regulation 13 of the VAT Regulations 1995 to provide a regular VAT invoice to whichever of the appellants was the purchaser of a car in any particular case.'

It also accepted that:

'[t]he problem here is of [the appellants'] own making and the remedy also. The remedy is for [the appellants] to go back to the franchised dealer[s] with evidence of their purchase order[s] for the vehicle[s] and ask them to issue a credit note against the original invoice because it has been made out incorrectly and to have a tax invoice made out in the name of the business. The [appellants] would then be able to reclaim the input tax subject to the statutory time limits and normal conditions.'

In relation to transactions where Hotelbeds have an invoice:

-If it is a valid VAT invoice, there is no need for HMRC to consider discretion as Hotelbeds as will be able to exercise its right and recover the input tax on the VAT return subject to the normal conditions.

-If it is an invalid VAT invoice, then Hotelbeds will need to provide the information as to why to the particular invoice is invalid and HMRC can review this information. A corrected invoice should always be requested from the supplier. If the invoice is in the name of the guest then Hotelbeds should go back to the supplier and request a corrected invoice. If all the details on the invoice are correct apart from the name ie Hotelbeds Spain rather than Hotelbeds UK then in these circumstances, HMRC is much more likely to apply its discretion in relation to the periods covered by the 2 ECNs only.
From the evidence provided to date, no detailed breakdown has been provided on which of the circa 300,000 transactions that an invoice has been received for and why the invoice is invalid. When HMRC requested information about ECN3, an error was identified in that 17 incorrect VAT registration numbers had been included in the claim. HMRC has concerns about the accuracy of the claims given that also errors have also been notified for ECN1 and ECN2 in how the claim has been prepared. In relation to invoices that have been issued to guests, there is the risk that input tax has been recovered by another party. Given that this issue has been ongoing for approximately 7 years, the scale of the issue (Hotelbeds group companies have requested HMRC apply discretion to input tax claims of over £22m), the concerns raised when ECN1 was repaid and the denial of the statutory clearance request, the fact that the suppliers are still in existence and Hotelbeds is continuing to interact with them, HMRC does not consider it appropriate to apply discretion for input tax recovery under Regulation 29.

If there are particular circumstances where Hotelbeds is unable to contact a specific supplier, for example they are dissolved then HMRC would consider these specific

circumstances on a case by case basis.
If Hotelbeds gain a valid VAT invoice, then they would be able to recover this on their VAT return subject to the normal rules on recovery and time limits."

The Challenge

66. The Claimant says that the refusals to allow the deductions in question are unlawful because HMRC failed without good reason to apply their own public Guidance on the subject, alternatively and in any event the Claimant had a legitimate expectation to which the court will give effect that in their circumstances they would be entitled to deduct input tax based upon statements made in HMRC materials namely Appendix 2 of the Guidance contained in the second Policy Guidance, the SOP and/or in the course of dealing in which two earlier ECNs were accepted by HMRC on the basis of what the Claimant says are effectively identical facts.

67. They say also that HMRC made an irrational decision on the facts given that the Claimant held sufficient proof of the relevant supplies; the decision was inconsistent with the Guidance and the grounds upon which the Claimants were refused are incoherent.

68. Further, the decision evinces a breach of the EU principle of effectiveness upon which the Claimants may rely for periods before 31 December 2020 by virtue of the transitional provisions in the European Union (Withdrawal) Act 2018 para 39(5) of Schedule 8, read with para 3 of Schedule 1. There is no issue but that, if the EU principles apply, these are the correct dates and legislative framework.

69. The Claimant observes, correctly, that these paragraphs of VIT31200, consistently with Regulation 29(2) itself, do not prescribe the nature of alternative evidence a taxpayer must provide before HMRC will consider whether it is satisfactory to support deduction. They argue that HMRC's decision-maker in this case wrongly refused even

to consider exercising his discretion to permit repayment unless the alternative evidence the Claimant relied upon was comprised of 'invalid' invoices.

70. They refer to his evidence to the Court explaining the decision he made. He said the following in his statement:

184 ...I advised Hotelbeds that I would consider exercising HMRC's discretion in relation to invalid invoices but Hotelbeds have provided no details to date for me to consider.

185. HMRC's decision on ECNs 3 and 4 was that where there were no invoices for the transactions at all because Hotelbeds had systematically failed to obtain VAT invoices, HMRC would not exercise the discretion to permit the claims for input tax based on alternative evidence at all. Where there were invalid VAT invoices HMRC would consider exercising the discretion in Hotelbeds favour, but no further details were provided to enable that to be done.

186. In coming to the decision I had specifically considered the guidance in VAT Notice 700 at section 16.8 Invalid invoice procedure, in particular 16.8.1 What to do if you hold an invalid VAT invoice and 16.8.2
...
190. Within the SOP, it refers to holding/having/been issued with an invalid invoice and does not mention specifically the situation where no invoice is held. Specifically at paragraph 1 it refers to HMRC's policy in respect of claims for input tax supported by invalid VAT invoices with the explanation of what is an invalid VAT invoice given at paragraph 10. With the description at paragraph 10, I took the SOP to refer to the situation where an invoice was held, and this helped me to make the distinction between where no invoice was held, and an invalid VAT invoice was held.

191. This distinction was also supported by my understanding of the Tower Bridge case where it was stated that the primary purpose of HMRC's discretion under Regulation 29 was to allow defective invoices to be corrected by the subsequent supply of information which ought to have been in the invoices in the first place but was not (as referred to at paragraph 125 of the Tower Bridge decision).

192. In my decision letter, I referred to the the[sic]*primary purpose of HMRC's discretion under Regulation 29 of the VAT Regulations 1995, and stated that in the situation where no invoices were held HMRC would not exercise its discretion."*

71. In other words says the Claimant, the decision-maker read the Guidance and the caselaw as telling him that where there was no invoice, HMRC was not required even to consider the alternative evidence proffered.

72. The decision-maker also stated that there was no apparent reason why the Claimant could not get VAT invoices since they had explained to HMRC their contracts did require the suppliers to render one to them, and there was an example of a new supplier who did do so.

73. This the Claimant says was a clear failure to follow the guidance contained in VIT31200, and involved a failure to consider whether the alternative evidence the Claimant had provided was adequate to enable a deduction of input tax to be properly made. If he did consider it, it was not considered properly, in order to see whether it evidenced the charge to tax but rather, contrary to the Guidance in VIT31200, he had only looked to see if the Claimant had pursued the individual suppliers for invoice evidence themselves. In fact they had**,** and it was not the Claimant's fault that their suppliers had failed to respond adequately.

74. The essence of the complaint is that the decision maker here confined himself to the notion that alternative evidence must comprise "invalid invoices" whereas that is not the position under the Guidance nor is it a lawful consideration of the discretion residing in HMRC. Thus they failed to follow VIT31200 and unlawfully fettered the discretion under both VIT31200 and regulation 29(2) by refusing to consider exercising their discretion unless the alternative evidence the Claimant relied upon was of a particular type. The Claimant relies particularly on the passage that refers to the

> "*Factors for HMRC staff to consider when exercising discretion where the supply is not of goods specified in the Invalid Invoice Statement of Practice*"
> …
> "*The factors will vary depending upon the individual circumstances of the taxpayer. Example questions are contained at Appendix 2 of the Statement of Practice and are listed below. These are only examples, they are not absolute and not all questions will be appropriate to all taxpayers. HMRC staff should prepare bespoke questions that suit the individual circumstances of the taxpayer's business*".

75. The Claimant says that although headed "*Invalid Invoice Statement of Practice: Appendix 2'*, the VIT31200's wording on its face covers a non-invoice situation with "*Questions to determine whether there is a right to deduct in the absence of a valid VAT invoice*". It asks a series of questions each of which the Claimant could answer appropriately.

76. The Claimant points to wording in the SOP headed "*Input Tax deduction without a valid VAT invoice*" which by its title suggests no invoice is necessary, and also states, "*This Statement of Practice explains and clarifies HMRC's policy in respect of claims for input tax supported by invalid VAT invoices*." But the required documentation section refers to the "*documentary evidence*" being anything "*other than an invoice*". The '*Decision Flowchart'*, (Appendix 1) speaks to the situation where a taxable supply has taken place, but a valid VAT invoice cannot be obtained.

77. The Claimant points to exchanges within HMRC in the evidence querying whether this wording was to be changed (it was not), and to the fact that HMRC never suggested the SOP did not apply to the Claimant's case. In so far as it had been applied properly, it would they argue have allowed relief.

78. On behalf of the Claimant, Mr Singh KC highlighted what he said were material errors in the decision-making. The taxpayer had been criticised as failing to obtain invoices, yet HMRC, responsible for the care and management of VAT, did nothing to enforce the suppliers' legal obligations to issue invoices. Where an invoice has not been issued within a 30 day time limit HMRC should contact the supplier and warn them that continuing irregularity may result in a civil penalty. That never happened, and he pointed to the evidence showing that one of the officers of HMRC had commented it was quite wrong. He contrasted the enormous amount of resource and time expended

by the taxpayer in seeking to get invoices from the hotel - 900 separate VAT registered suppliers were chased in respect of 300,000 individual supplies. Even now years later invoices are being given to them, it was submitted, illustrating how unreasonable HMRC's position was.

79. The alternative evidence is satisfactory, he argued. As to "systematically", he submitted this was being used in the sense of "repeatedly". There was a contrast between a taxpayer who had made reasonable efforts to comply with the legislation and the taxpayer who had on the other hand systematically failed. A systematic failure did not encompass therefore, the actions of the taxpayer who has reasonably tried to comply with legislation. Somebody who makes no effort to retain or obtain invoices might be described thus. For example, a taxpayer who doesn't have a system or doesn't keep any of the invoices might come within it. Alternatively, where a claimant deliberately enters a dubious arrangement such as in the case of *Boyce* meaning he is not going to receive an invoice by design - that would be a systematic failure.

80. The Upper Tribunal case of *HMRC v James Edwin Boyce* [2017] UKUT 0177 (TCC) upon which HMRC relied in their Decision Letter, was a case where Mr Boyce's business operated the purchase, supply and export of prestige motorcars- Porsches, Mercedes and Range Rovers. Most were exported by Mr Boyce's customer, Great Harvest Ltd, to Singapore. The manufacturers of the vehicles and the owners of the dealership franchises would not have approved of Great Harvest purchasing them in the UK for the purposes of export like this. The Tribunal described the solution by Great Harvest as:

" *… to disguise its involvement by Mr Boyce purchasing the vehicles and then selling them on to Great Harvest. In turn, Mr Boyce's involvement was disguised by individuals purchasing the vehicles from the dealership franchises for him ("the Named*

Purchasers"). The managers of the dealerships where the vehicles were purchased ("the Dealerships") were not only well aware of what was happening, but in fact actively sought Mr Boyce out to sell the vehicles to… some of the Named Purchasers were themselves employees or contacts of the Dealerships".

81. The Dealerships' invoices referred to the Named Purchasers, rather than Mr Boyce, as the purchasers of the vehicles. The FTT found they would be extremely unlikely to supply Mr Boyce with a replacement VAT invoice or to credit the Named Purchasers and reissue an invoice to Mr Boyce. Mr Boyce was then assessed to tax by HMRC in the sum of almost £125,000. Some £100,663 represented disallowed repayment of input tax in the absence of satisfactory purchase invoices. HMRC considered Regulation 29 and their discretion, but refused to exercise it in his favour.

82. The Upper Tribunal (Tax and Chancery Chamber) (Arnold J) held in favour of HMRC that the Tribunal below had been wrong to have considered that the fact that it was virtually impossible or excessively difficult for Mr Boyce to obtain valid VAT invoices meant that there had been a breach of the principle of effectiveness. This difficulty was not as a result of HMRC's decision not to accept alternative evidence, but due to the nature of the transactions which Mr Boyce chose to enter into. i.e. a system which was designed not to produce an invoice to him.

83. Further, there was a real and obvious risk of fraud in that the VAT invoices made out to the Named Purchasers could be used in order to make duplicate claims for the recovery of the VAT shown on them. That risk distinguished this case from one where no VAT invoice had been issued at all. In addition, the alternative evidence required was not just that of a supply taking place, but what ought to have been contained in a valid invoice, if one had been available; as an exception to the general rule about input tax recovery, it was up to Mr Boyce to prove those details were present.

84. The present case was not on a par with *Boyce* the Claimant submitted- here there was no system designed not to produce the invoice, and certainly no attempt at any subterfuge. In respect of the present case Mr Singh KC emphasised the amount of money involved - for example with ECN 4 about £6 million (as at the date of the hearing) which was significantly in excess of the claimant's annual operating profit. He stated the spreadsheets set out the details of every single supply, the name of the supplier, the date of the supply, the VAT amount and so on. Namely, all the key information that would be on an invoice had one been submitted. HMRC made an error in their approach to the spreadsheet materials.

85. His submission on the Guidance was that there was nothing inconsistent about all of the bits of guidance when looked at together. VIT 31200 catered for exactly the present situation. The reasoning of the Decision Letter was confused but it appeared to be that HMRC decided that the Claimant had systematically failed to obtain invoices. They would not consider exercising their discretion to permit the deduction, unless the alternative evidence relied upon was invalid invoices.

86. The Claimant's core argument is that the decision-maker only looked at the alternative evidence to identify hotels and check whether the taxpayer had chased the invoices, so he never actually considered the alternative evidence to see if it supported the charge to tax. This was a misapplication of the policy: he just did not look at the alternative evidence. That is a very powerful reason he submitted for allowing the claim and permitting the deduction. The policy states "*HMRC staff will not simply refuse a claim without giving reasonable consideration to such evidence*". And he pointed to the duty to ensure no more tax than was properly due was paid.

87. He emphasised that from 1 March 2023 there was no issue because the Claimant started operating the TOMS system.

88. As to the protection of the revenue unusually in this case the reverse position from that typical in the caselaw obtained: HMRC had monies that were properly input tax that had not been repaid when it was clear that output tax had been paid. There was no loss to the public purse.

89. In the present case there was no perceptible risk that an input tax deduction might be obtained by others and no suggestion that such a risk ever materialised - only a theoretical risk was put forward. That could not materialise here because the end consumer does not obtain their room from the hotel. The Claimant supplies the room to a tour operator, and the individual gets the room from that tour operator - so the payment goes from the individual to the tour operator. The hotel could not charge the individual for the room. The punter would say "I've already paid my tour operator why is the hotel charging me?"

90. As to the Statement of Practice the Claimant's submission was that this guidance applied to the whole situation and did not differentiate between whether you have an invoice which is invalid or whether you have no invoice. It shouldn't matter what the document is, the point is whether the conditions for the right to deduct are met. The Claimant referred to emails within HMRC where they indicated that the wording does not represent policy advice and it needs to be changed. They note that wording was not in the event changed.

91. The first paragraph states "*this statement of practice explains and clarifies HMRC's policy in respect of claims for input tax supported by invalid VAT invoices*…." The taxpayer says that HMRC recognised it had to apply to all kinds of alternative evidence,

that the wording needed to be changed and other parts of the guidance make clear it's not just limited to invalid invoices. For example in paragraph 6 (see above) the phrase "*without a valid VAT invoice there is no right to deduct input tax. However, in the absence of such an invoice you may still be able to make claims for input tax, but these claims are subject to HMRC's discretion. This of course assumes that a taxable supply has taken place.…*" assists them.

92. The Claimant relies on paragraph 17 under the heading "*How will HMRC apply their discretion*" - the answer to which is that "*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).*" Particular attention was drawn to paragraph 19 which states as long as the claimant can provide "*satisfactory answers to the questions at appendix 2 and to any additional questions may be asked input tax deduction will be permitted*". The Appendix questions were it was said, were satisfactorily answered.

93. The Claimant understood HMRC's position to be that it systematically failed to obtain VAT invoices and therefore HMRC does not have to permit the deduction. Emphasis is placed on paragraph 19 and that the questions answered at Appendix 2 meant input tax deduction would be permitted. The language is slightly different for the latter says they will allow deduction, the other document says normally they will.

94. As to Notice 700 and paragraph 16.8 that is headed "*Invalid invoice procedure;* 16.8.1 immediately underneath has the heading "*What to do if you hold an invalid VAT invoice*".

95. HMRC say in contrast that the operative policy is found in VAT Notice 700, a document of general application, and it alone is relevant to the decision-maker's task in this case.

96. Their essential submission is that the conclusion that the Claimant had "*systematically failed to obtain valid VAT invoices*" was fatal to their claims, and it was not beyond the range of reasonable decisions open to the decision-maker. The Court should approach the challenge as requiring the taxpayer to demonstrate the decision was in this sense perverse, and further to demonstrate to the Court that the only proper decision that was available to HMRC was to allow the claims under ECNs 3 and 4. There was no good reason the Claimant could not obtain the invoices , and they had "systematically failed" to do so.

97. In questioning, Mr Singh had agreed that the word "systematically" appeared to be used by HMRC, at least on occasion, as meaning "repeatedly". He submitted that the guidance relied on by HMRC, even if it were the solely relevant document, which was disputed, contrasted the taxpayer who had made reasonable efforts with the taxpayer who had systematically failed, and that demonstrably, the Claimant fell into the former category. He suggested a taxpayer who received invoices but failed to pass them on would fall into the latter category. A taxpayer who had tried to comply with the legislation could not be said to have "systematically failed". It was not the Claimant's failure that meant the suppliers did not send on invoices, and HMRC who had supervisory and coercive power through the imposition of penalties on those who were non-compliant, had not acted.

98. Mr Singh had also suggested that "systematically" implied there was some failure in the Claimant's systems- which here there was not. Further, it might mean where a claimant deliberately enters into dubious arrangements where there will deliberately be

no invoice. That was not this case. It was not possible to say here what HMRC were isolating as the systematic failure – perhaps it was the payment method by VCC, he ventured. That was the industry standard though it could be Visa, Amex or Mastercard, it operated rather as a payment by mobile does. It was not of the same character as the *Boyce* case.

99. Mr Watkinson on behalf of HMRC argued that in those (many) cases where the Claimant held no invoices, there was no apparent reason why it could not obtain them, it had been a commercial decision to do as they had done, and to change the payment system which reduced the chance of them receiving an invoice. This was their choice, and HMRC were justified in not exercising their discretion to permit the Claimant to rely on alternative evidence at all in such circumstances.

100. The primary submission was that this situation had arisen because the Claimant had chosen to change its payment method for commercial reasons to the VCC which meant they did not automatically receive a valid VAT invoice, which consequence they were aware of. Secondly, where they held invalid invoices, as opposed to no invoices, HMRC would consider exercising their discretion, but he submitted that they required further information, had asked for it, and the Claimant had not satisfactorily provided it.

101. In answer to my questions of him during submissions as to the meaning of "systematically", he said it meant a variety of things. He said first it was an ordinary word and did not require a gloss, and Notice 700 was general Guidance and applied to every business so it was "apt to cover a broad spectrum of failures". He nonetheless agreed with me that it was a precise concept, but said it was apt to cover "a broad range of factual scenarios" meaning different trader situations. It covered "failures that are

not one-off", accepting the antonym might be "individual" or "on -off" or "infrequent". He said it also connoted the concept of scale as well as frequency, here there were thousands of instances of no invoice, so that was "systematic". He also said it imported a reference to some kind of system; it was therefore broad enough to cover the sort of scenario that was in fact a business model of not obtaining invoices – like *Boyce*, as well as the case, as here, where your experience suggests to you, that you may not get invoices.

102. He submitted the decision letter should not be "pored over", nor examined with a fine-toothed comb, accepting it could have been better phrased. It was not, as submitted by HB, a decision that HMRC would not consider the evidence in those cases where there was no invoice held. It was reasonable he submitted for HMRC to say, even in light of the attempts by HB to obtain invoices from suppliers, that they had not made reasonable attempts to comply with the legislation- as required by VATN 700. This was because the business method was known not to produce many or any invoices and so was within the policy reasons for rejection.

103. Mr Watkinson agreed that a taxpayer was entitled to assume that others would abide by their legal obligations – i.e. that the suppliers would supply an invoice as the law required. However, the Claimant had created an environment that disincentivised the sending of an invoice, and there was "a balance to be struck". The taxpayer was required to strive to fulfil its obligations to obtain invoices; thus he submitted that a failure to try hard enough would constitute a systemic failure. Such was the case in the present circumstances.

104. He submitted that the decision-maker had been entitled to say that there was no good reason why the taxpayer had not obtained invoices. The system they adopted

discouraged invoices. The policy was to be interpreted as meaning this, and reliance was placed on the *Everycar Contracts Ltd* case in the Tribunal as an example of HMRC reasonably holding the view that the taxpayer could have obtained invoices.

105. In that case, another car dealer matter, the trade was in the purchase and export of "top end" cars, typically Mercedes-Benz and BMW models. It was "*not well regarded by the car manufacturers*" and the problem arose from the fact that the UK franchised dealers concerned preferred not to issue paperwork – particularly VAT invoices – naming Everycar. They issued paperwork naming unconnected individuals with those individuals' addresses, although they knew that their sales were in reality being made to Everycar. The company made claims for repayment of input tax. The officer noted that

" *…the company had deliberately for business reasons chosen to adopt a practice whereby the invoices were made out to third parties. The suppliers were by my understanding still in existence and the company could have obtained invoices from them had they chosen to.*"

and

" *…if the third party invoices were to be accepted as alternative evidence, there was a risk to the Exchequer of duplicate claims being made to the input tax."*

Her reasoning for refusal was

"*If the third party invoices were to be accepted as alternative evidence, there was a risk to the Exchequer of duplicate claims being made to the input tax, both by [Everycar] and by the person to whom the invoice had been addressed. I considered that this risk of enabling fraud to be committed was a valid reason not to apply [HMRC's] discretion to accept alternative evidence".*

106. In that case it was held there was no good reason why a credit note could not be issued to the third party and a new invoice issued to the relevant taxpayer, so the officer's decision was upheld.

107. Mr Watkinson showed the Court the contract between the taxpayer and the supplier. In fact it set out the contractual requirement upon the supplier to furnish HB with an invoice, although it did not, because of the nature of the system, make payment conditional on an invoice. His case was the contract ought to have contained an exhortation to abide by the obligation to send HB an invoice and that HMRC were entitled to say that there had been a "systematic failure" – in essence, here there were a lot of invoice failures, a lot of money was at stake, and it was the inability of the taxpayer to force an invoice to be sent to them that had caused this. The decision was consistent with the policy in VAT Notice 700 and made under it.

Consideration

The Policy

108. I have come to the clear conclusion that none of the three pieces of written policy in this case was drafted with a "no invoice" situation in mind.

109. Each of them, including that relied upon by HMRC here, namely 16.8 in VAT Notice 700, is headed or makes reference to "invalid invoices". There is no reference directly to "the position where no invoice is held" and thus no written policy Guidance that pertains *directly* to present circumstances. The drafters of these policy documents do not appear to have contemplated particularly the position that the right to input tax might be exercised when a taxpayer held materials other than an invoice. The titles to the documents or the relevant sections make that clear. Those parts which can be construed as applicable to the case of a claim without any invoice are in truth also capable of being applied where an invalid invoice is held as well. The headings and

other context suggest that the framework in mind was that of the invalid invoice, not the absence of invoice.

110. Furthermore, such guidance as there is, even if indirectly perhaps of assistance, is inconsistent, ambiguous and, in my judgement, difficult for a decision-maker to navigate. An element of sympathy must extend to the officer who was tasked with the decision-making in the present case. It may not be accidental that whilst one division in HMRC allowed ECNs 1 and 2, another declined to allow ECNs 3 and 4 which had been made on essentially similar terms. That observation is, however, speculative: the point is, that the available written policies were not of precise utility to those tasked with deciding the ECNs.

111. HMRC in submission suggested that VAT Notice 700 was the predominating document which applied. In my view, whilst part of the main body of HMRC general Guidance, this document is otherwise no more obviously applicable in the present circumstances than the other two HMRC documents. Mr Watkinson read only the second paragraph, but the whole of the section 16.8 is headed "invalid invoices" and deals with a position where an invalid invoice is held. In order to suggest it intends to incorporate guidance for the current situation, the title to section 16.8 has to be ignored.

112. The policy documents give no warrant for HMRC declining to consider materials seeking to show that the right to deduct is evidenced by documents other than one called an invoice. While it is the case that to *exercise automatically* the right to deduct, a valid invoice must be held, it is not the case that without an invoice there is no right at all. However, insofar as the officer expressed this is as the law, given his later explanation of the decision, I regard it as possibly a "slip of the pen". The observation of the Supreme Court in *NHS Lothian* makes clear that such is the (agreed) position.

113. In lighting upon the written policy contained in Notice 700 HMRC has misconstrued and/or misapplied its own policy. The decision as currently explained does not suggest a coherent understanding or consistent application of policy. Indeed, as stated, there was in my view no precise written policy that dealt with the approach to take where no invoice was held. The explanation given on behalf of HMRC now, for example, that the likelihood of the suppliers failing to send an invoice was a foundation for holding that HB had failed to make reasonable attempts to comply with the legislation is inconsistent with ECNs 1 and 2 having been granted under policy. The document relied upon fails to explain what is meant by reasonable attempts to comply, particularly since the phrase has here been held to apply to a trader whose contract actually required his supplier to produce invoices to him in terms, and where HMRC took no contemporaneous steps to enforce the suppliers' obligations under the law to furnish invoices.

114. The balance of the competing principles – fraud, the right to repayment etc. is differently emphasised in the different policy documents and no coherent connect between the one and the other was suggested to the Court.

115. The main policy objects of HMRC might, however, with some analysis, be capable of being discerned in these policy materials notwithstanding. Again, it must be said the officer making the decision on these materials was in my judgement placed in a significant difficulty in trying to rationalise three arguably inconsistent – and as I judge it-in truth, inapplicable, pieces of policy Guidance.

116. Given the absence of directly applicable, specifically drafted, policy, the decision-maker in this situation is required to go back to the scope of the discretion which the taxpayer seeks to invoke, and to judge the request made against the principles of the tax

in light of HMRC's duty to protect the revenue. The starting point is the demands of the law which would guide the exercise of HMRC's discretion under Regulation 29.

117. Those requirements appear from the framework materials set out above and were, I accept, in part, reflected in the HMRC decision-making process in this case and may be found in some places in parts of some of the Guidance documents, although not in my view sufficiently clearly expressed. They are, in simple terms, in respect of this case at least, and *in no order of priority:*

The protection of the revenue – that is to say the necessary drive to recover taxes due, and this includes as a very important factor

The minimisation of the risk of fraud;

The recognition of the central importance of the right to deduct, which is connected to

The recognition of the neutrality of VAT;

The observation of a proportionate/reasonable approach to procedural requirements, which is connected to

The need to discourage arrangements that undermine the evidentiary basis and structure of the taxation system, and hinder the efficient management of the tax.

118. Taking each piece of policy material in turn, it seems to me that there are elements of these relevant policy objectives in each of them.

In respect of VIT 31200, the document reflects clearly the powerful right to deduct and the centrality of neutrality of the tax. The Commissioners are, correctly, expressed to be under a duty to ensure no more tax is paid than is properly due.

It also shows that the reduction of fraud as the most powerful countervailing feature. The process is very entity-specific: HMRC are obliged to focus on the actual business and the particular facts before them, and obliged to consider the evidence carefully in each case. Further, although the onus is on the taxpayer to provide alternative proof of the essentials, where that is satisfactory payment should ensue.

In respect of the SOP, addressing fraud and avoidance is the predominant reflection of policy. Where an invoice is invalid, requesting a compliant document from the supplier is noted as the first recourse. Its absence does not preclude recovery, and where normal commercial checks are made, persuading HMRC to allow recovery is likely. This document puts neutrality of the tax at the forefront. The Annexes emphasise that positive answers to the central questions will likely lead to recovery, underlining that the essential details enabling HMRC to determine the legal essentials for repayment are central.

In respect of VATN 700, this repeats the obligation of the trader who holds an invalid invoice to seek satisfactory documentation from his supplier requiring- in this document - evidence to be furnished as to why that is not possible. Again, the essential elements of the tax, if the subject of satisfactory evidence, justify recovery. Here, policy speaks of the taxpayer satisfying HMRC that they have taken reasonable steps to comply with the legislation and the supply has taken place. That will then lead to them "*considering exercising their discretion*" which, the parties agree, must mean they will go on to consider the quality and extent of the proffered alternative evidence of the right to deduct. The phrase "*exercise its discretion*" appears to mean also "*exercise its discretion in favour*

of recovery". The use of language in this document is in several places unclear and unhelpful. However, VATN 700 also seeks in my judgement to draw attention to a further principle: namely, that provision of consistently inadequate evidence of the right to deduct deriving from an intentional organised plan of business operation (such as in *Boyce* – designed not to produce an invoice) going forward will disentitle a taxpayer from deduction. Such a course of action would set up an alternative, parallel - and likely much more onerous- system of input tax deduction than that designed by the EU and domestic legislation. The efficient management of the tax is thus also a relevant consideration.

119. The strong driver against recovery without a valid invoice is fraud. But here, there was no real risk of fraud. Further, materials of a type existed sufficient to satisfy HMRC that two earlier claims based on similar records could lawfully be paid. The payments were made without caveat as to the nature of these materials provided, or as to the measurable risk of fraud, or perception of the material accuracy of the majority of entries, nor doubts about the bona fides of the parties. In other words the taxpayer was entitled to believe that the policy had been and did apply to it. That it recognised that they took steps to secure invoices, and the volume of evidence had satisfied the checklist of essentials HMRC stated would support recovery. There was a sole indication after payment, that the position going forward posed problems.

120. In the absence of coherent and helpful guidance it is perhaps unsurprising that the decision-maker went astray. However, HMRC, in seeking to do the best they could, applied some parts of the documents but in my judgement the decision they reached was not in the circumstances of this case sustainable. That is so whether it is expressed

as being a misapplication of policy or a misunderstanding of their own policies, or in terms of the factors taken into account.

121. HMRC submitted that the Guidance meant that if you had done everything it was reasonable to expect of you to get the invoices and the supply had been shown to have taken place then HMRC would consider exercising its discretion in your favour. But if you had "systematically failed" to obtain a valid VAT invoice they could refuse, and in that context "systematically" meant "repeatedly". HMRC's essential case was the Claimant could get the invoices, they could try harder, and they did not. Therefore HMRC submitted, it was rational to conclude there was "systematic" failure.

122. In my judgement "systematic" has to mean a threat to the recovery of VAT emerging from a planned system. A systematic failure, without more, cannot be just the repeated failure - that is not what the word means. The usual meaning of systematic involves the concept of planning: this must on a common sense meaning invoke the notion of the choice of an organised plan. The word connotes intention, order and planning – in my judgement it connotes an element of deliberate choice. It may be that was what was intended to be conveyed here - namely this was intended to be read as HMRC's rejection of the construction of a parallel system that always and necessarily avoided the obtaining of valid invoices – whether as valid documents or invoices at all. However that is not what it says. The threat to the revenue going forward is of paramount importance in this concept - again, *Boyce* is the example. That was not this case, however. Further, the words used both in the policy documents and in the Decision Letter are in my judgement inadequate properly to convey this notion.

123. Although not spelt out in policy and not explained, this was a reflection in my judgement of the fear of a parallel system of trading and input tax deduction that was

incompatible with the statements of principle to the effect that the invoice is paramount. Inevitably in such a scenario the burden on the Revenue would be heavy. However, as I say this is not spelt out in the decision nor reflected in the policy.

124. I find the use of the word "*systematically*" in VAT Notice 700 unhelpful and unexplained. It has a number of possible meanings, even according to Counsel's submissions. No policy document giving guidance on matters of this importance can afford to have a variety of unexplained meanings that are not immediately clear to the reader. The imprecision of the Guidance - unexplained and indeed, not obvious, is unacceptable and cannot, as it must, guide a trader in the organisation of its business affairs. Furthermore, none of it is actually designed to deal with the position the trader found itself in.

125. The reference to *Tower Bridge* is apt to mislead. That case was not about a primary as opposed to a secondary purpose for regulation 29. In any event, albeit the primary purpose may be to deal with circumstances where a document is held, because that may be the norm, it is of no assistance to the construction of the discretion to think of primary and secondary purpose and thereby to disregard, or at best devalue, as on one reading of it the Decision Letter did, a claim by a taxpayer without invoices.

126. The purpose of the discretion is to recognise, necessarily, that the neutrality of the tax is important. Failure to recover input tax is non-neutral. In the same way as over - recovery of input tax harms the revenue and depletes the public purse, the retention of moneys properly recoverable is equally wrong and unfair. The tension between protection of the revenue and recognition of the neutrality of the tax and therefore the right to deduct is central. In my judgement the decision failed to take the principles of neutrality and the right to deduct properly into account and thereby also erred in law.

127. In my judgement here, however, and irrespective of the inapplicable policy documents and their misapplication, and the failure properly to consider the principles including of neutrality, a further factor is fatal to HMRC's decision. By the time of the decision, HMRC knew that the taxpayer had changed its modus operandi. There was no system going forward – there was no proposed parallel, non-invoice based, recovery scheme. The taxpayer had been refused a continuing work around, they had considered the options and told HMRC latterly they were doing so. They had opted for TOMS.

128. In my judgement there was no serious suggestion of fraud, indeed there never had been, and no serious concerns as to inaccuracy or failure to pay output tax- the acceptance of ECNs 1 and 2 show that. There was latterly an attempt to insert uncertainty in so far as saying there had been mistakes, or that they "could if they wanted to" i.e. "could try harder" with regard to invoices but the real concern here, as submitted, was with the risk of the position going forward. That risk had ceased at the date of the decision.

129. The Claimant is correct to emphasise that fundamentally there was no meaningful complaint concerning the risk of fraud. There was no complaint about the identity of the supplier, the date of the transaction, the VAT registration of the supplier nor of the intention of the taxpayer to abide by its obligations – that is to say its obligation to hold an invoice. However, and whether that is correct or not, the situation here was fundamentally different. Crucially, as stated, there was no threat to the future system of input tax deduction. Many weeks before the Decision Letter was promulgated, HB indicated that they had changed their systems for the future. The threat to future revenue methods was gone. In those circumstances the decision of 9 May 2023 was irrational.

130. The context was that the Claimant had been repaid without serious query 2 ECNs based on sets of information very similar to that offered for ECNs 3 and 4. They had been told thereafter, that as to the future there was likely a serious issue, and systems were strengthened, seeking to produce the required invoices. As directed by HMRC, they applied to obtain a ruling from HMRC that they might use an alternative method of input tax recovery evidence going forward, but had failed. And after 28 February 2023 they changed to the Tour Operators' Margin Scheme paying tax only on the margin, and obviating the need for recovery against invoices.

131. In my judgement the obstacles concerning documentation and proof placed in the way of recovery of ECNs 3 and 4 were not reasonable. They produced a refusal that was unfair and unreasonable, and unsustainable in public law terms. They are inconsistent with the payment of the earlier ECNs. In light of the payment of ECNs 1 and 2 without serious quibble as to the quality of the evidence or the bona fides of the suppliers and the supply, the Claimant could reasonably expect that evidence of that nature was sufficient to found recovery. One of the grounds relied upon by HMRC when rejecting the two later ECNs was that it was said that from the information provided by Hotelbeds, HMRC cannot be sure that they have collected all the output tax that Hotelbeds are claiming in their ECNs. The officer states (correctly) that the ordinary way for HMRC to check whether VAT claimed as input tax has been accounted for by the supplier is to check the VAT invoice, or check the list of VAT invoices included in a VAT report that is the basis for the VAT return. For transactions where there were no invoices at all HMRC could not do this. He cites (just) one example where there was a discrepancy in the amount said to be due when the supplier reconciled their records. In the context of the information submitted, the carefully collated spreadsheets, the detail, the precision and accuracy of the enormous majority of the many entries, HMRC's

cavil at a tiny fraction that were shown (by the taxpayer themselves) later to be inaccurate and were corrected, is as it was put "grasping at straws" - looking for reasons for refusal, when none was, standing back, and acting reasonably and proportionately, really available. It was never seriously suggested that output tax had routinely not been received by HMRC, nor was it suggested there was fraud of any kind, nor that parties (many internationally known names) did not exist or had not traded as recorded by the taxpayer.

132. The Claimant argued, given the status of the taxpayer, the suppliers, their bona fides and the plethora of detail of the transactions without invoices, it was wrong for the Revenue not to give effect to the right to deduct and to the principle of neutrality as the policies seemed to provide. The real concern which was the core oral submission of HMRC, was what they called "systematic" that the business failed more often than not to receive invoices. HMRC had put down a marker concerning the future – I deduce (though that deduction is irrelevant to my reasoning), that as indicated, this was really the concern.

133. It must be right that the Revenue should guard against a parallel system of operation – the *Boyce* example where the modus operandi *could* not produce a compliant invoice exemplifies it. In my judgement, this might apply also where what happens is a threat to the proper management of the Revenue going forward. The crunch point would be if the taxpayer, upon whom the obligation to "obtain" an invoice is placed, could not obtain an invoice, he would have to do business in a different manner. The system of VAT requires that respect is given to the centrality of the invoice. However, here this concern did not arise: as stated, before final refusal of ECNs 3 and 4 was made, the Claimant made clear from 1 March 2023 there was *no* pattern of operation going

forward. In these circumstances, aside from HMRC's misunderstanding and therefore misapplication of policy, the decision to withhold repayment of ECNs 3 and 4 was also unreasonable in the sense that it was outside the band of reasonable decisions open to HMRC for the reasons given.

134. Nothing said here is intended to cast any doubt on the numerous statements in caselaw as to the importance of the invoice which make clear the centrality still of that main document of trade – the invoice –to the operation of the system. It serves to minimise the risk of fraud and to maximise neutral application of the tax in a manner that is proportionate to the national authorities with the care and management of the tax. In the current situation, however, none of the relevant risks were seriously in play with this taxpayer. Perhaps most importantly, the risk of establishing a parallel non-compliant system had vanished on 1 March 2023 before the final decision was promulgated in May.

135. Within the evidence is a private exchange within which HMRC worry that the Claimant would not stay with TOMS; and then what would be done to stop that? This was not expressed as part of the public reasoning of the decision, nor as a submission. Rightly so. But the remaining concern about this taxpayer, namely that its commercial operation was unlikely ever to render invoices on a regular basis going forward had in fact disappeared once the TOMS system was adopted, before the decision was promulgated.

Result

136. This application for judicial review must be allowed. It is a corollary of the reasoning that HMRC should have allowed payment of ECN3 and ECN4. This was the only lawful decision available on the facts of this case. For the relevant dates it may also be expressed as a breach of EU principle of effectiveness.

137. It is not necessary given my decision in this case to deal with the parallel submission based upon legitimate expectation. It seems to me that the better analysis is that referring to the application of policy, and also to the unreasonableness, in the public law sense, of the final decision in the circumstances of these facts properly understood.