[2015] UKUT 0552 (TCC)
Case number: FTC/16/2011
UT/2011/0001

Decisions by HMRC refusing appellant's claims for input tax deduction on ground that the input tax had been incurred in transactions connected with the fraudulent evasion of VAT and that appellant knew or should have known that this was the case - application of Joined Cases C-439/04 and C-440/04) Kittel v Belgium and Belgium v Recolta Recycling [2006] ECR I-6161; [2008] STC 1537 – appeal to First Tier Tribunal ("FTT") against HMRC decisions dismissed – appeal to Upper Tribunal – whether FTT applied correct standard of proof in respect of finding that appellant knew transactions connected with fraud – yes – whether the finding of FTT was perverse - no – appeal against decision of FTT dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

EXCEL RTI SOLUTIONS LIMITED **Appellant**

- and -

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

TRIBUNAL: The Honourable Mr Justice Barling

Sitting in public in London on 11th and 12th March 2015

K.P.E. Lasok QC instructed by **The Khan Partnership LLP for the Appellant**

Mark Cunningham QC and Matthew Smith instructed by **Howes Percival LLP for the Respondents**

DECISION

Introduction

1. This is an appeal by Excel RTI Solutions Limited ("Excel") against the decision of the First-tier Tribunal ("the FTT") released on 27 October 2010 ("the FTT Decision"). In the FTT Decision the FTT dismissed Excel's appeal against four decisions of the Respondents ("HMRC") refusing Excel's input tax deduction claims for the periods 04/06, 05/06 and 06/06 in the amount of £3,302,830. The first and main decision of HMRC was made on 21 December 2006, and is contained in a letter of that date.

2. Each of HMRC's decisions represented an application of principles set out in the judgment of the Court of Justice in Joined Cases C-439/04 and C-440/04) *Kittel v Belgium* and *Belgium v Recolta Recycling* [2006] ECR I-6161; [2008] STC 1537. HMRC concluded that the input tax in question had been incurred in transactions connected with the fraudulent evasion of VAT and that Excel knew or should have known that this was the case. Pursuant to those principles HMRC therefore denied Excel's claim for deduction of the input tax.

3. In the Amended Grounds of Appeal of 26 July 2013 Excel sought to challenge the FTT Decision on a number of grounds. However, in his skeleton argument Mr Lasok QC, who appeared for Excel in this tribunal (but not in the FTT), indicated that only two grounds were now being pursued. These are that the FTT erred in law (i) in holding that Excel knew that the transactions in question were connected to a fraudulent loss of VAT; and (ii) in concluding that the principles in *Kittel* apply in cases involving what is known as "contra-trading".

4. In fact only the first of these grounds is actively being relied upon before me: Mr Lasok stated that in the present appeal, in the light of the judgment of the Court of Appeal in *Fonecomp v HMRC* [2015] EWCA Civ 39, Excel did not intend to make any submissions in relation to the second ground. He invited me to dismiss the appeal

on that ground, although the argument was not being formally conceded and permission to appeal in *Fonecomp* was being sought from the Supreme Court.

The background

5. HMRC's decisions in relation to Excel were largely concerned with one variety of what has come to be known as "MTIC" or "Missing Trader Intra-Community" trading. MTIC is a device to defraud HMRC of VAT. In much simplified terms, typically there is a chain of transactions each purporting to be a supply of particular goods on which output VAT is required to be charged by the supplier to its customer and then paid over to HMRC. At some point in the chain a supplier defaults on the payment due to HMRC and disappears. At one or more points in the chain traders then seek to recover from HMRC, as input tax, the VAT paid to their suppliers. The result is a loss of VAT to HMRC. An MTIC scheme often involves several intermediaries or "buffers" who participate in the chain of transactions in order to add to the complexity of the arrangement and thereby provide a smokescreen for the fraud, making it more difficult for the authorities to unravel.

6. It is common ground that wholesale trading in mobile phones and kindred products has been a particularly fertile ground for MTIC-type fraud, and that by this means many billions of pounds of revenue has been lost to HMRC over recent years.

7. Originally Excel described its business as internet resourcing and IT consultancy services. However, in July 2004 the company indicated to HMRC an intention to expand into the import and export of mobile phones, and later informed them that it had decided not to sell in the UK but to concentrate on export sales to EU or third countries.

The FTT Decision

8. Before the FTT, HMRC contended that some nineteen chain transactions in which Excel was a participant and which involved the supply of mobile phones were traced through buffers to defaulters who had failed to account for the VAT charged by them to the first buffer. Two other transactions were alleged to involve contra-trading, in which Excel's consignments were not traced back to a defaulter, but Excel acquired the goods from suppliers who sold other goods to overseas customers; these other

goods were traced back to defaulters so that the sale to Excel removed the need for Excel's suppliers to make a repayment claim. I was told by counsel that it was not necessary for the purposes of this appeal for the precise details of those contra-trades to be rehearsed.

9. Each of these twenty-one transactions was said by HMRC to be part of an overarching fraudulent scheme or schemes, and it was alleged that Mr Tony Constantinides, the managing director of Excel, knew this. Alternatively, HMRC contended before the FTT that Excel should have known that the transactions were connected with fraudulent defaults. HMRC argued that in these circumstances the *Kittel* principles were triggered so that Excel's right to deduct/recover the input tax in question was lost.

10. Excel's case in the FTT was not that Excel's transactions were *not* connected with fraudulent defaults (as to which Excel merely put HMRC to proof), but that Mr Constantinides did not know of any such connection and that it was not established that he should have known.

11. The hearing before the FTT was substantial, taking place over some thirteen court days. Twenty six witnesses were called by HMRC, and two by Excel, including Mr Constantinides. All these witnesses were cross-examined - Mr Constantinides for about one and a half days. The statement of a further witness was put in evidence. The hearing bundle contained some 22,000 pages.

12. HMRC had placed before the FTT a flow chart in respect of each of the twenty-one chain transactions. These flow charts were exhibited to the witness statement of Ms Farzana Malik, who was a witness for HMRC. The charts indicated both the flow of money and the flow of invoices. These flows did not take the same route, in that the money flowed through companies who were not involved in the invoice chain relating to the goods. HMRC also produced a schedule of all twenty-one transactions, describing *inter alia* the role played by each participant in the chain (eg money conduit, buffer, broker, defaulter etc), the goods, dates and amounts of invoices and payments, the gross profit earned by Excel, and the VAT loss to HMRC ("the Schedule").

13. Before the FTT (as before me) considerable emphasis was placed by both sides on the circumstances surrounding one of the transactions (Deal 1), as providing a sufficient exemplar of the other deals, there being no real dispute as to what had taken place in the various transactions.

14. So far as Deal 1 is concerned, it was (and remains) common ground that there were purported back-to-back sales (evidenced by invoices, purchase orders and other documents) between six companies (including Excel) in respect of 3,500 Nokia mobile phones, and that the money relating to these sales passed through ten companies, including the six. Each of the ten companies (which comprised entities in the UK, Spain, Denmark and Pakistan) had an account with the First Curacao International Bank ("FCIB") in the Dutch Antilles. All the individual sales between the six companies were agreed on the same day (5 April 2006), and all the related payments between the ten companies took place on the same day (10 April 2006) through the companies' FCIB accounts. In each case the money arrived in the payer's account in time to enable that company to make a corresponding payment out to the next "link" in the money chain. Absent such timely arrival of the funds into the payer's account, in virtually every instance of a payment in Deal 1 the payer would have had to find some alternative source of funds in order to make its own payment.

15. The FTT identified the synchronisation of so many payments as a significant factor in reaching its conclusion.

16. The FTT concluded that Excel knew that the relevant transactions in which it participated were connected with the fraudulent evasion of VAT. The first limb of the *Kittel* test was therefore satisfied and it was unnecessary to determine whether or not HMRC succeeded on the alternative limb, that Excel ought to have known of that connection.

17. Although the judgment is substantial, the FTT's conclusions and reasoning are stated succinctly. I set out the salient paragraphs for convenience:

> "233. On that basis we now turn to the evidence before us remembering that it is clearly established by *Mobilx* that the burden of proof as to the *Kittel* test is on Customs and that it is to be associated from objective factors. We observe at this point that, if there was an issue as to whether the mobiles existed or whether they were exported, the burden of proof as to those matters would be on the Appellant. However the existence of the phones and their purchase and sale by Excel were not in dispute.

234. The primary submission of Mr Cunningham was that Excel through Mr Constantinides had actual knowledge that its transactions were connected with fraudulent evasion, inferring knowledge from the totality of surrounding circumstances and rejecting Mr Constantinides' denial of knowledge. The objective factors are not limited to those of which Excel had knowledge or means of knowledge and are thus more extensive than those relevant to whether Excel should have known.

235. The strongest evidence for Customs is the flow charts produced by Mrs Malik from the FCIB records, see paragraphs 77 and 78 above and paragraphs 83 to 91 and also the flow chart for Deal 1 annexed to this decision…..

236. Analysis of the transaction statements shows that, for the most part, the payments for the mobiles could not have been made without borrowing if the payments for the goods had not been received. J Corp could not have paid Excel but for the money passing through Catseye from Gulf Phones. Almost all the payment Oracle received from Deepend passed through Mobile Direct to Gulf Phones.

237. The market forces explanation by Mr Patchett-Joyce[1] at paragraph 221 above provides no explanation for the flow of funds from Deepend through four companies to J Corp. His explanation involves Deepend, the defaulter in Deal 1, introducing goods which it acquired from MV at a price which was attractive to Bluewire which sold through two more companies to Excel which received a call from J Corp an approved customer (see paragraph 69) which was coincidentally put into funds to buy the goods from Excel. In our judgment put at its lowest this was most improbable. Although Mr Patchett-Joyce said that the complexity of the overall scheme was mind boggling, that description is equally apposite to the money transfers without which the transactions could not have been funded. Indeed the complexity of co-ordinating the money transfers so that the necessary funds reached Excel's customer in time to pay Excel without the participation of Excel is to our mind far greater.

238. The preceding two paragraphs have been based on Deal 1. We have not analysed the other deals in the same detail, however paragraphs 84 to 91 addresses features of the other deals. We note that Gulf Phones and Catseye appear again in Deal 4 and that Mobile Direct appears in Deal 19. It is to be noted that the only company appearing in all 21 deals in Excel.

239. Mr Cunningham placed considerable reliance on the J and S letters, see paragraph 209 above, producing a schedule. We have compared the letters with the schedule and find that the figure for the number of chains examined should be 67 and that for transactions found by Customs to have commenced with a defaulting trader should be 18. Although none of the letters said that the other chains were clear, the only letter which specifically stated that enquiries were ongoing into the other deals in the month in question was that of 8 December 2005, see paragraph 33 above. However after the letter of 5 May 2005 Mrs Bransgrove did say that the letter did not mean that four other months were not problematical, see paragraph 22. We do regard it as significant that Inter Comms, which was the supplier in four deals including Deal 1, was the supplier of the goods supplied in November 2005 identified in the letter of 22 February 2006 and was also the supplier of the goods supplied in September 2005 identified in a letter of 6 March 2006.

240. We consider that it is significant that Mr Constantinides had on his own evidence considerable experience in the telecoms business acquired over a number of years with different companies. Furthermore he had a university degree in electronics and communications and carried out six months of research into the mobile market before undertaking the first trade in 2004. He was clearly fully aware of the risks. That does not mean that he had actual knowledge of the connection of his deals with fraud but is one of the objective factors in ascertaining whether he did have such knowledge.

241. In relation to Mr Cunningham's submissions on Deal 1 (paragraph 208) we have already commented on Inter Comms being the supplier. We do not attach any significance to the handwriting "Lee Goulding": there was no expert evidence, the point was not pleaded and Mrs

[1] Counsel for Excel in the FTT.

> Beard's evidence relied on the Deal Notes. The inspection fee for Deal 1 was £700; we do not regard it as realistic to suggest that A1 had 10 to 15 employees working for 3 hours for that fee particularly if the goods were supposed to be coming direct from the manufacturer via Excel's supplier. We do not regard the error on the initial purchase order and the Redhill notation as significant. The waiver of the deposit in Deal 1 with the "N/A" notation by Jodie Curl on the Deal Check List is more easy to accept than the fact that there was no deposit in any of the deals notwithstanding that the goods were shipped on hold. The level of inspection by J Corp was not Excel's concern. Whereas the delay in payment in Deal 1 may have been attributable to dilatoriness by J Corp and the weekend, there was a delay in payment in every deal notwithstanding Mr Constantinides' emphasis on the need for 24 hour service on 365 days and the fact that no deposits were received.
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> 242. We accept the evidence of Mrs Bransgrove as to Excel's due diligence. On 20 July 2005 she noted "the high quality of due diligence carried out by Excel", see paragraph 27. Although she did not put it in this way, what she was referring to in her evidence was however clearly the paperwork. As she said at paragraph 113 above she could not be inside the mind of Mr Constantinides. The quality of the due diligence on paper is of very limited value in deciding whether Mr Constantinides was a participant in fraud. If he was participating in complex fraud, it would be no surprise if he made substantial efforts to cover it. The evidence of Mrs Bransgrove was consistent with that of Mr Plowman, see paragraph 191. That evidence however cuts both ways since the better organised Excel was, the more difficult it is to accept that Mr Constantinides was unaware of the overall contrivance.
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> 243. We have considered the evidence of Mr Fletcher with care but do not place any substantial reliance on it. We consider that there is considerable force in the submissions of Mr Patchett-Joyce recorded at paragraph 215. His evidence included factual material which was inevitably nearly all second hand including that on Nokia's pricing policy; we have no difficulty with that since the Tribunal regularly receives hearsay evidence. However his conclusions seem to us to be a matter for submission by counsel rather than evidence by an expert witness. There is an inherent difficulty in expert evidence as to the grey market, particularly since it did not appear that Mr Fletcher's researches covered inquiries to any authorised distributors. It does not seem to us that there is any inherent improbability in a trader engaging in broker-like activities, matching deals, carrying no stock and only dealing at a profit. We do not understand why Excel should be expected to have known why its counterparties should have chosen to deal at the prices which they were willing to agree.
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> 244. We have considered the submissions of Mr Patchett-Joyce with care. He said everything which could be said on behalf of Excel. In our judgment he was however unable to provide any credible explanation for the FCIB evidence produced by Mrs Malik. Market forces provide no explanation as to why Excel's customers were put in funds to pay Excel as part of essentially circular payments. In our judgment the only reasonable explanation is that the payments were part of overall schemes in which Mr Constantinides, and through him Excel, must have been a knowing participant. We find that Excel knew that by its purchases it was participating in transactions connected with fraudulent evasion of VAT."

The issues in this appeal

18. As stated above, of the several grounds originally put forward only one remains. This is a challenge to the FTT's finding that Excel knew of the connection with fraud. However, as argued before me by Mr Lasok, the ground has two limbs: first, that the FTT did not apply the correct standard of proof, and second that the finding of actual knowledge was in any event perverse, there being no or insufficient evidence capable of supporting that finding.

19. The first of these limbs, concerning the standard of proof, does not seem to figure as a separate point in any of the several documents which track the evolution of the grounds of appeal in this case, and so far as one can see that question does not appear to have figured to any significant extent in the argument before the FTT. Be that as it may, Mr Cunningham QC, who appeared for HMRC here and below, took no point on this, and I shall therefore treat the issue as properly before me.

Relevant legal principles

20. Before examining the parties' submissions on these questions, it is convenient to set out some of the case law which contain the legal principles on which those submissions are made.

The Kittel principles

21. As I have said, HMRC's decisions denying Excel's claims for deduction of input tax represented an application of the principles formulated by the Court of Justice of the European Union ("CJEU") in *Kittel*, now established as the leading case in this area.

22. In that judgment the CJEU stated that a taxable person who receives a supply of goods and who did not and could not know that the transaction concerned was connected with a fraud committed by the seller cannot be deprived of the right to deduct the input VAT he has paid, even where the contract of sale is void by reason of fraudulent evasion of VAT or other fraud. The Court then went on to identify the circumstances in which a derogation from that right to deduct input tax falls to be applied by the national authorities and courts:

> "53. By contrast, the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity' are not met where tax is evaded by the taxable person himself (see Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 59).
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> 54. As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76). Community law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32).
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> 55. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, inter alia, Case 268/83

Rompelman [1985] ECR 655, paragraph 24; Case C-110/94 *INZO* [1996] ECR I-857, paragraph 24; and *Gabalfrisa*, paragraph 46). It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends (see *Fini H*, paragraph 34).

56. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.

57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.

58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.

59. Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.

60…….

61 …. where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

23. *Kittel* has been referred to and applied by the CJEU in a number of subsequent cases. These include Joined cases C-80/11 and C-142/11 *Mahageben kft v Nemzeti Ado* and *David v Nemzeti Ado* [2012] STC 1934. The judgment in that case contained the following passages:

"45. In those circumstances, a taxable person can be refused the benefit of the right to deduct only on the basis of the case-law resulting from paragraphs 56 to 61 of *Kittel and Recolta Recycling*, according to which it must be established, on the basis of objective factors, that the taxable person to whom were supplied the goods or services which served as the basis on which to substantiate the right to deduct, knew, or ought to have known, that that transaction was connected with fraud previously committed by the supplier or another trader at an earlier stage in the transaction.

……..

49. Given that the refusal of the right to deduct in accordance with paragraph 45 of the present judgment is an exception to the application of the fundamental principle constituted by that right, it is for the tax authority to establish, to the requisite legal standard, the objective evidence which allows the conclusion to be drawn that the taxable person knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud committed by the supplier or by another trader acting earlier in the chain of supply.

50. In the light of the foregoing considerations, the answer to the questions referred in Case C-142/11 is that Articles 167, 168(a), 178(a), 220(1) and 226 of Directive 2006/112 must be interpreted as precluding a national practice whereby the tax authority refuses a taxable person the right to deduct, from the VAT which he is liable to pay, the amount of the VAT due or paid in respect of the services supplied to him, on the ground that the issuer of the invoice relating to

> those services, or one of his suppliers, acted improperly, without that authority establishing, on the basis of objective evidence, that the taxable person concerned knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of supply."

24. In Case C-285/11 *Bonik EOOD v Direktor na Direktsia* [2013] STC 773, the CJEU considered the approach which the national authorities and courts should take in determining whether the right to deduct input tax under Article 167ff of Directive 2006/112 had been established. In that regard the Court said:

> "31. In order to be able to conclude that there is a right of deduction, as relied upon by Bonik on the basis of those supplies of goods, it is necessary to check whether those supplies have actually been carried out and whether the goods in question were used by Bonik for the purposes of its taxed transactions.
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> 32. However, it should be borne in mind that, in proceedings brought under Article 267 TFEU, the Court has no jurisdiction to check or to assess the factual circumstances of the case before the referring court. It is therefore for the national court, in accordance with the rules of evidence of national law, to carry out an overall assessment of all the facts and circumstances of the case in order to establish whether Bonik may exercise a right of deduction on the basis of those supplies of goods (see, to that effect, Case C-273/11 *Mecsek-Gabona* [2013] STC 171, paragraph 53).
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> 33. If that assessment discloses that the supplies of goods at issue in the main proceedings have actually been carried out and that those goods were used by Bonik for the purposes of its own taxed output transactions, Bonik cannot, in principle, be refused the right of deduction."

25. The Court then proceeded to consider the *Kittel* principles, repeating more or less word for word the now familiar formulae derived from paragraphs 53-61 of that judgment, as well as paragraph 49 of *Mahageben* (see paragraphs 35-44 of *Bonik*).

26. *Kittel* and related cases have also been considered and applied in several decisions of the courts and tribunals of this jurisdiction, including, in particular, by the Court of Appeal in *Mobilx Limited v HMRC* [2010] EWCA Civ 517 and *Fonecomp* (above). In *Mobilx*, at paragraph 59 of his judgment, Moses LJ emphasised that

> "the test in Kittel is simple and should not be over-refined."

27. In relation to questions of proof, Moses LJ gave the following guidance:

> "81…It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary.
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> 82. But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG appeal, Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of

due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.

` 83. The questions posed in BSG (quoted here at § 72) by the Tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge. I can do no better than repeat the words of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563:-

> "109 Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
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> ……
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> 111 Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them.""

28. When *Mobilx* was in the High Court[2] Floyd J (as he then was) indicated that the standard of proof to be satisfied by HMRC in relation to *Kittel* knowledge was the civil standard of the balance of probabilities (see paragraph 82 of his judgment).

Principles on appeal from the FTT

29. By virtue of ss.11(1) of the Tribunal, Courts and Enforcement Act 2007 an appeal may be made to the Upper Tribunal "... on any point of law arising from a decision made by the [FTT]."

30. It is not in dispute that the case law as to the nature and scope of appeals on a point of law from the VAT and Duties Tribunal to the High Court under ss.11(1) of the Tribunals and Inquiries Act 1992 - the predecessor procedure - remains applicable. In this regard Floyd J in *Mobilx* (above), provided the following helpful summary of the scope of such an appeal:

> "13. Section 11 (1) of the Tribunals and Inquiries Act 1992 provides that an appeal lies to the High Court if a party "... is dissatisfied in point of law" with a decision of the VAT and Duties Tribunal.

[2] [2009] EWHC 133 (Ch).

14. In *Georgiou v. Customs and Excise Commissioners* [1996] STC 463 CA at 476, Evans LJ refers to excerpts from the speeches of Viscount Simonds and Lord Radcliffe in *Edwards v. Bairstow* [1956] AC 14, 14-15) and observes (at 476 f-g) that

> "... it is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled."

15. At page 476H Evans LJ set out a four stage process for examining challenges to findings of fact:

> "... the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make."

16. Complete absence of evidence, or the evidence being to the contrary effect, are two of the grounds on which it may be said that a tribunal was not entitled to reach a conclusion of fact ...

17. ...

18. Subject to these very tight limitations, it is not open to the High Court to conduct a review of the evidence to see whether it would have reached the same conclusion. An appellate court is poorly placed to assess the value of oral evidence given before the Tribunal. Moreover, if the analysis of the evidence is such that reasonable judicial minds might differ on the outcome, there is no basis for saying that the decision of the tribunal of first instance is wrong."

Limb 1: standard of proof

31. It is common ground (and clearly correct) that the burden of establishing that Excel had the relevant knowledge rests on HMRC who wish to deny the company the right to deduct input tax in these instances. However, the parties differed as to the standard of proof to be applied.

32. Mr Lasok submitted that the FTT had erred in law by adopting an erroneous approach to the standard of proof. He set the scene for his argument on this point by submitting that the *Kittel* test was a creature of EU law. For confirmation of this proposition he relied upon a statement by Arden LJ in *Fonecomp* (above) at paragraph 45 of her judgment in that case. He submitted that in such circumstances national law cannot be applied unless the EU measure in question refers to national law, and there was no reference to national law in *Kittel* or *Mahageben.* Although in *Bonik,* at paragraph 32 of its judgment, the CJEU did expressly state that the national court

must apply "the rules of evidence of national law", Mr Lasok said that the CJEU was there dealing with the assessment by the national court of whether the right to deduct input tax had been established in principle, and in particular whether the supply of the goods in question had actually taken place and whether the goods were used by the taxable person for its own taxed output transactions. He submitted that that issue arose in a legislative context and had been delegated to the national authorities. He sought to distinguish that exercise from the *Kittel* assessment which the national court was then required to make. In the latter there was no delegation to the Member State in terms of national rules of evidence, and EU law therefore applied to the standard of proof.

33. In that regard Mr Lasok referred to the passages in the CJEU's decisions in *Mahageben* (at paragraph 49) and *Bonik* (at paragraphs 43-4) where the Court states that *Kittel* knowledge is to be established "to the requisite legal standard" by means of "objective evidence". He submitted that the phrase "requisite legal standard" is a term of art in EU law which is often used by the CJEU without any explanation of what it means. The best example of its meaning is, he submitted, to be found in a decision of the General Court in Case T-45/07 *Unipetrol v Commission* [2011] ECR II-4629. At paragraph 48 thereof the General Court stated:

> "It must be noted that as regards proof of an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 58, and Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 86). It is accordingly necessary for the Commission to produce precise and consistent evidence to support the firm conviction that the infringement took place (see Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 43 and the case-law cited). It must also be noted that in order for there to be an agreement within the meaning of Article 81(1) EC it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 86; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 256). Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point (Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 215)."

34. Mr Lasok contended that, although *Unipetrol* was a competition case, there was no authority to the effect that EU law applied different standards of proof in different types of cases, and the *Unipetrol* standard was the "requisite" standard for proving *Kittel* knowledge.

35. As to the standard actually applied by the FTT, Mr Lasok submitted that although the FTT did not say so in terms, it could be inferred that they applied a balance of probabilities standard, not least in view of their tacit acceptance of Mr Cunningham's submission that the civil standard was applicable.[3] Mr Lasok contended that the FTT therefore erred in law in taking that approach when the "requisite legal standard" was as stated in *Unipetrol.*

36. In response to these submissions Mr Cunningham stated that it was not entirely clear what standard of proof had been applied by the FTT. Although it was probably the civil standard, it was unnecessary to decide the point as whatever the appropriate standard of proof, the unambiguous and unqualified language of the FTT in relation to its findings demonstrated that it had been met here. Mr Cunningham referred in particular to the language in paragraphs 237 and 244 of the FTT Decision (above) as indicating that the FTT had clearly formed a "firm conviction" without the kind of doubt to which the General Court referred in *Unipetrol.* Therefore, the requisite standard of proof had been achieved.

37. Mr Cunningham submitted that in any event the standard of proof varied depending on the different circumstances, and *Unipetrol* was a cartel case whereas the present case relates to VAT. He referred to the Opinion of Advocate General Colomer in *Kittel* at paragraphs 56-7, where the Advocate General advised the Court that it was for the national court to establish, "in accordance with rules of national law", knowledge of the fraud on the part of the person claiming the right to deduct. Mr Cunningham submitted that in paragraph 61 of its judgment in *Kittel* the CJEU clearly endorsed that approach.

Discussion and conclusion on limb 1

38. As I stated earlier, it does not appear that there was any substantial debate or issue about the standard of proof before the FTT, and it seems very likely the FTT applied the civil standard in accordance with Mr Cunningham's submission to them. This would hardly be surprising in the light of the case law, not least Floyd J's dictum in *Mobilx*, which was not in any way called into question by the Court of Appeal when they dealt with questions of proof in that case (see paragraphs 27 and 28 above).

[3] This submission is recorded at paragraph 200 of the FTT Decision.

39. On the basis that the FTT did approach the issue before them on the basis that knowledge must be established by HMRC on the balance of probabilities, I consider that they were correct to do so. In my view the argument that EU law requires its own, different, standard to be applied in such a case as this is misconceived.

40. It is true that the *Kittel* criteria are creatures of EU law, having been laid down by the CJEU in its case law, but that is very far from saying that when national courts come to assess whether those criteria are established as a matter of fact, they must look for and apply an EU standard of proof. The well-established principle of procedural autonomy means that, in the absence of a direction of the CJEU or other binding EU rule, national procedural and evidential rules are normally applicable when national courts are enforcing EU rights and obligations.[4] This is subject to the proviso that those national rules do not infringe other principles of EU law, such as the principles of equality and effectiveness.[5]

41. I do not agree with Mr Lasok's submission that when in *Mahageben* and *Bonik* the CJEU spoke of "the requisite legal standard" it was stipulating that a specific EU law standard of proof is to be applied. In my view that phrase is not a term of art with a specific meaning in EU law. It is a phrase which means what it says: national courts are to apply whatever standard of proof is required to the question of fact in issue. Where there is no applicable EU standard, "the requisite legal standard" will be determined by national rules of evidence, subject to the proviso mentioned above.

42. In my judgment *Unipetrol* does not advance Excel's argument. It is important to bear in mind that the issue in that case was whether an infringement of the EU competition rules had been established by the European Commission. Substantial financial penalties can be imposed for such infringements. The competition rules are penal for the purposes of Article 6 of the European Convention on Human Rights so that, for example, the presumption of innocence applies. The linkage between the penal nature of such an infringement and the particular criteria of proof specified in that case is made clear when one looks at the cases cited by the General Court in

[4] See, for example, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29; and Case C-246/09 *Bulicke* [2010] ECR I-7003, paragraph 25.
[5] See, for example, Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraph 17; and Joined Cases C-392/04 and C-422/04 i-21 *Germany and Arcor* [2006] ECR I-8559, paragraph 57.

paragraph 48[6] of its judgment (all of which are also dealing with infringements of the competition rules). One such case is Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, where the General Court gave the following explanation for those specific criteria of proof:

> "214. It is accordingly necessary to determine, in the context of the present plea, whether the Commission established to the requisite legal standard, on the basis of the recorded facts, that the infringement continued until 28 January 1998.
>
> 215. It should be noted in that regard that as regards proof of an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 58, and Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 86). Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, **in particular in proceedings for annulment of a decision imposing a fine.**
>
> 216. **In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the ECHR**, which is one of the fundamental rights which, according to the settled case-law of the Court of Justice, reaffirmed in the Preamble to the Single European Act, by Article 6(2) of the Treaty on European Union and by Article 47 of the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1), are protected in the Community legal order. **Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments** (see Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, paragraphs 175 and 176).
>
> 217. **It is accordingly necessary** for the Commission to produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see *Volkswagen v Commission*, paragraph 99 above, paragraphs 43 and 72 and the case-law cited)."
>
> (My emphasis)

43. The fact that specific criteria need to be applied by the General Court when determining whether, in its role as prosecutor, the Commission had properly proved its allegation of an infringement which by its nature is penal and can lead to severe fines, does not necessarily mean that the same criteria are to be applied in the present case, which is of an entirely different nature, and where such criteria have not been specified by the CJEU. Despite the context of fraud, there is no penal element in this case: in essence the *Kittel* test determines whether the national tax authority should derogate from the right of a taxable person to credit for its input VAT. Where the derogation applies and the right to deduct is removed, this does not represent the

[6] See paragraph 33 above.

imposition of a penal measure but is simply the result of the fact that by reason of the fraud (and the participation in it of the person claiming deduction) "the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity' are not met" (see paragraph 53, and also paragraph 56, of *Kittel*).

44. Therefore, in my view there is no justification for seeking to gloss the judgments in *Kittel*, *Mahageben* and *Bonik* by attributing an EU law meaning to "the requisite legal standard" where the CJEU did not refer to such meaning, either expressly or by cross-reference to other cases, such as those identified by the General Court in *Unipetrol*. I consider that in *Kittel*, *Mahageben* and *Bonik* the CJEU was imposing no specific criteria other than those expressly mentioned, ie the need for "objective factors" (*Kittel*) or "objective evidence" (*Mahageben* and *Bonik*). The rest is left to national rules of evidence.

45. If this were not already clear, the matter is put beyond doubt by paragraph 32 of the judgment of the CJEU in *Bonik* (see paragraph 24 above). The distinction, to which Mr Lasok drew attention, between the national court's assessment which is the subject of paragraphs 31 and 33 of *Bonik* (where national rules of evidence are expressly referred to) and its assessment in paragraphs 40-44 of that case, does not in my view connote a different standard of proof for each. Each involves an assessment of fact, and there is no rational reason why the CJEU would wish the national court to apply different standards of proof (as distinct from burdens of proof) when considering these issues. On the contrary, it is likely that there would be evidence overlapping both issues, which would render the application of different standards of proof unworkable. Had the Court intended such an extraordinary situation it would surely have spelled it out. In fact, paragraph 32 reminds the national court that, in Article 267 proceedings, the CJEU has no jurisdiction to check or to assess the factual circumstances of the case, and therefore the referring court must carry out "an overall assessment of all the facts and circumstances of the case" in accordance with national rules of evidence. This wording is sufficiently wide and general to encompass both the assessments which the national court is obliged to carry out.

46. By way of analogy Mr Lasok sought to rely on the Supreme Court's decision in *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16, where one issue of law (interpretation

of an EU directive) necessarily had to be determined in accordance with EU law, and the other issue of law (the nature of a contractual relationship) necessarily had to be determined by reference to the proper law of the contact (see paragraphs 22-23 of the judgment of Lord Neuberger). That, it seems to me, is a wholly different situation, and provides no real analogy to the two issues of fact with which *Bonik* is dealing.

47. It follows that in my view EU law makes no provision for a specific EU standard of proof in respect of *Kittel* knowledge, save that the decision must be based on objective evidence. Rather, in paragraph 32 of *Bonik,* the CJEU expressly directed that national rules of evidence are to be applied. Even if the correct analysis of *Bonik* is that the reference to national law in paragraph 32 is applicable only to the first factual assessment (which I do not consider to be the case), national evidential rules would still apply to the *Kittel* assessment, no EU standard of proof being stipulated. It follows that in either case the civil standard of the balance of probabilities is the appropriate standard, in accordance with *Mobilx* and other cases. Therefore, in applying that standard the FTT did not err in law, and this ground of appeal fails.

48. For the avoidance of doubt I should make clear that in so holding I am not suggesting that the standard of proof referred to in the *Unipetrol* line of cases, which is specifically applicable to issues of infringement of the EU competition rules, is necessarily materially different, or would be liable to produce a different outcome, from the balance of probabilities standard as applied in the law of England and Wales. Still less should I be taken to be expressing a view as to whether the *Unipetrol* criteria are equivalent to the criminal standard of proof as understood in the law of this jurisdiction. Those are matters which it is not necessary for me to decide.

49. Finally, there is considerable force in Mr Cunningham's submission that the terms in which the FTT expressed their finding of knowledge on the part of Excel were sufficiently unequivocal to satisfy the terms of the *Unipetrol* criteria of a "firm conviction" and to exclude the presence of the "doubts" referred to in that case. However, it is not necessary for me to reach a conclusion on that point.

Limb 2: perversity

50. This limb contains the remainder of Excel's challenge of the FTT's finding, in paragraph 244 of the FTT Decision, "that Excel knew that by its purchases it was participating in transactions connected with fraudulent evasion of VAT".

51. That finding of actual knowledge on the part of Excel is clearly a finding of fact. As such it can only be challenged in this tribunal on the limited grounds summarised by Floyd J in *Mobilx* (see paragraphs 29-30 above). In short, absent a discrete error such as the one alleged in limb 1, in order to be successfully impugned as an error of law for this purpose, a finding of fact must be perverse. The test has been framed in a variety of ways, but the essence of it is that the evidence before the FTT must be incapable of supporting that finding, such that no reasonable tribunal, properly directing itself as to the standard and burden of proof, could have made it. What is clearly impermissible is for this tribunal to conduct a review of the evidence to see whether it would have reached the same conclusion as the FTT.

52. Excel has not called into question that Deal 1 and the other twenty transactions did represent fraudulent schemes the aim of which was to cheat HMRC of VAT revenue. Mr Lasok accepted in the course of argument that the transactions in question were probably fraudulent. What Excel takes issue with is the finding that it knew that it was participating in transactions connected with fraud.

53. Excel begins its challenge to this finding by submitting that the FTT's reasoning is based entirely on the FCIB material, summarised in HMRC's flow charts, and that no other evidence was material to the FTT Decision. For this submission Excel places particular reliance upon the separate decision of the FTT declining Excel's application for permission to appeal, in which the FTT said that "in the absence of a credible explanation for the FCIB evidence the Tribunal was entitled to infer knowing participation". Excel also relies upon the fact that the FTT did not, in refusing permission, refer to any other material and did not expressly refute Excel's assertion in its permission application that no other matter appeared material to the FTT decision.

54. This point is in my view unsustainable.

55. First, the FTT Decision states that the FCIB records constitute "the strongest evidence" in favour of HMRC (paragraph 235). That clearly implies that there is additional evidence.

56. Second, the FTT expressly referred to additional factors and material.

- For example, in connection with the so-called "J&S" (ie joint and several liability) letters sent by HMRC to Excel, the FTT regarded it as

  "significant that Inter Comms, which was the supplier in four deals including Deal 1, was the supplier of the goods supplied in November 2005 identified in the letter of 22 February 2006 and was also the supplier of the goods supplied in September 2005 identified in a letter of 6 March 2006." (Paragraph 239)

- The FTT also regarded it as

  "significant that Mr Constantinides had on his own evidence considerable experience in the telecoms business acquired over a number of years with different companies. Furthermore he had a university degree in electronics and communications and carried out six months of research into the mobile market before undertaking the first trade in 2004. He was clearly fully aware of the risks. That does not mean that he had actual knowledge of the connection of his deals with fraud but is one of the objective factors in ascertaining whether he did have such knowledge." (Paragraph 240)

- It is also clear that the FTT was aware that Excel (and each of the other nine participants in Deal 1) had an account at FCIB in the Dutch Antilles, and they did not believe the reason given by Mr Constantinides for Excel deciding to open that account:

  "…there was a delay in payment in every deal notwithstanding Mr Constantinides' emphasis on the need for 24 hour service on 365 days and the fact that no deposits were received. (Paragraph 241)

- Similarly, the FTT clearly regarded as material the fact that in none of the deals in question had Excel required a deposit from its customer:

  "The waiver of the deposit in Deal 1 with the "N/A" notation by Jodie Curl on the Deal Check List is more easy to accept than the fact that there was no deposit in any of the deals notwithstanding that the goods were shipped on hold." (Paragraph 241)

- There is also the FTT's reaction to the inspection commissioned by Excel in Deal 1. HMRC's argument had been that this was part of the paper trail laid by Excel to give the impression that the transaction represented genuine trading. The FTT appeared to have accepted that there was something in the point:

> "…we do not regard it as realistic to suggest that A1 [the inspection company] had 10 to 15 employees working for 3 hours for that fee particularly if the goods were supposed to be coming direct from the manufacturer via Excel's supplier." (Paragraph 241)

- Further, the FTT clearly considered Excel's admittedly high standard of "due diligence" to be a relevant factor:

> "the better organised Excel was, the more difficult it is to accept that Mr Constantinides was unaware of the overall contrivance." (Paragraph 242)

57. Third, it must be borne in mind, as mentioned above, that the hearing before the FTT was substantial, taking thirteen court days with many witnesses, and that Mr Constantinides was in the witness box for about one and a half days. Although the FTT do not say so in terms, it is an ineluctable inference from their finding at paragraph 244 that they did not believe his denial of knowledge that Excel's transactions were connected with fraud. That was an assessment of the evidence in the case that they were well-placed to make. Given the time spent on his oral evidence, the FTT would have had ample opportunity to consider the witness's demeanour and assess his truthfulness. There is no doubt that Mr Constantinides' credibility was an issue placed fairly and squarely before the FTT by Mr Cunningham in his cross-examination of Mr Constantinides and in his submissions (see for example paragraphs 157 and 234 of the FTT Decision). HMRC's case was that the whole scheme was contrived and orchestrated with the sole purpose of stealing VAT, and that everyone had to be a knowing participant.

58. Finally on this aspect, so far as the FTT's remarks when refusing permission to appeal are concerned, it is wholly unrealistic to expect a tribunal which has provided a substantive decision running to nearly 250 paragraphs to rehearse, in a very short ruling on permission to appeal, all its reasons for the conclusions it reached, and to refute each and every assertion made in the application.

59. For these reasons I do not accept Excel's submission that the only material relied upon by the FTT as material to its conclusion were the FCIB records and the flow charts considered in paragraphs 235-8 and 244 of the FTT Decision. There was clearly additional material (including that which I have identified above, albeit not necessarily exhaustively) before the FTT which they did (and were entitled to) rely upon as being relevant to the issue of knowledge with which they were concerned.

60. Mr Lasok sought to cast doubt on the validity of and/or the weight attributable to some of this material. For example, he argued that there were other commercial reasons (ie other than guilty knowledge on the part of Excel) for its failure to take the customers' deposits referred to in the contractual documents, and that the delay in receipt of contractual payments did not necessarily mean that the reason put forward by Excel for opening an account with FCIB was not genuine. However, in these respects he was inviting me to do what is not permissible, namely to embark on a review of the evidence and to substitute my own view of its weight and value for that of the FTT. None of the criticisms of the material was such as to render it worthless so that it would be incapable of being relied upon by a reasonable tribunal.

61. In these circumstances another major pillar of Excel's perversity argument falls away, as the FTT were clearly not relying only on the FCIB flow charts, and therefore the FTT Decision does not stand or fall by reference to them, as alleged by Excel.

62. Nevertheless, I should deal with Mr Lasok's submission (made on the basis that no other probative material or factors were taken into account by the FTT) that the FCIB records, taken alone, did not entitle the FTT to reach the conclusion they did.

63. It is clear that the FTT placed considerable reliance on the FCIB evidence. I have already summarised the circumstances of the chain of transactions in Deal 1, which was treated as representative of the other deals (see paragraphs 13-14 above). The FTT noted in particular that Excel's counsel's explanation for the synchronisation of the contractual transactions in Deal 1 was "at its lowest…most improbable" and that the complexity of co-ordinating the money transfers so that the money reached Excel's customer in time to pay Excel was "mind-boggling" unless Excel was a participant. The FTT had earlier described[7] the timing of, and participation in, the two chains in detail. All the ten payments shown on the relevant flow chart were made sequentially on the same day (10 April 2006) and involved parties in four different countries, namely the UK, Pakistan (Mobile Direct and Gulf Phones), Spain (Catseye) and J Corps (Denmark). As mentioned, the FTT was, of course, well aware that all ten companies had accounts at FCIB through which all the relevant payments were made, and clearly did not believe that the reason (speed of payment processing) that Mr Constantinides had given for opening Excel's account with that bank was genuine,

[7] Paragraph 57ff of the FTT Decision.

given that "there was a delay in payment in every deal notwithstanding Mr Constantinides' emphasis on the need for 24 hour service on 365 days" (see paragraph 56 above).

64. The FTT clearly concluded that this degree of synchronisation required considerable orchestration, and could not realistically have been achieved without all participants' knowing co-operation. The FTT also noted that Excel was the only company appearing in each of the twenty one deals. (See paragraphs 235-244 of the FTT Decision).

65. Mr Lasok sought to impugn the FTT's reliance upon the FCIB records in a number of respects. He pointed to one or two omissions in the flow charts, including, in Deal 1, the invoice between Oracle and Deepend. He drew attention to the FTT's statement that there "was no *primary* evidence that Excel had any knowledge of the buffers or defaulters in any of the chains" (my emphasis), and to the fact that until these events FCIB was an apparently well-regulated bank in the Dutch Antilles. In particular, he submitted that it is well-known that, in classic MTIC fraud, the fraudster in the UK is working in cahoots with a fraudster in another Member State; that whether or not they get the flow of payments exactly right depends upon how efficient they are, but their efficiency does not justify a conclusion that a trader in the position of Excel is a participant in the fraud or knows of it; and that here, therefore, the FCIB evidence was evidence of fraud, but not evidence that Excel knew of the fraud. Mr Lasok submitted that, far from being complex, all it would have taken to produce the synchronisation shown on the flow charts without the knowing participation of Excel would be for J. Corps to telephone Gulf and ask them to ensure that the money came to J. Corps in time for J.Corps to pay Excel. This would preclude any need for Excel's knowledge and participation.

66. This argument, however, ignores the fact that Excel was involved not just in Deal 1 but in all twenty one of the fraudulent deals. To suggest that Excel is unlucky enough to be so many times the "innocent interloper" in chains of payments and transactions which are accepted to involve carefully orchestrated frauds, (and in which Excel appears to have received the lion's share of the profit on all or most occasions) would surely stretch credulity to breaking point.

67. But quite apart from that, Mr Lasok's submission is once more inviting me into forbidden territory. I cannot possibly hold, on the basis of this and other similar criticisms of the evidential weight of the FCIB evidence, that the latter is so lacking in probative value that the FTT would not be entitled to rely on it as objective evidence. I mean no disrespect to the skilfully presented arguments of Mr Lasok, if I do not detail every one of the criticisms he levelled at the value of the evidence. None came near to inflicting a killer blow, and together they amounted to what Evans LJ in *Georgiou* described as "a disguised attack on findings of fact which must be accepted by the courts."[8] In any event, as I have already indicated, evidential material was relied upon by the FTT in addition to the FCIB flow charts.

68. In my judgment this ground cannot succeed. There was objective evidence before the FTT on the basis of which they were clearly entitled to reach the conclusion that Mr Constantinides, and through him Excel, knew that the transactions in which it was participating were connected with the fraudulent evasion of VAT. That conclusion was not perverse.

Conclusion

69. It follows that this appeal must be dismissed.

70. I invite the parties to agree and submit to me for approval an order reflecting this decision, including any consequential orders or directions.

The Honourable Mr Justice Barling

Judge of the Upper Tribunal

Release date: 21 October 2015

[8] Paragraph 30 above.