Appeal number: FTC/62/2010
[2011] UKUT 259 (TCC)

VALUE ADDED TAX – input tax repayment claim – MTIC fraud – contra-traders – whether Appellant knew or should have known that its transactions were connected with fraud

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

REGENT COMMODITIES LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE NEWEY

Sitting in public in London on 23 and 24 May 2011

James K. Pickup QC, instructed by Bark & Co, for the Appellant

Christopher Foulkes and Karen Robinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The issue in this case is whether the Commissioners for Her Majesty's Revenue and Customs ("HMRC") were justified in denying the entitlement of the Appellant, Regent Commodities Limited ("Regent"), to deduct input tax in the sum of £2,107,822.50. The basis on which HMRC denied Regent's input tax claim was that the input tax in question arose from transactions connected with the fraudulent evasion of Value Added Tax ("VAT") and that Regent knew or should have known of this fact.

2. The First-tier Tribunal (Judge David Demack and Miss Susan Stott FCA CTA) decided in HMRC's favour. Regent, however, appeals against the Tribunal's decision.

Basic facts

3. In late 2005, Regent was acquired by Mr Andrew Belfield, who became the company's sole director. The Tribunal found that Mr Belfield agreed to buy Regent for the account it had with First Curacao International Bank ("FCIB"), a Dutch Antilles bank. At the time, most wholesale trade in mobile phones and central processing units (or "CPUs") was carried out using accounts which traders held with FCIB.

4. Regent began trading in mobile phones and CPUs in January 2006, concluding two transactions that month. Since the goods were, in each case, purchased within the United Kingdom and then exported, Regent sought repayment of the input tax on its acquisitions. In March 2006, Regent was informed by HMRC that its repayment claim would be met, but that repayment would be on a "without prejudice" basis.

5. Mr Belfield introduced £15,000 of his own money into Regent. A company called Marldon Corporation Limited ("Marldon") agreed to lend money as "transactional finance" for Regent, but the sums borrowed had been repaid in full by March 2006. Mr Belfield subsequently obtained finance from Lorimer Holding and Finance Limited ("Lorimer") and Global Financial Services Management Limited (or Global Financial Services Limited) ("Global"). Both companies were registered in the British Virgin Islands, but Global had an address in Hong Kong. Lorimer lent Mr Belfield £250,000, and Global advanced £1.5 million to Regent.

6. In the quarter to the end of April 2006, Regent entered into 16 transactions in which it both bought and sold goods within the United Kingdom ("buffer" deals) and a slightly larger number of transactions in which it bought goods in the United Kingdom and then exported them ("broker" deals). 15 of the broker deals dated from the April, and all of these

involved mobile phones or CPUs which had previously been imported into the United Kingdom from elsewhere in the European Union. With all bar two of the 15 transactions, Regent purchased direct from the importer. The importers were David Jacobs UK Limited ("David Jacobs"), S&R International Limited ("S&R"), Epinx Limited ("Epinx") and Svenson Commodities Limited ("Svenson"). Regent dealt with only the first three of these. It purchased the goods which Svenson had imported from "buffers" rather than from Svenson itself. In every case, Regent received and made payments through its account with FCIB.

7. In May 2006, Regent submitted its VAT return for the quarter to the end of the preceding month. The return sought repayment of input tax of £3,083,775.37. The return was selected for in-depth verification, and in June 2007 Regent was notified by HMRC that they rejected its claim for £2,027,626.75 in respect of the 15 broker deals in April. The amount of the input tax denied was later increased to £2,107,822.50. At the date of the hearing before the Tribunal, other elements of Regent's repayment claim remained the subject of extended verification and so were not the subject of any appeal.

8. It is HMRC's case, and the Tribunal accepted, that the transactions at issue arose from the species of "Missing Trader Intra-Community" (or "MTIC") VAT fraud known as "contra-trading". As the Tribunal noted, contra-trading was described as follows by Christopher Clarke J in *Red 12 Trading Ltd v Revenue and Customs Commissioners* [2009] EWHC 2563 (Ch), [2010] STC 589 (in paragraph 7):

> "Goods are sold in a chain ('the dirty chain') through one or more buffer companies to (in the end) the broker ('broker 1') which exports them, thus generating a claim for repayment. Broker 1 then acquires (actually or purportedly) goods, not necessarily of the same type, but of equivalent value from an EU trader and sells them, usually through one or more buffer companies, to broker 2 in the United Kingdom for a mark up. The effect is that broker 1 has no claim for repayment of input VAT on the sale to it under the dirty chain, because any such claim is matched by the VAT accountable to HMRC in respect of the sale to United Kingdom broker 2. On the contrary a small sum may be due to HMRC from broker 1. The suspicions of HMRC are, by this means, hopefully not aroused. Broker 2 then exports the goods and claims back the total VAT. The overall effect is the same as in the classic version of the fraud; but the exercise has the effect that the party claiming the repayment is not broker 1 but broker 2, who is, apparently, part of a chain without a missing trader ('the clean chain'). Broker 2 is party to the fraud."

9. In the present case, HMRC contend that each of the four importers (David Jacobs, S&R, Epinx and Svenson) was a contra-trader, knowingly

offsetting its input tax claims in deal chains involving a fraudulent defaulter ("dirty" chains) against its output tax liability in respect of acquisition deals in "clean" chains in which there appeared to be no tax loss.

10. Before the Tribunal, the parties agreed that the following three questions arose (see paragraph 6 of the decision):

> "i. Have [HMRC] established that there were fraudulent tax losses in the deal chains of the alleged contra-traders?
> ii. If so, are the transactions in respect of which Regent seeks input tax credit referable to those tax losses or any of them ie is there a connection between them?
> iii. And, if so, did Regent, through Mr Belfield, know or should it have known at the time of entering into each transaction that it was connected to a fraudulent tax loss?"

11. The Tribunal answered each of these questions in the affirmative.

The scope of the appeal

12. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 (which replaced section 11(1) of the Tribunals and Inquiries Act 1992) provides for a right of appeal to the Upper Tribunal on a "point of law arising from a decision made by the First-tier Tribunal".

13. Guidance as to the grounds on which factual findings can be challenged on appeal is to be found in *Edwards v Bairstow* [1956] AC 14. Viscount Simonds there said (at 29) that a finding of fact should be set aside if it appeared that the finding had been made "without any evidence or upon a view of the facts which could not reasonably be entertained". Lord Radcliffe (at 35) quoted a passage from a judgment of Lord Normand in which the latter had said that an appellate Court could intervene if the lower tribunal had "misunderstood the statutory language" or had "made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it". Lord Radcliffe went on to say this (at 36) about the position where "the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal":

> "I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather

> misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

14. The Upper Tribunal has to beware of allowing an attack on a finding of fact of a First-tier Tribunal to be dressed up as a point of law. In *Georgiou v Customs and Excise Commissioners* [1996] STC 463, Evans LJ said (at 476):

> "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 misused 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."

The grounds of appeal

15. Omitting points which were not pursued, Regent's grounds of appeal can be summarised as follows:

(i) The Tribunal erred in its interpretation of the appropriate test for denying an entitlement to claim input tax;

(ii) The Tribunal erred in law and/or alternatively reached a conclusion that no reasonable Tribunal properly directing itself in law could have reached in finding that the four relevant importers knew that the schemes in which they were involved were fraudulent in nature;

(iii) The Tribunal erred in law, or alternatively came to a conclusion that no reasonable Tribunal directing itself properly in law could have come to, in holding that conclusions reached by Mr Nigel Humphries, an HMRC analyst who gave evidence to the Tribunal, were correct;

(iv) The Tribunal erred in law, or alternatively came to a conclusion that no reasonable Tribunal directing itself properly in law could have come to, in holding that evidence given by Mr Terence Mendes, an

officer of HMRC, indicated that each party in the ten deal chains where Global initiated payment was aware of who it had to deal with;

(v) The Tribunal erred in law, or alternatively came to a conclusion that no reasonable Tribunal directing itself properly in law could have come to, in holding that there was compelling evidence that Regent, by Mr Belfield, knew that its transactions were connected with fraud and that there was a guiding mind behind the company's transactions; and

(vi) The Tribunal erred in law, or alternatively reached a finding which no reasonable Tribunal properly directing itself in law could have reached, in finding as follows:

"Mr Belfield's failure to make full enquiries and investigation resulted in Regent failing to discover information which ought to have led to his making further enquiries. The result was that Regent became committed, without sufficient protection, to enter into transactions with the four contra traders (plus Ace Telecom and Megantic) linked by way of contra trading to the other transactions of those traders established to be fraudulent. Had he asked the appropriate questions and been answered, he would have concluded that the uncommercial features being offered to the Appellant could only be explained by taking into account other transactions those traders were entering into, and that the only explanation was that those other transactions were in some way connected with fraud."

16. I shall consider these grounds of appeal in turn below, though in a somewhat different order.

Mr Humphries [Paragraph 15(iii) above]

Mr Humphries' evidence

17. The Tribunal introduced the evidence given by Mr Humphries in these terms (in paragraph 100 of the decision):

"Mr Humphries analysed the deal sheets of the four alleged contra-traders which supplied Regent (albeit indirectly in Deals 2 and 3) in its 15 denied deals. They revealed patterns of trade similar to those of other traders performing the same role. Each of the four alleged contra-traders formed part of one of two groups of traders operating in such a way as to indicate to Mr Humphries that their activities were co-ordinated and contrived; that each participant in the transactions knew from whom it was to purchase and to whom it was to sell. It was also revealed that David Jacobs and Svenson

> shared a pattern of trading with five others …, forming a group of 7 contra-traders. It also showed that Epinx and S&R shared a pattern of trading with 4 others …, forming a second group of 6 contra-traders."

18. As Mr Humphries explained, many chains of transactions had been found to involve a Spanish company referred to as Parasail, a Dutch company referred to as Comica or a German company referred to as Forex. The Tribunal accepted as correct (paragraph 110 of the decision) the following comments made by Mr Humphries about these transactions:

> "Overall, the transactions involving Parasail, Comica and Forex must be contrived. They occur within a closed cell of traders which appear to be operating in concert. The goods originate with a very small group of EU suppliers, and end up with the same group of companies at the end of the transaction chains. Where both ends of the chains have been further traced, and with one exception, none of the companies involved received, as customers, goods which they had originally supplied as suppliers. This has happened no matter which combination of UK traders the goods passed through on its way.
>
> … This could not happen in the course of normal commercial trade, and I do not believe it would be possible unless the traders involved at each stage of the transaction chains had knowledge of the contrived scheme".

19. The Tribunal also said this (in paragraph 130 of the decision):

> "Regent undertook only a small number of deals compared to the total number analysed, but one of the principal points to emerge from Mr Humphries' analysis was that the rigid patterns of trade – where, within well-defined groups, the EU source of the goods determined the EU destination – showed that the trades were organised in that way. Regent's deals followed the same pattern. Each and every deal, including those when Regent acted as a buffer or broker in other deals beyond the 15 denied, fitted the same pattern: Regent bought from different suppliers and sold to different customers, both within the EU and in the UK; each time it chose from which company to buy and which to sell, its trades followed the same pattern. That happened even though there were two distinct groups of contra-traders, each with its own pattern of trade. So, when Regent bought from Epinx, it sold to companies within the overall pattern established for the Epinx group. Yet when it bought from David Jacobs, it always sold to companies within the pattern seen for all the David Jacobs group's deals. We find the conclusions drawn by Mr Humphries from his analysis to be correct".

20. Mr Humphries explained that there was evidence indicating that Parasail and Comica were run by the same individual.

Discussion

21. As already mentioned, it is Regent's case that the Tribunal erred in law, or alternatively came to a conclusion that no reasonable Tribunal directing itself properly in law could have come to, in holding that Mr Humphries' conclusions were correct.

22. Mr James Pickup QC, who appears for Regent, argued that knowledge had to be distinguished from contrivance. He accepted that the patterns of trading identified by Mr Humphries suggested contrivance, but said that that did not mean that Regent knew that its transactions were connected with fraud. While Mr Humphries' evidence may have suggested that there was an overall scheme to defraud HMRC, it could not (Mr Pickup said) be inferred that individual traders (in particular, Regent) knew that their transactions were connected with fraud.

23. Mr Pickup further submitted that the Tribunal had ignored "critical failings" in Mr Humphries' evidence. Mr Pickup pointed out, for example, that Mr Humphries had not considered the trading undertaken by Regent before April 2006 or the prices at which goods were bought and sold, that Mr Humphries had not looked at freight forwarders' records, that one of the deals at issue before the Tribunal did not fit precisely into Mr Humphries' scheme and that repayment had not been denied in respect of six transactions to which Mr Humphries' analysis applied (viz. broker deals in the quarter to the end of April 2006 which remained the subject of extended verification). Mr Pickup further argued that analysis conducted by Mr Humphries "over many months" could not assist as to the knowledge of a particular trader who would only have had knowledge of his immediate counterparties.

24. I have not been persuaded that there is any force in these criticisms. That there were further matters that Mr Humphries could, potentially, have considered does not rob his evidence of force. With regard to the deal which was said not to fit into the scheme, it can be seen from paragraph 112 of the decision that Mr Humphries addressed the point in cross-examination and that the Tribunal had his evidence in mind. The fact that Mr Humphries' analysis could be said to apply to the six extra deals arguably indicated that Regent knew that those deals were connected with fraud rather than that those at issue before the Tribunal were not (and Mr Christopher Foulkes, who appears with Miss Karen Robinson for HMRC, told me that HMRC had now denied Regent's right to deduct the relevant input tax).

25. Further, I do not think the time that Mr Humphries' analysis took is of any importance. Were it to take a forensic scientist a long time to establish that DNA at a crime scene was that of a particular person, that would not deprive his evidence of significance. The length of time that Mr Humphries was engaged in his work must be similarly irrelevant. The fact that Regent did not have access to all the information which was available to Mr Humphries does not matter either, any more than the value of the forensic scientist's evidence would depend on the defendant having had access to the same materials.

26. Nor do I consider that Mr Humphries' evidence was of significance only in relation to whether there had been an overall scheme to defraud HMRC. It seems to me that the Tribunal was entitled to accept Mr Humphries' view that individual traders must have been aware that the trading in which they were participating was contrived. It is, in particular, hard to see that the patterns of trading Mr Humphries found would have existed unless individual traders had known to whom they were meant to sell.

27. I agree with Mr Foulkes that this ground of appeal amounts to a disguised attack on a finding of fact. To my mind, there was ample evidence before the Tribunal capable of supporting the findings which it made in this respect.

Mr Mendes [Paragraph 15(iv) above]

Mr Mendes' evidence

28. Mr Mendes gave evidence before the Tribunal about what he had gleaned from interrogating the computer records of FCIB. Administrators were appointed in respect of FCIB in October 2006, and its computer database was subsequently made available to HMRC.

29. Having reviewed Mr Mendes' evidence, the Tribunal said this about it (in paragraph 95 of the decision):

> "We find Mr Mendes' evidence clearly to show that Global initiated payment in respect of each of the ten deal chains connected with it, and received payment at the other end of the chain of payments. It paid and was paid by companies of which, on Mr Belfield's account, Regent had no knowledge and which, in the course of legitimate trade, would not have known of each other's identity in the particular chain of transactions. That happened on each and every occasion Regent conducted a deal, irrespective of with whom it dealt, and who else was in the chain of supply or chain of customers. We find that evidence compelling as indicating that each party in the chain, and particularly Regent, was aware from whom it must

purchase, and to whom it must sell, and that Regent dealt with those with whom it was intended to deal".

Discussion

30. Mr Pickup attacked the conclusions which the Tribunal drew in the last sentence of paragraph 95 of the decision (quoted above). He accepted that the matters to which Mr Mendes referred were indicative of contrivance, but he argued that they did not indicate complicity on the part of Regent. There was, Mr Pickup said, no evidence that Regent had any knowledge of transactions beyond its immediate purchase and supply. In particular, Mr Pickup submitted that Regent would not have known that a chain began and ended with Global.

31. To my mind, however, the Tribunal was fully entitled to express the views it did in the last sentence of paragraph 95 of the decision. As Mr Pickup recognised, the fact that money returned to Global suggested something other than normal commercial trade. In the ordinary course, the money would surely have been most unlikely to find its way back to Global once, let alone on multiple occasions. The fact that the money regularly reverted to Global does tend to indicate, as it seems to me, that the transactions were not occurring by chance and, in consequence, that individual participants in the chains knew who they were supposed to sell to. At all events, I think it was open to the Tribunal to take that view.

The importers' knowledge [Paragraph 15(ii) above]

The Tribunal's findings

32. The Tribunal found that each of the four relevant importers (or "contra-traders") knew that its transactions were linked to fraud. The Tribunal summarised its conclusions in this respect as follows:

> "[W]e are satisfied that each [importer] deliberately and fraudulently offset some or all of the input tax repayment claims it would otherwise have had to make by conducting acquirer deals as well. In acting so, we find that each contra-trader was aware of the connection of its broker deals to fraud. However, we accept that those responsible for the defaults in the contra-traders' supply chains and the nature of the defaults may not have been known to the contra-traders; but observe that it is unnecessary for a contra-trader to have that knowledge in respect of its broker chains for it knowingly to conduct its deals so as to disguise those connections" [paragraph 160 of the decision]
>
> and

> "In reliance on Mr Humphries' evidence, that of the officers for the four contra-traders and the documents to which they referred, we conclude that the schemes in which the four contra-traders were involved were fraudulent in nature and that the contra-traders, as participants therein, clearly knew of that nature. We hold that each was involved in conspiracies with the various defaulters in the dirty chains. In so concluding, we have taken particular account of the fact that none of the contra-traders has been either assessed to tax, or had a decision letter. We are required to determine whether the contra-traders knew they were involved in conspiracies with the various defaulters; the test does not require us to consider whether a trader has been assessed to tax or received a decision letter. And, in relation to the evidence of those officers for the contra-traders who stated that they did not know whether the individual companies for which they were responsible were so involved, we observe that we have evidence covering the overall picture, whereas they had only the information relating to the individual companies with which they dealt" [paragraph 183 of the decision].

Discussion

33. Mr Pickup argued that the evidence before the Tribunal was not such as could entitle it to find that the importers knew that their transactions were linked to fraud.

34. One of the points Mr Pickup made in this context was that the Tribunal's finding could not be reconciled with its acceptance (in paragraph 160 of the decision) that the "nature of the defaults may not have been known to the contra-traders". The reference to the "nature of the defaults" related, Mr Pickup argued, to the fraudulent evasion of VAT. The Tribunal was thus proceeding on the basis that the importers may not have known that VAT was being evaded.

35. In my view, however, this is not a fair reading of the decision. I agree with Mr Foulkes that, in the context, the Tribunal must have had in mind whether the default involved, for example, a missing trader as opposed to a hijacked VAT number. That interpretation is, as I see it, compatible with the words "nature of the defaults". Further, Mr Pickup's construction of "nature of the defaults" would make a nonsense both of the paragraph in which the words appear and of other passages in the decision (e.g. paragraphs 180 and 183). Had the Tribunal intended the sentence including the reference to "nature of the defaults" to mean that contra-traders may not have known of fraudulent evasion of VAT, it would hardly have said in the previous sentence that "each contra-trader was aware of the connection of its broker deals to fraud".

36. Mr Pickup said that the evidence given by the HMRC officers with responsibility for them suggested at times that the importers may not have known of the fraudulent tax losses in their broker chains. He cited, for example, evidence given by Mr Richard Davies, the officer dealing with David Jacobs, to the effect that he (Mr Davies) did not know how much David Jacobs had known of the overall scheme. Mr Pickup contended that the Tribunal had ignored the "best evidence, namely that of the individual officers conducting the verification exercise". He said, too, that it was permissible to ask why HMRC had not, at the date of the hearing before the Tribunal, issued decision letters in respect of the importers.

37. However, Mr Davies also expressed the view that David Jacobs were "fully aware of what they're doing". Likewise, Mr David Palmer said that it was his "opinion that S&R knew that it was involved in fraudulent activity", and Mr Ian White said that he believed that Epinx was a contra-trader. In any case, the officers' opinions were far from determinative. In fact, it is difficult to see how the opinions can, strictly, have been admissible.

38. Mr Pickup queried the Tribunal's observation that it had "evidence covering the overall picture, whereas [individual officers] had only the information relating to the individual companies with which they dealt". In my view, however, the Tribunal's comment was warranted. It had the benefit of significant evidence (e.g. from Mr Humphries) which had not been available to individual officers.

39. Mr Pickup also referred to certain observations which Judge Demack had made during the hearing. I cannot see, however, that any importance should be attached to these. The Tribunal's considered views are to be found in the decision. It is those that count.

40. Mr Pickup noted that the importers "were not present to argue their case" before the Tribunal and that their "individual due diligence was presented to the Tribunal only as it was known to [HMRC]". It seems to me, however, that the Tribunal was nonetheless entitled to determine issues as to the importers' knowledge, for the purposes of the proceedings before it, on the available evidence. The Tribunal's conclusions will not be binding (or even, perhaps, admissible – compare e.g. *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, [2004] Ch 1) in any proceedings to which the importers may themselves be parties.

41. In all the circumstances, the Tribunal was, in my judgment, clearly entitled to find that the importers knew that their transactions were linked to fraud. There was evidence to support that conclusion.

Actual knowledge [Paragraph 15(v) above]

The Tribunal's findings

42. The Tribunal concluded that Regent, through Mr Belfield, had actual knowledge that its transactions were connected with VAT fraud. The Tribunal stated, for example, that it was determining the appeal "on the basis of Regent's actual knowledge of a connection with VAT fraud" (paragraph 185 of the decision), that it had concluded that "Regent's deals formed part of a contrived scheme or schemes to defraud the revenue, and that Mr Belfield knew that they did so" (paragraph 265) and that there was "compelling evidence that Regent, by Mr Belfield, knew that its transactions were connected with fraud, and that there was a guiding hand behind the company's transactions" (paragraph 271). The Tribunal said that it was satisfied of the correctness of all of Mr Foulkes' "comprehensive submissions as to Regent's knowledge of its transactions being connected with VAT fraud" (paragraph 258).

43. The Tribunal found support for its conclusions both in Regent's "clear breaches" of its own due diligence procedures and in "evidence that Mr Belfield, and hence Regent, was aware that its deals were contrived and pre-arranged" (paragraph 243). Numerous matters were identified as indicating contrivance and pre-arrangement. The Tribunal referred to the evidence given by Mr Humphries and Mr Mendes. Evidence of contrivance and pre-arrangement was also, the Tribunal considered, to be found in, among other things, the following:

(i) The fact that Marldon's directors, who also ran Megantic Services Limited ("Megantic") (which itself traded in mobile phones and CPUs), were willing to lend Mr Belfield money, to trade with Regent as both a supplier and a customer, and to afford Regent credit on its purchases. "In the real commercial world," the Tribunal said, "Megantic would not have wanted Regent as a competitor, and certainly would not have financed its operations";

(ii) The fact that in one instance Regent bought goods from Megantic for exactly the same price as the latter had paid for them;

(iii) The fact that suppliers were prepared to extend very substantial credit to Regent without having conducted due diligence on it and even though it was "a newly formed company with no capital of its own to speak of" and another company of which Mr Belfield had been a director had gone into liquidation in 2005;

(iv) The "apparent ease with which [Regent] and Mr Belfield were able to obtain unsecured loans from Global and Lorimer respectively";

(v) The size of Regent's turnover. "No legitimate business with capital as small as that of Regent," the Tribunal observed, "could have achieved a turnover of the magnitude it did achieve in a matter of three months";

(vi) The speed with which transactions were carried out. In the Tribunal's view, "the transactions were carried out at a speed consistent only with pre-planning and orchestration";

(vii) The fact that Regent delivered goods to its customer's freight forwarder on the very day it received the purchase order and without waiting for payment or verification of the customer's VAT number;

(viii) The "fixed" profits Regent made on its buffer deals and the fact that "in its broker deals Regent's profits were always in the range of 7.1 per cent to 7.8 per cent";

(ix) The fact that companies were suppliers to Regent one day and its customers the next;

(x) The fact that Regent bought goods from a contra-trader and sold them on to an existing customer of the contra-trader;

(xi) The fact that a broker such as Regent is a "crucial player". The Tribunal took the view that "the only reason for the inclusion of Regent in the chain of transactions was to ensure that an input tax repayment claim could be made".

Discussion

44. Mr Pickup took issue both with the Tribunal's conclusions as to individual pieces of evidence and with its overall finding of actual knowledge.

45. For my own part, however, I find the Tribunal's reasoning cogent and compelling. In any case, for Regent to upset the finding of actual knowledge, it must do more than show that there were counter-arguments or that the Tribunal could potentially have arrived at a different conclusion. The question is whether the Tribunal was *entitled* to make a finding of actual knowledge. In my judgment, it plainly was. There was certainly evidence to support that conclusion, and the conclusion was not contrary to the evidence. To echo Lord Radcliffe in *Edwards v Bairstow*, it is not the case, in my view, that "the true and only reasonable conclusion contradicts the determination".

46. To my mind, it was open to the Tribunal to take the view that each of the matters mentioned in sub-paragraphs (i) to (xi) of paragraph 43 above suggested actual knowledge on the part of Regent. I should have thought,

moreover, that, in the circumstances of the present case, the evidence given by Mr Humphries and Mr Mendes (as to which, see paragraphs 17-31 above) would of itself have sufficed to entitle the Tribunal to make a finding of actual knowledge. As already mentioned, the Tribunal considered (with justification, in my judgment) that that evidence indicated that Regent knew to whom it was supposed to sell.

Legal principles [Paragraph 15(i) above]

47. The Tribunal approached the case on the footing that a trader could be denied the right to deduct input tax if he knew or should have known that it was more likely than not that his transactions were connected with fraud. Thus, the Tribunal said (in paragraph 12 of the decision) that the relevant "knowledge" was "knowledge of the *probability* of fraud" and that "the test is that … the ordinary competent trader should have known that there was, *or was likely to be*, a missing trader" (emphasis added in each case). In paragraph 18 of the decision, the Tribunal quoted from a judgment in which there had been reference to a trader taking "the risk of participating".

48. It is common ground between the parties that, while the Tribunal's analysis accorded with the case law as it stood at the time of the hearing, it is not consistent with the subsequent decision of the Court of Appeal in *Mobilx Ltd v Revenue and Customs Comrs* [2010] EWCA Civ 517, [2010] STC 1436. One of the issues in that case was whether the right to deduct input tax could be denied where the relevant trader "knew or should have known that it was more likely than not that transactions were connected to fraud" or "only … where the trader knows or should have known that the transaction *was* connected to fraud" (see paragraph 53). The Court of Appeal concluded that the correct question was whether a trader knew or should have known that the transaction *was* connected to fraud. The Court's reasoning can be seen in following paragraphs from the judgment of Moses LJ (with whom Carnwath LJ and Sir John Chadwick agreed):

> **"**[55] If HMRC was right and it was sufficient to show that the trader should have known that he was running a risk that his purchase was connected with fraud, the principle of legal certainty would, in my view, be infringed. A trader who knows or could have known no more than that there was a risk of fraud will find it difficult to gauge the extent of the risk; nor will he be able to foresee whether the circumstances are such that it will be asserted against him that the risk of fraud was so great that he should not have entered into the transaction. In short, he will not be in a position to know before he enters into the transaction that, if he does so, he will not be entitled to deduct input VAT. The principle of legal certainty will be infringed.

> [56] It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he *might* be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the court in *Kittel*, nor is it the language it used. In those circumstances, I am of the view that it must be established that the trader knew or should have known that by his purchase he *was* taking part in such a transaction, as Sir Andrew Morritt C concluded in his judgment in [*Blue Sphere Global Ltd v Revenue and Customs Comrs* [2009] EWHC 1150 (Ch), [2009] STC 2239] (at [52]):
>
> '… The relevant knowledge is that BSG ought to have known that by its purchases it was participating in transactions which were connected with the fraudulent evasion of VAT; that such transactions might be so connected is not enough.'"

49. To my mind, however, the fact that the Tribunal's understanding of the law has proved erroneous is unimportant. The Tribunal asked itself whether Regent knew or should have known that each of its transactions "was connected to a fraudulent tax loss?" (see paragraph 10 above), not whether Regent knew or should have known that the transactions were *likely* to be so connected. Moreover, the Tribunal determined the case on the basis of Regent's "actual knowledge of a connection with VAT fraud", not on the footing that Regent knew that there was *probably* such a connection. In the circumstances, it cannot matter that the Tribunal understood the law to be that HMRC could deny an input tax claim if the trader merely knew that fraud was likely (compare e.g. *Mobilx Ltd v Revenue and Customs Comrs*, at paragraphs 77-80, and *Euro Stock Shop Ltd v Revenue and Customs Comrs* [2010] UKUT 259 (TCC), [2010] STC 2454, at paragraphs 17 and 19). The Tribunal's "error" did not affect its decision.

50. There was some discussion before me as to the significance of paragraph 51 of the judgment of the European Court of Justice in *Kittel v Belgium* [2008] STC 1537. The paragraph in question reads as follows:

> " … it is apparent that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT".

Mr Pickup noted that this paragraph had been described as providing "a safe harbour for a trader" (*Honeyfone Ltd v Revenue and Customs Comrs* (2008) VAT Decision 20667). However, he accepted in the course of his submissions that the European Court of Justice had not been intending to provide a "safe harbour" for a trader with actual knowledge that his transactions were connected with the fraudulent evasion of VAT. A trader with such knowledge can be denied the right to recover input tax however extensive his "due diligence".

51. It follows that the Tribunal's decision is not vitiated by its assessment of the relevant legal principles.

Inadequate due diligence [Paragraph 15(vi) above]

52. As mentioned above, this ground of appeal concerns a passage in the decision in which the Tribunal said (in paragraph 272):

> "Mr Belfield's failure to make full enquiries and investigation resulted in Regent failing to discover information which ought to have led to his making further enquiries. The result was that Regent became committed, without sufficient protection, to enter into transactions with the four contra traders (plus Ace Telecom and Megantic) linked by way of contra trading to the other transactions of those traders established to be fraudulent. Had he asked the appropriate questions and been answered, he would have concluded that the uncommercial features being offered to the Appellant could only be explained by taking into account other transactions those traders were entering into, and that the only explanation was that those other transactions were in some way connected with fraud."

53. Mr Pickup argued that the Tribunal's observations in this passage could not be justified. Among other things, he submitted (a) that Regent had carried out all enquiries and investigations that could reasonably have been expected of it as a trader in the particular market and (b) that there was no further enquiry and/or investigation which could have led to Regent discovering either of the alleged frauds, whether the original fraud of the defaulting trader or the cover-up fraud of the contra-trader.

54. These points seem to me to bear essentially on whether Regent *should have known* that its transactions were connected with fraud. The Tribunal, however, found that Regent had actual knowledge of the connection with fraud, and I have concluded that it was entitled to make that finding. In the circumstances, it cannot matter whether the Tribunal was also justified in the views it expressed in the passage quoted above. If Regent already had *actual* knowledge, it is immaterial what information might have been yielded by better due diligence. I need not, therefore, consider this ground of appeal further.

Overall conclusion

55. In all the circumstances, the tribunal was, in my judgment, entitled to arrive at the conclusion it did. I shall accordingly dismiss the appeal.

MR JUSTICE NEWEY
TRIBUNAL JUDGE

RELEASE DATE: 28 JUNE 2011