[2014] UKUT 0135 (TCC)

Appeal number FTC/33/2013

VAT – MTIC fraud – whether contra-trading outside scope of decision in Kittel – no – appeal dismissed – permission to appeal refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LIFELINE EUROPE LIMITED

Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Mr Justice Warren, Chamber President
Judge Edward Sadler

Sitting in public in London in the Rolls Building on 10 March 2014

Andrew Young, counsel, instructed by D&S Consultants for the Appellant
Jenny Goldring, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, on behalf of the Respondents

DECISION

Introduction

1. This is an appeal by the Appellant ("**Lifeline**") against a decision of the Tax Chamber, Judge Sandy Radford and Michael Templeman ("the **Tribunal**") released on 28 June 2012 ("**the Decision**"). It concerns, in part, "contra-trading" transactions, in the course of which a VAT fraud is committed, but its effect or realisation is hidden by seemingly unrelated and "innocent" transactions. It is a sophisticated version of missing trader intra community (MTIC) fraud. Contra-trading was described by Judge Avery-Jones and Ms O-Neill in their decision in the VAT and Duties Tribunal in *Olympia Technology Ltd v HMRC* [2008]. The relevant passage was set out by the Chancellor, Sir Andrew Morritt, in *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch). In that description will be found an explanation of the commonly-used terms "clean chain" and "dirty chain" to describe VAT trading chains which respectively do not and do involve fraudulent steps. We do not think that it is necessary to give any further description of contra-trading or of these types of chain.

2. Lifeline did not appear and was not represented at the hearing before the Tribunal. Before us it was represented by Mr Andrew Young. The Respondents ("**HMRC**") were represented before the Tribunal and before us by Ms Jenny Goldring.

The facts

3. The detailed facts are complex; they are dealt with in [41] to [335] of the Decision. For present purposes, it is necessary to go no further than the brief summary in [36] to [38] of the Decision:

> "36. This is an appeal against a decision by HMRC denying the appellant the right to deduct input tax in the sum of £2,481,482.56. This input tax was

> incurred by the appellant in relation to 38 purchases of CPUs and mobile telephones undertaken in the monthly VAT periods 04/06 (15 purchases), 05/06 (22 purchases) and 06/06 (1 purchase).
>
> 37. 35 of the appellant's purchases of CPUs when traced back through the transaction chain were found to commence with a company which had fraudulently evaded the VAT owed by it.
>
> 38. Three of the appellant's purchases of mobile phones when traced back through the transaction chain were found to commence with a contra trader Globalised Corporation ("Globalised"). That contra trader had entered into further deals that had commenced with defaulting traders."

4. It was HMRC's case that the purchases in relation to which the input tax was incurred were connected with the fraudulent evasion of VAT and the Lifeline knew or should have known that that was the case. It was HMRC's case that the appellant's transactions formed part of an MTIC fraud and, in the three transactions in which mobile phones were traded, constituted "contra-trading".

5. The Tribunal, in an unchallenged finding, found that Lifeline, through a director, Mr Haried, "ought to have known that it was part of a fraudulent scheme". Indeed, it may even be that the Tribunal considered Mr Haried had actual knowledge of the fraud, saying this at [476]:

> "Overall we found that there were too many unexplained connections between the various companies for these to be coincidences and the profits of the appellant too good to be true for it not to have knowingly been part of a fraudulent scheme."

The appeal

6. Lifeline applied for permission to appeal. Permission was refused by the Tribunal and by the Upper Tribunal on paper. Following an oral hearing, Judge Herrington gave permission to appeal on one issue:

> "That on a proper construction of Community law, an alleged tax loss in a different supply chain is too remote to enable the national court to refuse the applicant the right to deduct."

7. In effect, Lifeline seeks to argue that it is not open to HMRC to refuse to allow an input tax deduction in relation to a supply to Lifeline in a clean chain, by reference to a fraud in another, dirty, chain, where Lifeline was not a party to any transactions in that chain, but where Lifeline knew or ought reasonably to have known of the fraud in that chain.

The law

8. The law in this area has been exhaustively reviewed in two recent decisions of the Upper Tribunal: *Fonecomp Ltd v HMRC* [2013] UKUT 0599 (TCC) (Sales J and Judge Berner) ("***Fonecomp***") and *Edgeskill Ltd v HMRC* [2014] UKUT 0038 (TCC) (Hildyard J) ("***Edgeskill***"). Both of those decisions were concerned with contra-trading transactions and considered, in relation to such transactions, (i) the decision of the CJEU in Joined Cases C-439/04 and C- 440/04 A*xel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (together "***Kittel***") (ii) the decision of the Court of Appeal in *Mobilx Ltd v HMRC* [2010] EWCA Civ 517, [2010] STC 1436 ("***Mobilx***") and (iii) decisions of the CJEU since *Kittel* in which fraudulent evasion of VAT was under consideration, namely Joined Cases C-80/11 and C-142/11 *Mahagében and Dávid* [2012] STC 1934, Case C- 324/11 *Tóth* [2013] STC 185, Case C-285/11 *Bonik* [2013] STC 773 and Case C-643/11 *LVK-56*, unreported, judgment of 31 January 2013.

9. In *Fonecomp*, the tribunal said this in relation to *Mobilx*:

> "….we consider that the relevant European case law has been thoroughly analysed by the Court of Appeal in *Mobilx Ltd v Revenue and Customs Commissioners* [2010] EWCA Civ 517; [2010] STC 1436 and there is nothing that can usefully be added to its judgment in that case. In truth, the arguments rehearsed by Mr Patchett-Joyce before us go over ground which has been well-travelled domestically and in the Court of Justice and there is no material doubt about the legal principles to be applied. ……. "

10. The relevant approach was identified by the tribunal in [56] and [61] of the judgement of the CJEU in *Kittel*:

> "56…. 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. …
> …….
>
> 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 person entitlement to the right to deduct."

11. In *Edgeskill*, Hildyard J expressed as similar conclusion in relation to *Mobilx*:

> "It is quite clear from *Kittel*, as explained by the Court of Appeal in *Mobilx*, and by Sir Andrew Morritt C in *Blue Sphere Global Ltd v Revenue and Customs Commissioners* [2009] STC 2239, that the objective criteria which determine the scope of VAT and the right to deduct are not met, not only (a) where it is demonstrated that the taxable person is himself seeking to evade tax but also (b) where it is demonstrated that the taxable person knew or should have known that the transaction which he is undertaking, even if it would otherwise meet the objective criteria, is connected with fraudulent evasion of VAT. In either case, the taxable person is to be regarded as a participant, and thus disqualified from the right to deduct."

12. In both appeals, the proposition that, in respect of contra-trading transactions, the interpretation of *Kittel* formulated in *Mobilx* can now been seen to be wrong, in the light of the further decisions of the CJEU which we have mentioned, was rejected: see *Fonecomp* at [29] and *Edgeskill* at [124] where Hildyard J said this:

> "In short, nothing in *Mahagében*, or perhaps I should add for comprehensiveness, *Tóth*, *Bonik*, or any other CJEU authority cited, including *Hardimpex kft.*, [Case C-444/12], *LVK-56* [Case C-643/11] and *Forvards V SIA* [Case C-563/11] (each of which was pressed on me on behalf of the Appellant in supplemental submissions in writing dated 10 June 2013 as confirming its contentions), involves any departure from or restriction of the *Kittel* principles

> as interpreted in *Mobilx*. As indicated above, that analysis is binding at this level, and I could only depart from it if I was persuaded that subsequent cases cast such doubt as to merit a reference to the CJEU: I have not been so persuaded."

13. Likewise, the tribunal in *Fonecomp* declined to make a reference considering that there was no sound basis on which to do so.

14. If matters rested there, it is clear that we ought to dismiss the appeal and make no reference. As a matter of domestic law, we are bound by *Mobilx* and, quite apart from that, we should follow *Fonecomp* and *Edgeskill* unless we were firmly of the view that they were wrongly decided (which we are not: quite the reverse, we think that they were correctly decided). And as to EU law, we would not make a reference since, like others, we would regard the matter as *acte clair*.

15. Mr Young submits that two recent decisions of the CJEU throw further light on what the CJEU was saying in *Kittel*. He submits that these decisions suggest that the narrower interpretation of *Kittel* for which he contends is correct (namely that, for the input tax deduction to be disallowed, the supply in question must have taken place in the same "dirty" chain as the fraudulent transaction).

16. The first of those decisions is Case C-494/12 *Dixons Retail plc v HMRC* ("***Dixons***"). Mr Young relies on [21] of the Judgment where the Court held that

> "that concept ["supply of goods"] is objective in nature and that it applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person in question or for them to take account of the intention of a trader other than that taxable person involvement in the same chain of supply."

It is said that the reference to "the same chain of supply" shows that the *Kittel* principle applies only to transactions within a single chain of supply.

17. The second of those decisions is Case C-18/13 *Maks Pen EOOD v Direktor na Dirktsia 'Obshalvane I danachno-osiguritelna praktika Sofia* ("***Maks Pen***"). Mr Young relies in particular on [28] of the Judgment:

> "….a taxable person cannot be refused the right of deduction unless it is established on the basis of objective evidence that that taxable person –to whom the supply of goods or services, on the basis of which the right of deduction is claimed, was made – knew or should have known that, through the acquisition of those goods or services, he was participating in a transaction connected with the evasion of VAT committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services…."

18. We do not consider that either *Dixons* or *Max Pen* calls into question the clear conclusions drawn in *Mobilx*, *Fonecomp* and *Edgeskill* (as well as in a number of cases in the Tax Chamber to which we do not need to refer). The references to "the same chain of supply" in *Dixons* and to transactions "upstream or downstream" in *Maks Pen* are relevant to the particular facts of those cases and do not, in our view, lend support to the suggestion that the CJEU has adopted an approach which requires the relevant transactions to have taken place in the same chain.

19. Accordingly, we do not consider that *Dixons* and *Maks Pen* give rise to a need for further clarification from the CJEU when none was needed before. If we entertained a doubt about whether the matter is in fact *acte clair* following those decisions, which we do not, we would not consider it appropriate for us to make a reference even if we were to accept that we have power to do so. We think that the question of any reference ought then to be left to the Court of Appeal. This is particularly so given that the decision in *Fonecomp* is the subject matter of an application to the Court of Appeal for permission to appeal. We do not think that we should in effect pre-empt the decision of the Court of Appeal. Rather, the Court of Appeal can make a reference if it considers that there is anything in the point.

Conclusion on the appeal

20. We would dismiss the appeal and refuse to make a reference to the CJEU.

Permission to appeal

21. At the end of the hearing of this appeal, we indicated our decision stating that we would give our written decision (*ie* this Decision) later. We invited Mr Young to make an application for permission to appeal so that it would be unnecessary for the matter to return to us later or for a further oral hearing of any such application.

22. In accordance with section 13(11) Tribunals, Courts and Enforcement Act 2007, we specify the Court of Appeal in England and Wales as the appellate court to hear any appeal from our decision.

23. We should give permission to appeal only if an appeal stands a real, in contrast with a fanciful, prospect of success. We do not consider that an appeal has any real prospect of success. It is, we suppose, possible that the Court of Appeal will take a different view about the making of a reference. We do not consider that we should give permission on the basis that it may take a different view, but think that the question should be left to the Court of Appeal itself to decide. On that basis, we refuse permission to appeal. This puts Lifeline in the position to follow the route taken by *Fonecomp* should it wish to take matters further.

24. Quite apart from that, paragraph 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 provides:

> "Permission to appeal to the Court of Appeal in England and Wales…shall not be granted unless the Upper Tribunal or, where the Upper Tribunal refuses permission, the relevant appellate court, considers that –

> (a) the proposed appeal would raise some important point of principle or practice; or
>
> (b) there is some other compelling reason for the relevant appellate court to hear the appeal."

25. We doubt that the proposed appeal raises an important point of principle or practice although it is not necessary for us to decide that in the light of our refusal on the basis of the lack of any real prospect of success. We do not consider that there is any other compelling reason why we should give permission.

Disposition

26. The appeal is dismissed. We refuse to make a reference to the CJEU. Permission to appeal is refused.

Mr Justice Warren
Chamber President

Judge Edward Sadler
Upper Tribunal Judge

RELEASE DATE 24 March 2014