



PROCEDURE — whether permissible to strike out parts of grounds of appeal as bound to fail — UT rules 5, 8, TCEA s 25, CPR Pt 52.9 — no power to strike out and would not be exercised even if existed

REFERENCE — whether later CJEU jurisprudence undermines judgment in Mobilix — no — reference refused

Case numbers: FTC/21/2013
FTC/133/2013
FTC/33/2013
FTC/78/2013
PTA/151/2011
TC/2009/10020
FTC/16/2011

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

BETWEEN

(1) **UNIVERSAL ENTERPRISES (EU) LIMITED**
(2) **PELIX LIMITED (in administration)**
(3) **LIFELINE EUROPE LIMITED**
(4) **RIGCHARM LIMITED**
(5) **RADARBEAM LIMITED**
(6) **MASSTECH CORPORATION LIMITED (in administration)**
(7) **EXCEL RTI SOLUTIONS LIMITED** Appellants

- and -

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

Tribunal: Judge Colin Bishopp

Sitting in public in London on 29 January 2014

Mr Michael Patchett-Joyce, counsel, for the first appellant, Ms Francesca Titus, counsel, for the second, sixth and seventh appellants, Mr Andrew Young, counsel, for the third appellant and Mr Andrew Legg, counsel, for the fifth appellant. The fourth appellant did not appear and was not represented.

Mr James Puzey, counsel, for the respondents.

DECISION

1. All of the appellants in these cases have failed before the First-tier Tribunal in their challenges to HMRC's decisions to deny their entitlement to a credit for input tax incurred in the acquisition of goods, on the grounds in each case that the appellant knew, or should have known, that the transactions in which it engaged were connected with a tax fraud elsewhere. They are, in short, what are commonly known as MTIC appeals. In what follows I shall assume the reader's familiarity with the jargon used in such cases.

2. The appeals are not joined and are not proceeding together—indeed, they are at different stages in the appeal process—but they were all the subject of an application by HMRC which raises various matters of principle and it was convenient to deal with all of the appeals affected by the application at the same time. The application was for a direction that, depending on the stage reached, permission to appeal already granted should be set aside or varied, so as to prevent the appellant concerned from arguing certain grounds; or that, where an application for permission to appeal has yet to be determined, so much of the application as is based on those grounds should be summarily dismissed.

3. The appeals and the position they have reached are as follows:

- **Universal Enterprises (EU) Limited** (represented before me by Mr Michael Patchett-Joyce): permission to appeal granted by the First-tier Tribunal, listed to be heard by this tribunal on 10 and 11 February 2014;
- **Pelix Limited** (represented by Ms Francesca Titus): permission to appeal granted by the First-tier Tribunal, not yet listed to be heard;
- **Lifeline Europe Limited** (represented by Mr Andrew Young): permission to appeal granted by this tribunal, listed to be heard on 10 and 11 March 2014;
- **Rigcharm Limited** (not represented before me, although I had and have taken account of a letter from its director of 26 January 2014): permission to appeal granted by the First-tier Tribunal, listed to be heard by this tribunal on 24 and 25 June 2014;
- **Radarbeam Limited** (represented by Mr Andrew Legg): permission to appeal refused by the First-tier Tribunal and, on paper, by this tribunal, but oral application for permission pending;
- **Masstech Corporation Limited** (represented by Ms Titus): application to the First-tier Tribunal for permission to appeal pending;
- **Excel RTI Solutions Limited** (represented by Ms Titus): permission to appeal granted by this tribunal but not yet listed to be heard.

4. The grounds which HMRC, represented by Mr James Puzey, wish to have excluded or dismissed are, in essence, those which they say have been determined by the Court of Appeal in *Mobilx Ltd (in administration) v Revenue and Customs* [2010] EWCA Civ 517, [2010] STC 1436 ("*Mobilx*") and which have been

repeatedly decided in the same way by this tribunal and the First-tier Tribunal, and in particular by this tribunal in *Powa (Jersey) Ltd v Revenue and Customs Commissioners* [2012] UKUT 50 (TCC), [2012] STC 1476, *S & I Electronics plc v Revenue and Customs Commissioners* [2012] UKUT 87 (TCC), [2012] STC 1620, *Fonecomp Ltd v Revenue and Customs Commissioners* [2013] UKUT 0599 (TCC) and *Edgeskill Ltd v Revenue and Customs Commissioners* [2014] UKUT 0038 (TCC). In summary, the grounds are that HMRC cannot deny the entitlement to deduct to a trader in a “clean” chain, because of a default in a “dirty” chain (or, put another way, there is no warrant in European law for HMRC’s construct of contra-trading); that the absence of any legislative provision in the United Kingdom’s domestic law permitting the denial of an input tax deduction is fatal to HMRC’s case; that conspiracy must be pleaded and proved if HMRC are to succeed; that denial of the right to deduct is a disproportionate remedy; that HMRC cannot deny the right to deduct to a broker while allowing it to buffers in the same chain; and that “connected with” is not a correct translation of the term “impliquée dans” used in the original French version of the judgment in *Kittel v Belgium, Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 1537 (“*Kittel*”).

5. The essence of HMRC’s position, as Mr Puzey put it, is that they should not be forced to litigate the same points in appeal after appeal. The judgment of the Court of Appeal in *Mobilx* is binding on the First-tier Tribunal and the Upper Tribunal, and it is, and has several times been described as, a careful and authoritative interpretation of the judgment of the Court of Justice of the European Union (“CJEU”) in *Kittel*. There is no later jurisprudence of the CJEU which calls into question anything said in *Kittel*, nor anything in the Court of Appeal’s interpretation of it, and it is inevitable that the First-tier Tribunal and the Upper Tribunal will follow *Mobilx*. Attempts to persuade the Upper Tribunal that *Mobilx* was wrongly decided have hitherto been robustly rejected and they will continue to be rejected. I should exercise my case management powers in a way which allows appellants to pursue arguable points, but which does not waste the time of the tribunal and the parties in the pursuit of fruitless and exhausted arguments.

6. The appellants question whether there is any jurisdiction to do as HMRC ask (a point to which I come shortly) but also argue that, even if there is jurisdiction, I should not exercise it. There are, they say, several cases in which the CJEU has indicated that the fraud must take place in the same chain of transactions, of which the latest example is *Dixons Retail plc v Revenue and Customs Commissioners* (Case C-494/12) [2014] STC 375, in which the Court said at para 21:

“The Court has likewise held that that concept [of ‘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 involved in the same chain of supply”

7. There are, in addition, two references pending before the CJEU in which arguments the appellants wish to raise are in issue. The first, from the Corta Suprema di Cassazione of Italy in *Idexx Laboratoires Italia srl v Agenzia delle*

5 *Entrate* (Case C-590/13), deals with conflicts, or apparent conflicts, between
different language versions of judgments and is therefore relevant to the argument
that “impliquée dans” has not been correctly rendered in the English-language
version of the judgment in *Kittel*; and the second, from the Hoge Raad of the
10 Netherlands, in *Turbo.com BV v Staatsecretaris van Financiën* (Case C-163/13),
in which the question referred is whether it is possible for a member State to
refuse to zero rate a supply to another member State, on grounds of fraud in
respect of the goods, even though there is no provision of national law providing
for such a refusal, a question very similar to that the appellants wish the CJEU to
15 consider in their cases.

8. Moreover, say the appellants, I should make a reference myself. The court’s
predecessor made it clear in *Rheinmühlen Düsseldorf v Einfuhr- und Vorratstelle
für Getreide und Futtermittel* (Case 166/73) [1974] ECR 33 that any court of a
15 member State should, indeed is obliged to, make a reference when the
interpretation of provisions of Community law is in issue and guidance from the
court necessary, notwithstanding the existence of a decision of a superior court
which is binding, as a matter of national law, on the referring court. The
appellants and others in a similar position have been attempting to bring an appeal
20 to the Court of Appeal in order that it might review its decision in *Mobilx* and
have been attempting to persuade the tribunals and the courts to make a reference
in order that the CJEU can reconsider and clarify its judgment in *Kittel*. In each
case their efforts have met with no success, and the repeated refusal of the First-
tier Tribunal and Upper Tribunal to recognise the force of the argument that
25 *Mobilx* was wrongly decided has frustrated every attempt to have the disputed
points clarified. This would be an ideal time to make a reference.

9. I agree with Mr Puzey that it is undesirable—for HMRC and appellants
alike—to litigate the same point in appeal after appeal. It is in the interests of all
that finality should be achieved. I do not, however, consider I can achieve that
finality in the manner Mr Puzey urged on me.

30 10. Rule 8(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides
that:

“The Upper Tribunal may strike out the whole or any part of the proceedings
if— ...

35 (c) in proceedings which are not an appeal from the decision of
another tribunal or judicial review proceedings, the Upper
Tribunal considers there is no reasonable prospect of the
appellant’s or the applicant’s case, or part of it, succeeding.”

11. Mr Puzey accepted that the wording of that rule precluded my exercising it
in order to achieve what he wanted. Instead, he said, I should exercise the power
40 in rule 5(3)(c), which allows the Upper Tribunal to “permit or require a party to
amend a document”; I could, he suggested, require the appellants who have
permission to appeal (I will deal later with those still seeking permission) to
amend their grounds, which are set out in a document, so as to exclude those
grounds which seek to argue, in essence, that *Mobilx* was wrongly decided. I can
45 deal with this argument shortly: in my judgment it is not open to me to use rule
5(3)(c) in order to circumvent the clear indication to be derived from rule 8(3)(c)

that the Upper Tribunal may not strike out any part of an appellant's case when (as is necessarily the case) permission to appeal has been given. It is not permissible to read the individual provisions of the rules in isolation, without regard to their overall structure and the intention of the Tribunal Procedure Committee, which is charged with the task of producing them.

12. Alternatively, Mr Puzey said, I might have resort to s 25 of the Tribunals, Courts and Enforcement Act 2007 which, by sub-s (1)(a), confers on this tribunal "the same powers, rights, privileges and authority as the High Court" in relation to the matters identified in sub-s (2), which include two defined powers of no immediate relevance and "all other matters incidental to the Upper Tribunal's functions". The powers so conferred are, by sub-s (3), not "limited by anything in Tribunal Procedure Rules other than an express limitation". As the High Court has the power to strike out the whole or part of an appeal notice, so too has the Upper Tribunal.

13. In my judgment this argument falls at the first hurdle since, as it seems to me, rule 8(3)(c) does amount to an express limitation: as I have said, it is clear that the power to strike out part or the whole of an appellant's case, on appeal from an inferior tribunal, has not been conferred on the Upper Tribunal, and deliberately so. But even if I am wrong in that conclusion, I am satisfied that these are not cases in which the High Court would adopt the course Mr Puzey urged on me.

14. The provisions of the Civil Procedure Rules which govern the High Court's abilities in this respect are to be found in Part 52.9 which, so far as relevant, provides:

- "(1) The appeal court may—
- (a) strike out the whole or part of an appeal notice;
 - (b) set aside permission to appeal in whole or in part ...
- (2) The court will only exercise its powers under paragraph (1) where there is a compelling reason for doing so."

15. What is meant by "compelling reason" has been considered by the Court of Appeal in several cases, of which I need mention only two: *Nathan v Smilovitch* [2002] EWCA Civ 759 and *Barings Bank plc v Coopers & Lybrand* [2002] EWCA Civ 1155. In essence, it must be shown that the judge who granted permission to appeal overlooked some indisputably decisive authority, or was misled to the extent that the process was an abuse. It is perfectly plain from the authorities that the power is to be exercised rarely, and only in the clearest of cases. I have no reason to think that the judges who granted permission in these cases were unmindful of the decision in *Mobilx*, or were misled. In the case of *Excel RTI Solutions*, I gave permission to appeal myself, in February 2011, not in disregard of *Mobilx* but because I was persuaded that references to the CJEU might make it arguable that *Mobilx* was wrongly decided although, as I explain below, in the event they did not.

16. I do not think, therefore, that it is arguable that a compelling reason has been established and I would not exercise the power even had I concluded that it was vested in me.

17. The power to strike out the whole or part of an appeal, even if it existed, could not be engaged before a would-be appellant has secured permission. In Radarbeam's case, as I have said, permission has been refused on paper but there is a forthcoming oral renewal of the application. Mr Legg asked for an extension
5 of time for seeking permission to amend the existing grounds of appeal, on the basis that the applicant has recently changed its representatives, and that the new representatives were in the process of reviewing the case. Mr Puzey opposed the application on the grounds that it was far too late: the application to the Upper
10 Tribunal had been made in May 2013 and had already been listed for a hearing in October 2013, though it was postponed pending the release of the decision in *Fonecomp*. Rather more important than delay (though I do not discard it as a factor) is that Mr Legg was not able to tell me, even in the most general of terms, what amendments to the grounds were in contemplation. In my view it is not appropriate to make any decision on the application, whether to extend time or
15 admit the amendments, until the amended grounds have been produced and both the tribunal and HMRC have had the opportunity of considering them. Accordingly I make no direction in respect of Radarbeam at this stage.

18. I also make no direction in respect of Masstech Corporation. As I have said, that appeal is still within the First-tier Tribunal, awaiting determination of a very
20 recently amended application for permission to appeal. But even were I to do as Mr Puzey suggested, that is deal with the application as a First-tier Tribunal judge, it does not seem to me that I should strike out parts of the appellant's application. The proper course, if the First-tier Tribunal is satisfied that the grounds advanced have no merit, is to refuse permission. There is no need to
25 embark on a two-stage process, consisting of a preliminary examination of the grounds in order to exclude some of them from consideration before dealing with what remains. In addition, the application is before the judge who heard the appeal in the First-tier Tribunal, and it is not appropriate for me to interfere.

19. I recognise the force of Mr Puzey's argument that HMRC should not be
30 required to litigate the same points repeatedly, with a consequent drain on the public purse, but for the reasons I have given I decline to do as he suggested.

20. I come finally to the suggestion that I should myself make a reference. It would be unusual to do so in the context of an application such as this, though I do not know of any impediment to my making a reference at any stage if I
35 perceive a need for one. I accept that the appellants and others in a similar position have been trying for a long time to secure both reconsideration of *Mobilx* and a reference, and I can understand their sense of frustration, but I am satisfied that a reference is neither appropriate nor necessary.

21. I have reached the conclusion that a reference is not appropriate because
40 there are now four decisions of this tribunal in which it has been accepted, in unequivocal and unqualified terms, that *Mobilx* was correctly decided and that a reference would serve no useful purpose. Although I am not strictly bound by those decisions, the convention is that I should follow them unless I am persuaded that they are wrong, which I am not. If a reference is to be made at all it is in my
45 view, on the current state of the authorities, the Court of Appeal or the Supreme Court which should make it. In reaching that conclusion I do not overlook the

Rheinmühlen Düsseldorf case to which Mr Young referred me, but bear in mind that a reference should not be made unless the referring court or tribunal entertains some doubt about the interpretation of European Union law which a reference might resolve. I entertain no such doubt; on the contrary I agree with other judges sitting in this tribunal that *Mobilx* was correctly decided, and that nothing said since by the CJEU casts any doubt on it.

22. The argument that a trader in a clean chain cannot be affected by anything which happens in a dirty chain is in my judgment wholly misconceived. Mr Young argued that there is nothing inherently wrong with contra-trading, a statement which, put in that way, is true: a trader who both imports and exports may legitimately organise his sales and purchases so that, at the end of a VAT period, he has little to pay, or a repayment claim. If he does so for reasons of cash flow, his conduct is unexceptionable. But that is not the reason for the contra-trading seen in cases of this kind. As has been said many times, not least by the then Chancellor in *Blue Sphere Global Ltd v Revenue and Customs Commissioners* [2009] STC 2239, its purpose is to conceal the fraud in the dirty chain and to make it harder to combat. The appellants' argument necessarily treats "clean" as synonymous with "innocent", but a clean chain in cases of this kind—that is, one in which each of the traders accounts correctly for VAT—is not innocent; it is an integral part of the fraudulent scheme. Even if I entertained any doubt (which I do not) that as a matter of EU law there is sufficient connection between a trader in the clean chain and the default in the dirty chain, there remains an insuperable connection with the fraudulent purpose of the clean chain.

23. Even if that interpretation is wrong, and the clean chain is to be treated as innocent, I see no support in the jurisprudence of the CJEU for the proposition that the transactions must be in the same chain. I accept that in *Dixons Retail*, as in other cases—including *Kittel* itself—the CJEU has referred to transactions in the same chain, but it has done so because in those cases, as a matter of fact, the relevant transactions and the fraudulent transactions were in the same chain. The judgments on this topic were considered with great care by the tribunal in *Fonecomp*; it concluded that the authorities show clearly that the only connection necessary is one with fraud. I respectfully agree with that analysis, and cannot usefully add anything to it.

24. At para 59 of its judgment in *Kittel* the court said this:

“... 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’.”

25. At para 61 it said much the same:

“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.”

26. In neither of those paragraphs is there any suggestion that the refusal is conditional upon the presence in the member State's domestic legislation of a provision authorising the refusal and it would be remarkable if there were any such requirement, since it is an elementary principle that a member State, and the courts and tribunals of that state, are obliged to give effect to European Union law whether or not it has been properly implemented. One has only to pose the question, "Could a member State refrain from heeding a judgment of the CJEU because it has chosen not to enact relevant domestic legislation?" to see that the answer is obviously not.

27. It is not apparent from the very brief question referred, and without any other material, what is the background to the Dutch reference I have mentioned, but it is in my view inconceivable, in the light of the manner in which the court expressed itself in *Kittel*, that there can be any possibility that it would, if now asked, add the condition that there must be relevant domestic legislation before input tax deduction could be refused in cases such as those before me.

28. On closer examination the Italian reference Mr Patchett-Joyce produced does not deal with an apparent conflict between different language versions of a judgment but with the inability of the referring court to determine the meaning of a particular phrase despite having examined it in different versions of the judgment. It is in my view of no possible help to the appellants in these cases. I will, nevertheless, deal with his argument about the supposed difference between "impliquée dans" and "connected with".

29. The reasons why the CJEU answered the referred questions in *Kittel* as it did were given by it at paras 56 to 58 of the judgment:

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.

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."

30. In deference to Mr Patchett-Joyce, I set out the same paragraphs from the French text:

56 ... un assujetti qui savait ou aurait dû savoir que, par son acquisition, il participait à une opération **impliquée dans** une fraude à la TVA, doit, pour les besoins de la sixième directive, être considéré comme participant à cette fraude, et ceci indépendamment de la question de savoir s'il tire ou non un bénéfice de la revente des biens.

57 En effet, dans une telle situation, l'assujetti prête la main aux auteurs de la fraude et devient complice de celle-ci.

58 Par ailleurs, en les rendant plus difficiles à réaliser, une telle interprétation est de nature à entraver les opérations frauduleuses."

31. The meaning of those paragraphs, whether one reads them in French or in English, is exactly the same: a taxable person who enters into a transaction knowing of an underlying fraudulent purpose aids the perpetrators of that fraud. If a so-called clean chain has the fraudulent purpose of concealing a default elsewhere, the transaction into which a trader such as the appellants entered is both “connected to” and “impliquée dans” (if they truly do mean different things) that fraudulent purpose.

32. The argument that the phrases “impliquée dans” and “connected with” have meanings which differ in a manner which might be significant has been dismissed so often and in such comprehensive terms that I cannot expand on what others have already said. In my judgment an argument based on this supposed nuance has no prospect whatever of success. It is perfectly clear what the court meant in *Kittel*, whether one reads the French or the English text, and like others sitting in this tribunal I see no possible error in the Court of Appeal’s interpretation of it. The same is true of the remaining arguments I have listed above; they have repeatedly been rejected and there is simply nothing more to say on the subject.

33. For all those reasons I shall not make a reference.

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Colin Bishopp
Upper Tribunal Judge

Release date: 31 January 2014