Appeal number:FTC/01/2013

VALUE ADDED TAX — input tax — MTIC appeal — whether connection with fraud established — whether, if so, appellant should have known of that connection — inadequate explanation of F-tT's reasoning and conclusions — whether evidence sufficient to support F-tT's conclusions — yes — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

IAN CHARLES (TRADING AS BOSTON COMPUTER GROUP EUROPE) **Appellant**

- and -

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

TRIBUNAL: Judge Colin Bishopp
Judge Charles Hellier

Sitting in public in London on 25 March 2014

Tim Brown, counsel, directly instructed, for the Appellant

Daniel Margolin, counsel, instructed by Howes Percival, for the Respondents

DECISION

Introduction

1. Mr Ian Charles, who trades as Boston Computer Group Europe ("BCGE"), appeals against that part of a decision of the First-tier Tribunal (the "F-tT") released on 12 June 2012 by which it dismissed his appeal against the respondents' (HMRC's) refusal to allow the deduction of input VAT in respect of his purchase of 3000 Apple iPod Nano 4GB ("the iPods") from Sceptre Services Limited ("Sceptre"). Mr Charles sold the iPods, in two separate batches, to Dutch companies. It was what is commonly, if not always correctly, referred to as an MTIC appeal. We assume in what follows that the reader is familiar with the concept, and with the jargon used in such appeals.

2. These transactions were only three of several purchases and sales considered by the F-tT. Three purchases followed by immediate sales, identified in the decision as the "Maystar deals", were of computer parts bought by Mr Charles from another UK trader and sold to the same Dutch customers; and a further two matched purchases and sales, identified as the "Grandbyte deals", were also of computer parts, again sold to the Dutch customers. HMRC had disallowed Mr Charles' input tax repayment claims in respect of those transactions as well. The F-tT decided that they were wrong to do so in respect of the Maystar deals, but dismissed Mr Charles' appeal so far as it related to the Sceptre purchase and the Grandbyte deals.

3. Mr Charles sought permission to appeal to this tribunal against those parts of the F-tT's decision which were adverse to him, but permission was given by Judge Berner, in this tribunal, only in respect of the purchase from Sceptre, and on limited grounds, which allow Mr Charles to challenge the F-tT's finding that there was a connection between his purchase and a fraud elsewhere; and its further finding, following from its conclusion that such a connection had been established, that Mr Charles should have known of that connection. The evidence that there was a tax loss was unchallenged before the F-tT, but Mr Charles did not admit that the loss was attributable to fraud. However, he put forward no positive case to counter HMRC's argument to that effect, which the F-tT accepted, and there is no challenge now to that part of the decision.

4. The F-tT found: (i) that the iPods had been imported into the UK, and sold and bought in a chain of substantially contemporaneous transactions ending with their purchase by Mr Charles and his export of them, (ii) that E-Management Solutions Europe Ltd ("EMS") was part of that chain, (iii) that EMS had fraudulently evaded the VAT payable by it at its stage of the chain, and (iv) that Mr Charles should have known that his purchase was connected with VAT fraud. As a result the F-tT held that he was not entitled to input tax credit in respect of the purchase of the iPods. We should add that we use the terms "import" and "export" in their colloquial sense rather than in the technical sense employed in the VAT legislation.

5. In reaching its conclusions the F-tT applied the principles stated by the European Court of Justice ("ECJ"), as it then was, in *Axel Kittel v Belgium;*

Belgium v Recolta Recycling (Joined cases C-439/04 and C-440/04) [2006] ECR 1-6161, [2008] STC 1537, and in particular what it said at [59]:

> " … 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 the fraudulent evasion of VAT …"

6. In *Mobilx Ltd v Revenue and Customs Commissioners* [2010] EWCA Civ 517, [2010] STC 1436 the Court of Appeal considered the interpretation and application of the ECJ's decision in *Kittel*. Moses LJ, with whom Carnwath LJ and Sir John Chadwick agreed said:

> "[51]. Once it is appreciated how closely *Kittel* follows the approach the court had taken six months before in *Optigen* [*Optigen Ltd v Revenue and Customs Comrs; Fulcrum Electronics Ltd v Customs and Excise Comrs; Bond House Systems Ltd v Customs and Excise Comrs* (Joined cases C-354/03, C-355/03, C-484/03) [2006] STC 419], it is not difficult to understand what it meant when it is said that a taxable person 'knew or should have known' that by his purchase he was participating in a transaction connected with fraudulent evasion of VAT. In *Optigen* the Court ruled that despite the fact that another prior or subsequent transaction was vitiated by VAT fraud in the chain of supply, of which the impugned transaction formed part, the objective criteria, which determined the scope of VAT and of the right to deduct, were met. But they limited that principle to circumstances where the taxable person had 'no knowledge and no means of knowledge' (para 55). The court must have intended *Kittel* to be a development of the principle in *Optigen*. *Kittel* is the obverse of *Optigen*. The Court must have intended the phrase 'knew or should have known' which it employs in paras 59 and 61 in *Kittel* to have the same meaning as the phrase 'knowing or having any means of knowing' which it used in *Optigen* (para 55).
>
> [52]. If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in *Kittel*. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises."

7. Moses LJ considered the extent of knowledge that was required at [53] to [60]. He held at [55] that it was not sufficient for HMRC to show that the trader should have known that he was running a risk that his purchase was connected with fraud. He concluded:

> "[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who 'should have known'. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was

> connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.
>
> [60] The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.
>
> [61] Such an approach does not infringe the principle of legal certainty … A trader who decides to participate in a transaction connected to fraudulent evasion, despite knowledge of that connection, is making an informed choice; he knows where he stands and knows before he enters into that transaction that if found out, he will not be entitled to deduct input tax. The extension of that principle to a taxable person who has the means of knowledge but chooses not to deploy it, similarly, does not infringe that principle. If he has the means of knowledge available and chooses not to deploy it he knows that, if found out, he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct."

8. Mr Charles does not argue that the F-tT misunderstood the principles, or that they were incorrectly applied to the facts as the F-tT found them; his case is that the facts so found were not supported by the evidence, and that the application of the principles to his purchase was accordingly unwarranted. Alternatively, he says (although this is, we think, the same point put another way), the F-tT was not entitled to reach the conclusion it did reach for the reasons it gave.

9. In so arguing, he relies on the familiar principle expounded by the House of Lords in *Edwards v Bairstow* [1956] AC 14, and re-stated by Lord Millett in *Begum v London Borough of Tower Hamlets* [2003] 2 AC 430 at [99], that although an appeal lies only in respect of an error of law (see, in this context, s 11(1) of the Tribunals, Courts and Enforcement Act 2007), a tribunal commits an error of law if it reaches a conclusion on the facts to which no person acting judicially and properly instructed on the relevant law could have come on the evidence before it. Although, put in that way, the proposition is correct, we think it desirable to add, at this early stage in our decision, a reminder of the cautionary note sounded by Evans LJ in *Georgiou v Customs & Excise Commissioners* [1996] STC 463 at 476:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. 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.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, 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. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

10. Mr Charles was represented before us by Mr Tim Brown (who did not appear below) and HMRC by Mr Daniel Margolin, who also appeared before the F-tT. Although Mr Brown argued the "should have known" point first, it seems to us that logic demands consideration of the presence or absence of connection before one turns to knowledge of it, and we shall deal with the issues in that order.

The connection issue

11. The F-tT started its examination of the connection of the purchase by Mr Charles from Sceptre to VAT fraud, at [64], by recording that the available material on this issue consisted of the oral evidence of an HMRC officer, Mr David Phillips, about BCGE, and the evidence of four other officers, one of whom was Mr Gerard Marescaux, about EMS, together with the documents they produced, as well as the evidence given by Mr Charles. It added that the same evidence, or at least some of it, had been before differently constituted panels of the Tax Chamber in connection with the appeals of two other traders, Sceptre itself ([2011] UKFTT 265 (TC)) and Coracle Ventures Ltd ("Coracle") ([2011] UKFTT 630 (TC)). We shall have a good deal more to say about those traders later. The F-tT stated in the same paragraph that it based its findings primarily on the evidence before it, and that any reliance it placed on the findings in the other appeals was of only secondary importance. It seems, from its discussion at [45] to [62] about the principles by which it was bound and from what it said at [132] and [134] (to which we come in more detail later), that it took those findings into account, but as a general rule treated them as no more than corroborative of its own conclusions.

12. The F-tT described the chain in this way:

> "[67] In this transaction, the tribunal found the following chain to have occurred. Goods identified as 3,000 Apple iPods Nano 4GB were shown to have been released by a company called Bruins with Maltese links to a company called Papoose in the UK on 8 8 2006. The goods appear then to have been in the custody of freight forwarders in the UK, and they remained in that custody throughout until sent out of the UK following sales by BCGE. The goods were transferred from Papoose to EMS; from EMS to a company called Connect; from that company to a company called Maximise;

from that company to Coracle; from that company to Sceptre; and from Sceptre to BCGE. All these transactions took place on 8 08 2006 in back-to-back transactions in quick succession.

[68] All those transactions took place in a chain that shows what HMRC submitted were all the usual hallmarks of an MTIC chain. The goods were moved from the contended defaulter, EMS, through four buffers to BCGE in a very brief time with each buffer making a small mark-up on the price, which was originally £106.70 (the mark-ups being 10p, then 20p, then £.75p then £1.50).

[69] …

[70] The transactions clearly took place at a fast pace. The documentation put before the tribunal was of erratic quality, with poor photocopying leading to the loss of the margins of some documents and obscurities such as hole punch marks on others. So the tribunal treats with some caution the weight to be attached to any finding based on a single document. But there was clearly a cumulation of minor mismatches and errors in timing that are questionable in a genuine commercial deal, if proper regard is had to the commercial significance of the underlying operation. It was the sale of 3,000 items intended for consumer use each worth around £100. They were all items clearly manufactured outside the United Kingdom which were imported, it was said, as part of the grey market, but sold on for 'export' so had only a transient presence in the United Kingdom.

[71] BGCE's paperwork for the deals is weak, even taking into account the basis on which the Appellant traded. The documents show, for example, that the release of the goods from EMS to Connect took place at 11:16 a.m., but that BCGE had already at that time paid a first tranche of £200,000 to Sceptre for the goods …"

13. It then turned to the question of whether there was a fraudulent loss of VAT and said:

"[73] Was there a VAT loss in this chain of transactions? The evidence for this was produced by officer Marescaux supported by the evidence of other officers … that EMS … had failed to account for the VAT at that stage of the chain of transactions, and that that VAT had been assessed on EMS but not paid. There was no challenge to that evidence. The tribunal accepts and it finds that there was a VAT loss linked to EMS in the chain leading to this transaction.

[74] Was that a result of fraudulent evasion of VAT? Officer Marescaux gave evidence that in his opinion it was. Again, although the Appellant put HMRC to proof on this issue, there was no serious challenge to this evidence. Reading that evidence together with the other evidence produced by HMRC (and not challenged), the tribunal finds as fact that there probably was fraud on the part of EMS at the relevant times."

14. Finally the F-tT dealt with the challenge made to the existence of a link from that fraud to Mr Charles' purchase:

"[75]. Was that linked to the purchase by BCGE? This submission by HMRC was challenged. Mr Willis [the solicitor who represented Mr Charles before the F-tT] contended there was no link to the purchase by BCGE, and that the documents produced linked to a failed transaction and not his

client's actual purchase and sale. The weak link, he submitted, was in the contended transfer of the relevant goods from EMS to a company called Connect.

> [76] The key documents put in evidence show this transaction taking place on 8 08 2006, a Tuesday. All the documents said by HMRC to evidence the deal chain bear that date, starting with the release note from Bruins to Papoose. All concerned transfers of a quantity of 3,000 iPod Nano 4gb, though there [is] inconsistent detail about the colours of the individual iPods in the transactions. The goods were held throughout at the same freight forwarders: Tech Freight Limited. And the unit prices, as already noted, were raised by small margins on each deal in the chain. The tribunal sees nothing in that documentary evidence to suggest that the goods were swapped, or that there was a break in the chain in some other way. It puts little weight on the mismatch of information about the colours of the units, as it has seen no significant evidence to suggest that unit prices will vary significantly with colour variation. The tribunal is satisfied on the balance of probabilities that there is a continuous chain here, and that therefore there is a link between the defaulting trader and BCGE."

15. We should add for clarity that the remarks about colour refer to the fact that some documents referred to black, and some to white, iPods, while others still referred to mixed colours, and there was some inconsistency between them. It was not, however, suggested before us that much, if anything, could be read into those inconsistencies.

16. The sequence of transactions from the sale by Connect (we use in what follows the same shorthand as the F-tT) to the purchase by Mr Charles set out by the F-tT at [67] was, it seems, clearly demonstrated (by copies of documents such as purchase orders and invoices showing the successive sales of the iPods from one member of the chain to the next), and that part of the chain was not in contention before the F-tT. However, no similar documentation was available for the transactions between Bruins, Papoose, EMS and Connect. Instead, HMRC relied on less direct evidence, from which it was necessary to draw inferences. We come to that documentation in the course of discussing the parties' submissions.

Mr Charles' submissions

17. Mr Brown argued that the only document produced to the F-tT on which it could have relied in reaching the conclusion that EMS featured in the chain was a release note, sent by EMS to the freight forwarder, Tech Freight, instructing Tech Freight to release goods of the relevant description to Connect. There were, he said, no other documents before the F-tT, in particular purchase orders or sales invoices passing between Papoose and EMS, or EMS and Connect, or any evidence of payments passing between them, which might have related to this supposed sale; thus although the F-tT did not say so in terms, the release note is the only document which could conceivably link EMS to the goods. However, it could as easily relate to what, it was suggested to the F-tT, was a failed deal (see [75], set out above). Moreover, the F-tT had regarded that single piece of paper as sufficient to establish the connection, despite other evidence which cast doubt on it or was inconsistent with it.

18. Mr Marescaux explained when giving his oral evidence that various schedules of EMS's transactions had been prepared at different times and by different HMRC officers, one of whom was himself. They were compiled from the results of enquiries carried out by several officers. There were in all five versions of the schedule, none of them bearing a date, and it is, we understand, not known with any certainty when or in what order they were compiled. The purpose of them all is to list sales by EMS between June 2006 and September 2006. Their significance in the context of this case is that HMRC say they provide the evidence that the iPods were sold by Papoose to EMS and by EMS to Connect, thus making the connection between EMS and Mr Charles' purchase. The critical factor is the reference on the release note sent by EMS to Tech Freight, namely EMS 0036, which HMRC say corresponds to the reference borne by an invoice from EMS to Connect; it is the match of the two references which demonstrates the sale by EMS to Connect.

19. The first schedule, in the order to which we were referred to them, reproduced at page 3086 of the hearing bundle produced for the F-tT (we use the page numbers as a reference for want of any better means of identifying the documents), was headed "Monthly Trader Listing". It contained no details of invoice EMS 0036. The schedule did, however, include an invoice, EMS 39, addressed by EMS to Connect and dated 8 August 2006, though the schedule contained no description of the goods, and did not identify the price. The second schedule was reproduced at page 3091 of the bundle; Mr Marescaux told the F-tT that it had been prepared by him. It was headed "E-Management Services Europe Limited Undeclared Sales". This list too did not include invoice EMS 0036 but showed EMS 39 as a sale to Connect on 8 August 2006 of 3000 iPods at a unit price of £107.25.

20. A third version of the schedule, at page 3020, contained a list of EMS transactions similar to the list at page 3091, although it differed by omitting matters such as VAT numbers. It was headed "Schedule of Identified Sales by E-Management Solutions Limited". It too contained a reference to EMS 39 but not to EMS 0036. The fourth version of the schedule (at pages 8719 to 8722) was exhibited to Mr Marescaux's second witness statement. This included both EMS 0036 and EMS 39, but EMS 0036 had been added, with others, out of numerical and date sequence, at the end of the schedule. Although the schedule was exhibited to his witness statement, Mr Marescaux told the F-tT that it had been prepared by another officer. It showed the EMS 0036 invoice as one representing a sale to Connect of 3000 iPods at £106.70 each, while EMS 39 (now shown as EMS 0039) was for a sale of the same number of iPods to Connect at £107.25 each.

21. The fifth version of the schedule, at page 3039, was another Monthly Trader Listing, exhibited to Mr Marescaux's first witness statement, together with a letter of 13 August 2008 from him to EMS notifying an assessment amounting to £88,633, a copy of which was also included. It appears that the schedule was sent with the assessment, as an explanation of the amount assessed. The schedule included both EMS 0036 and EMS 39, but this time in numerical sequence. The quantities and prices matched those shown in the fourth schedule.

22. Mr Marescaux's oral evidence to the F-tT was that he had prepared the fifth schedule by starting with the release notes and then looking at the information stored on HMRC's computer for deals done by Connect. There he found the details of the EMS 0036 transaction in which EMS had sold to Connect. He told the F-tT that he had not seen the documentation on which the entries in HMRC's computer for Connect's sales and purchases were based—those entries would have been made by another officer. Mr Marescaux told the F-tT that the only documents he had seen were the release notes, and that EMS had not supplied any others relating to this deal. He also accepted that the release note, like other release notes, did not contain the details of price which were present on the schedules. It follows that he was reliant on material he had not himself seen when compiling the schedules for which he was responsible. He had, in fact, made more than one assessment addressed to EMS, and in each case relied on the information he had at the time of the assessment: new information led to new assessments. He described the assessments as having been made on the basis of "best judgment" but, said Mr Brown, the question which we must decide is whether EMS bought and sold the goods, a question of fact rather than of judgment.

23. It was put to Mr Marescaux during the course of his cross-examination before the F-tT that it was possible that EMS 0036 related to a collapsed (or failed) deal. His response was

> "It could have been, but I have no evidence to support that."

24. He went on to say that although he had no documentation relevant to this supposed transaction apart from the release note, he had also relied on the fact that at the time EMS bought exclusively from Papoose, and, with one possible exception, sold only to Connect. That fact was drawn from the report of a visit by HMRC officers to EMS at which a Mr Bhutta, apparently a director of EMS, is recorded to have told them that he purchased only from Papoose and sold only to Connect. However, Mr Brown said, this evidence conflicted with the schedules of EMS transactions which showed sales to Wireless Amusements, and later (albeit after the date of the visit) to SMS Ireland.

25. Mr Brown's argument was that the evidence described by Mr Marescaux, which amounted to no more than a release note which could not be married to an invoice and a history of trading, even if it was correct, was an insufficient basis for the conclusion that a particular transaction had taken place. There was in addition the contrary evidence revealed by a note of a visit by HMRC officers to Tech Freight on 17 August 2006, nine days after the Sceptre transaction, in which the officers recorded the details of six chains of transactions. The note recorded no invoice numbers or other references, but showed that:

(i) EMS *was* a participant in five of the chains, on each occasion receiving the goods from Papoose and transferring them to Connect;

(ii) EMS was a participant in two of three identified chains dated 8 August 2006, each of which related to computer components, but was *not* a participant in the third chain, which related to 3000 iPods. This chain, apart from the absence of EMS, was the same as that alleged to result in Mr Charles' acquisition from Sceptre—that is, in this case, unlike in the others, Papoose seems to have sold direct to Connect;

(iii) on 11 August, three days later, EMS was a party to a chain relating to another 3000 iPods, buying from Papoose and selling to Connect. These goods did not reach Mr Charles.

26. Mr Brown pointed out that the F-tT did not mention the report of the visit to Tech Freight anywhere in its decision, and it must be assumed that it failed to take it into account. Had it done so, and had it also taken proper heed of the inconsistencies in and evident unreliability of the schedules prepared by the HMRC officers, it could not rationally have been satisfied, on the strength of a single piece of paper which was capable of an alternative explanation, that EMS had in fact traded in the 3,000 iPods which Mr Charles later bought and sold. Since the only VAT default of which HMRC led evidence was that of EMS, it followed that connection to a tax loss had not been established in respect of this chain and that the F-tT's finding to that effect should be set aside.

27. We should also mention that Mr Brown raised some concern over the F-tT's finding that EMS had been the importer since the iPods were present in the UK—at the freight forwarder Tech Freight—at the time they were released to it (if HMRC are right) by Papoose. If EMS had not been the importer its VAT liability would have been different. That, however, would be relevant only to the F-tT's findings in relation to whether or not there was a relevant loss of VAT, or VAT fraud on the part of EMS. Mr Brown did not press the point and, as permission to appeal has not been given in relation to those issues, we consider them no further.

HMRC's submissions

28. Mr Margolin did not dispute the proposition that if there was no connection to EMS HMRC could not establish their case, but argued that the evidence of connection which was before the F-tT amply supported its conclusions.

29. First, he said, the assertion that HMRC's case was based on a single piece of paper misrepresented the reality. There were, in fact, two documents, the release note to which we have already referred, and the listing of Connect's purchases (rather than the records of EMS's sales on which Mr Brown had focussed). The former bore the same date, 8 August 2006, as all the other documents relating to the chain; it was addressed to the freight forwarder to which Papoose's instruction releasing the goods to EMS was also addressed; and it related to the same quantity and description of goods. The latter linked goods of the same quantity and description to an immediate sale by Connect to Maximise, which in turn led by various steps, the detail of which was not challenged, to Mr Charles' purchase.

30. Those documents were fatal to Mr Brown's argument that the F-tT's findings were not based on sufficient evidence. Although it was true that the report of the 17 August 2006 visit did suggest that EMS might not have been a participant in this chain, it is nevertheless the case that the evidence showed that, with very limited exceptions, EMS bought only from Papoose and sold only to Connect and, perhaps more importantly, there is no evidence apart from the Tech Freight visit report to suggest (as Mr Brown's argument implies) that Connect ever bought directly from Papoose. The sequence of transactions as reconstructed by HMRC was consistent with other chains and the F-tT was entitled to find, on the balance of probabilities, that EMS was a participant in it.

Discussion

31. As Judge Berner said when giving permission to appeal in respect of this issue, the F-tT did not identify in any greater detail than that provided in the extract from its decision set out above what were the documents before it, and did not fully explain its reasons for arriving at the conclusion that there was (as it put it) an unbroken chain. It is clear that HMRC's case in respect of connection was challenged, and in those circumstances we consider that it was incumbent on the F-tT to explain with greater particularity than it did why it preferred one explanation (that there was a chain including EMS) to another (that this was a failed deal). It did not mention, still less address, the fact that two references, EMS 0036 and EMS 39, appear to have been used on the same day. It is also unfortunate that the F-tT made no mention of the report of the Tech Freight visit since it is not apparent whether it considered that the contents of the report did not undermine the conclusion it had reached about connection from the remaining evidence or, instead, the F-tT simply overlooked it. It is, in addition, unclear whether any of the officers who gave evidence, whose names are listed without any elaboration, contributed to an understanding of the chain although it must be assumed that, as in other cases of this kind, HMRC officers can do little more, so far as identification of a chain is concerned, than produce documents they have obtained from the various traders. It is uncontroversial that Mr Charles could have given no direct evidence about transactions several steps removed from him.

32. The question for us, as *Edwards v Bairstow* and *Georgiou* make clear, is whether there was evidence before the F-tT from which it could reasonably draw its conclusions. The absence from the decision of a clear explanation of its reasoning inevitably makes our task more difficult. Indeed, in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 the Court of Appeal made various observations about the lack of adequate reasons in a judgment. The fact that it is impossible to understand why the judge reached his conclusion may, of itself, amount to a ground for giving permission to appeal for the very reason that it is impossible to determine, until the appeal has run its course, whether there was sufficient evidence to support the tribunal's conclusions. The absence from the F-tT's decision in this case of clear reasoning has, therefore, made it necessary for us to examine the evidence ourselves in some detail in order to determine what conclusions the F-tT could reasonably have drawn from it.

33. We were told, and it is undisputed, that the evidence before the F-tT in respect of this issue consisted of:

(1) Copies of release notes (or release allocations) all bearing the same date, 8 August 2006, by which

(i) Bruins directed Tech Freight to release 3000 iPods to Papoose,

(ii) Papoose directed Tech Freight to release 3000 iPods to EMS,

(iii) EMS directed Tech Freight to release 3000 iPods to Connect (the release note bearing reference EMS 0036), and

(iv) Connect and the other members of the alleged chain directed the release of 3000 iPods to subsequent members of the chain until they reached BCGE (Mr Charles);

(2) Copies of invoices, purchase orders, and some payment evidence in relation to the chain of sales leading from Connect to BCGE;

(3) The oral evidence given by Mr Marescaux of what HMRC's officers had recorded in relation to Connect's purchase or purchases on 8 August 2006 from EMS under references EMS 0036 and EMS 39;

(4) The report of the visit to EMS; and

(5) The report of the visit to Tech Freight.

34. The F-tT also heard Mr Marescaux's evidence that he had used the information on HMRC's computer files for Connect compiled by other officers to identify transaction EMS 0036 as a purchase by Connect from EMS. It is true that HMRC provided the F-tT with no documentary evidence of the Connect files to which Mr Marescaux referred. However, the absence of supporting documentary evidence does not in our view call into question the veracity of Mr Marescaux's evidence on this matter; rather, it affects the weight to be attached to it. The F-tT would have been entitled to take into account the evidence on these schedules as supporting rather than undermining the presence of EMS in the chain.

35. We have mentioned the submissions by Mr Brown about the use by Mr Marescaux of the phrase "best judgment", an indication that it was merely Mr Marescaux's opinion that EMS was in the chain. An opinion of that kind, he argued, carried no weight.

36. We regard this challenge as misconceived. Section 73(1) of the Value Added Tax Act 1994 provides that where returns have not been made by a taxpayer or it appears to HMRC that they are incomplete "they may assess the amount due from him to the best of their judgment". It is clear that when Mr Marescaux said that his assessments were made on the basis of best judgment he was alluding to the power given by this section, the power he exercised in order to assess EMS. It is therefore true that the amount of VAT assessed on EMS represented Mr Marescaux's best judgment of that amount and was to that extent no more than his opinion. But that does not mean that his evidence of the basis on which he reached that opinion may not be evidence of appropriate weight to which the tribunal may have regard. His evidence was that he had obtained information from HMRC's computer of Connect's transactions with EMS. It is also true that that was second hand evidence of unseen documents because it was evidence of what another (unnamed) officer had recorded, and that the F-tT did not have the opportunity to assess the accuracy or veracity of that officer or of the underlying documents, but the F-tT was nevertheless entitled to have regard to it and to attach such weight to it as it saw fit.

37. Mr Margolin argued that the reported statement of Mr Bhutta that EMS bought only from Papoose and sold only to Connect was evidence on which the F-tT could properly have relied as evidence that EMS participated in the chain. That reported statement, even if wholly true (and the listing of other customers may suggest that it is not) does not demonstrate that Papoose sold only to EMS or that Connect bought only from EMS, and does not eliminate the possibility that the two companies traded directly with each other. However, as we have said, there was no other evidence, save possibly for the Tech Freight visit report, of any sales

by Papoose directly to Connect. The absence of such evidence is not, of course, tantamount to proof that no such sales took place, but it is a factor which the F-tT could properly have taken into account.

38. At [76] the F-tT said that it "sees nothing in the documentary evidence to suggest that the goods were swapped, or that there was a break in the chain in some other way." Its failure at this juncture to deal with Tech Freight visit report is in our view the most serious failing in the F-tT's approach. It has, indeed, led us to consider whether we should simply allow the appeal and re-make the decision ourselves in accordance with s 12(2) and (4) of the 2007 Act, making our own findings of fact in the process, but for the reasons which follow we have concluded that we do not need to adopt that course.

39. The question is not so much whether, as the F-tT put it, there was a "break in the chain" (meaning that HMRC could not trace the entire chain at all) but whether EMS did, or did not, feature in the series of transactions which led to Connect's acquisition of the goods, it being accepted that the chain leading from Connect to BCGE had been established. The critical issue therefore is whether the available evidence was sufficient to establish the participation of EMS since HMRC relied, in order to establish fraudulent tax loss, only on default by EMS. Either there was sufficient evidence to demonstrate, on the balance of probabilities, that it was a participant, in which case the F-tT, despite the shortcomings in its decision, must be take to have come to the right conclusion or, at least, one which it is not open to us to disturb; or there was not, in which case HMRC must be taken to have failed to discharge the burden on them of demonstrating a connection to fraudulent tax loss.

40. The evidence provided by the fourth and fifth EMS schedules (those we have identified as being at page 8719 and following and at page 3039 of the hearing bundles) was that Connect's records showed that it purchased 3000 iPods from EMS at £106.70 each, and that the invoice which related to that transaction bore the reference EMS 0036. The schedules also indicated that Connect bought another batch of the same number of iPods from EMS, on the same day, at £107.25 each and that the invoice for that deal bore the reference EMS39. The schedules record the date, invoice number, supplier's VAT number, description of goods, number of units, unit price, VAT and total price. That level of detail, even though it is not conclusive, in our view supports the inference that the information about those transactions has been drawn from source documents, and is not merely a reconstruction based upon assumption or interpolation.

41. It is, we think, a reasonable conclusion that EMS came into possession of at least one batch of 3000 iPods on 8 August 2006. That proposition is supported by the release note from Papoose, whose authenticity has not, we think, been challenged. It does not, of course, necessarily follow that the same goods were released to Connect on the strength of the release note bearing the reference EMS 0036, but the fact that (if we are right about the fourth and fifth schedules) the release note is consistent with them must amount to some evidence that they were.

42. What we find even more significant are the prices charged for the goods in that part of the chain which is not in dispute. Connect sold to Maximise at £106.80 per unit; Maximise to Coracle at £107.00; Coracle to Sceptre at £107.25

and Sceptre to BCGE at £109.25. The schedules show that EMS sold to Connect at £106.70, a price which allowed Connect a profit, even if a very modest profit. The price recorded as having been charged by invoice EMS 39 was £107.25 and it is in our view improbable that Connect would buy at that price only to make an immediate loss by selling at £106.80. All of the evidence that invoice EMS 0036 relates to a transaction that took place therefore fits together. It is also reasonable to infer, and for the same reasons, that if there was only one batch of 3000 iPods, they are more likely to have been the subject of invoice EMS 0036 than of invoice EMS 39.

43. The next matter to be considered is the significance and reliability of the report made following the visit to Tech Freight. It will be recalled that it showed that of three sets of transactions which took place on 8 August 2006, EMS participated in two (which related to computer components) but not in the third, which related to the 3000 iPods which, if HMRC are right, were later bought and sold by BCGE. There are, we think, three possible explanations: that EMS did not participate as a matter of fact; that Tech Freight handed over incomplete documentation which led the officers to draw incorrect conclusions; or that the officers misinterpreted what was provided. Some combination of the second and third possibilities may also have occurred.

44. Which of those possible explanations is correct is, plainly, a question which cannot be resolved with certainty. The question, however, is whether there was evidence before it from which the F-tT could properly conclude that a chain including EMS had been demonstrated. It will be apparent from what has gone before that we are satisfied that the evidence, leaving the visit report to one side, was sufficient. We are not persuaded that the visit report undermines that conclusion; on the contrary, given the consistent and cogent evidence of the chain, as we have described it above, and Mr Bhutta's statement that he bought only from Papoose and sold only to Connect, though not wholly correct, we are satisfied that it is more probable than not that the report is inaccurate in what it says about the participation of EMS. It follows that there was sufficient evidence before the F-tT from which it could conclude that the necessary connection was established.

45. For those reasons the appeal on this ground must be dismissed.

The "should have known" issue

46. We have found it more convenient, in this section of our decision, to deal with the parties' submissions as we describe the F-tT's findings, rather than separately.

47. The F-tT expressly found, at [7], that Mr Charles had not set out to engage in tax fraud, and in the same paragraph explained that it confined itself to the question whether he knew or should have known of the fraud of others. It made various comments, most of a critical nature, throughout its decision about the manner in which Mr Charles traded. It concluded, at [71], that his paperwork was "weak", by which we take it the tribunal meant that it did not represent a reliable audit trail, though at [26] it observed that as he was a sole trader there was no obligation on him to keep more than statutory records. At [128] it observed that he knew of the contents of Public Notice 726, relating to the imposition of joint and

several liability for which s 77A of the 1994 Act provides, a notice which HMRC routinely showed to traders in electronic goods; it describes a number of precautions which it is suggested such traders should consider taking. At [129] the F-tT found that Mr Charles was aware that there was fraud in the market in which he traded. It went on to make adverse comments about the quality of the due diligence he undertook into his suppliers and customers, and about the other precautions he took. For example, it was critical of the manner in which he engaged with the HMRC office at Redhill (that is, in making enquiries of the office of HMRC whose task was to deal with MTIC fraud, as HMRC perceived it, and to handle enquiries from traders in mobile phones, computer chips and similar goods and which provided confirmation, or otherwise, to intending traders of the validity of their proposed counterparties' VAT registrations).

48. More particularly, in respect of the Sceptre deals, the F-tT described in some detail Mr Charles' relationship with Sceptre and its directors, and relationships between Coracle and Sceptre. There was evidence that in period 06/06, and therefore shortly before the purchase with which we are concerned, Mr Charles made 11 purchases, three from Coracle and eight from Sceptre; in six of those eight transactions Sceptre had bought the goods from Coracle. In the transaction with which we are concerned, too, Coracle sold to Sceptre which sold to Mr Charles.

49. At [48] the F-tT said this:

> "Evidence before the tribunal shows that BCGE took part in a number of transactions where goods were supplied to BCGE by Sceptre where those goods had been supplied by Coracle to Sceptre. There were also transactions where Coracle supplied BCGE. In the view of the tribunal that is a most unusual set of circumstances. On what reasonable grounds would company A sometimes be buying goods to be sold on to company B and then to company C for export when the reverse, namely a sale by B to A then C for export, was also happening? Why did each company bother to sell through the other company or alternatively why did they not act in commercial partnership?"

50. At [66], the F-tT observed that there had been other transactions between Coracle and Sceptre in some of which Coracle had purchased goods from Sceptre and then exported them, and in others of which Sceptre had purchased from Coracle and then exported. It said that the deal with Sceptre had to be viewed against that background. It is apparent from the tone of the paragraph that the F-tT viewed this pattern of trading too as unusual.

51. Mr Brown attacked the comments at [48], and the implicit criticism at [66]. on the basis that it was not unusual for a trader to buy from a small circle of suppliers—indeed it was a prudent thing to do—and argued that there was no reason to suppose that Mr Charles knew that in any given case Sceptre had bought from Coracle. In addition, he said, the exchange of roles between Sceptre and Coracle described at [66] did not take place continually. The relevant transactions were separated by two months. In the markets in which the companies were dealing, he said, it was not unusual for traders to appear in different positions in sequences of transactions separated by weeks or months.

52. The evidence before the F-tT on this issue showed that in June, August, September, October, and November 2005 and February and March 2006 Sceptre sold to Coracle in a total of 22 deals, and that it bought from Coracle in June, July and August 2006 in a total of 18 deals. The decision records other evidence from which the F-tT found that Coracle and Sceptre had close financial links—each had, for example, lent money to the other—and it is quite clear from the evidence as it is set out in the decision that the directors of Sceptre and Coracle knew each other well, and that each must have known a good deal of the other's business. Mr Brown did not challenge those findings. We do not think, against that background, that the F-tT's further finding that the trading pattern between Sceptre and Coracle was unusual can reasonably be faulted. Having found a close relationship and an unusual pattern of trading the F-tT went on to say, at [134],

> "… it was a pattern that strongly suggested that there was knowledge that there was a ready profit in these deals in a way that also clearly suggests knowledge of fraud elsewhere in the chains of transactions. [The tribunal] can see no other reasonable explanation for the way those two businesses conducted their activities. That view is not based on, but is strengthened by, the decisions of the tribunals dealing with the appeals by those two companies."

53. However, at [135], the F-tT explained that it was not persuaded that Mr Charles was aware of the closeness of the relationship, or of the trading pattern we have described. Thus it must be taken to have discarded these as matters of relevance to its decision about knowledge. What is, in our view, of much greater importance is Mr Charles' own relationships with Sceptre and Coracle. The F-tT explained at [123] that Mr Charles gave lengthy evidence on that topic as well as on other matters, particularly in cross-examination, and that it found him generally credible, though not necessarily reliable—in other words, he was doing his best to give truthful answers but his memory was not always consistent with contemporary records. It went on, at [124] to [129], to examine the available evidence about Mr Charles' knowledge of the risks, in particular in respect of fraud, in the market in which he traded, concluding that he had a good general awareness which as it said at [129], "should have put him on the alert when dealing with individual transactions". However, at [135], it added that

> "On the appellant's own evidence, it does not appear to have occurred to him that the risks he faced included the risk of trading with Sceptre and Coracle."

54. The evidence showed that Mr Charles knew Sceptre's directors, Mr Anthony Rayer and Mr Colin Evans, well. Neither of them gave evidence to the F-tT in this case. At [132] the F-tT said:

> "… Both Mr Rayer and Mr Evans were people [Mr Charles] plainly thought he knew very well, and whom he was prepared to trust. They were his neighbours where his office was based and shared business facilities with him and they even witnessed and signed things for him that were an integral part of his business, so risking the leak of commercially valuable information. The tribunal has noted this being shown by specific evidence in its analysis set out above. But at the same time the tribunal is satisfied that Sceptre Services Ltd was engaged in transactions in which it – or more accurately Mr Rayer and Mr Evans – should have known there was fraud. That was the finding of the First-tier Tribunal that decided the appeal by that

company against the decisions of HMRC withholding repayments of VAT from it."

55. The part of that finding which relates to Mr Charles' acquaintance with Mr Rayer and Mr Evans was not disputed by Mr Brown, and we take it as unchallenged that he did have a close working relationship with Sceptre—Mr Margolin was, indeed, able to show us that there was evidence before the F-tT that Mr Charles and Sceptre carried on business from different floors of the same building, shared fax

56. facilities, and took only limited care not to disclose confidential information to each other, and that Mr Evans acted as Mr Charles' bookkeeper. Mr Brown did, however, take issue with the further finding, at [136], that Mr Charles had previously acted as a consultant to Sceptre. That finding, he said, failed to take account of Mr Charles' evidence that, although Sceptre had claimed that he was a consultant, the claim was incorrect. We agree with Mr Margolin that although there may have been no formal appointment of Mr Charles as a consultant, there was ample evidence, to be found in the transcript of his cross-examination and elsewhere, that he had in fact acted in such a capacity on several occasions. This objection, in our view, amounts to nothing more than pedantry.

57. Whatever the criticisms of detail which might be made of the F-tT's decision in this respect, there can be no real doubt in our judgment that it was entitled to find on the evidence before it that Mr Charles and Sceptre were not wholly at arm's length and that Mr Charles' dealings with Sceptre were casually conducted. We are, indeed, satisfied that Mr Margolin was right to argue that there was ample evidence from which the F-tT could conclude that Mr Charles traded with limited precautions with all of his counter-parties, but especially so with Sceptre.

58. At [133] the F-tT described Coracle as "another company the appellant knew well", but it provided no detail of the information on which it relied for that conclusion. There was, as we have said (see para 48 above), some history of trading between Coracle and Mr Charles and it was apparent from his oral evidence that Mr Charles did have some acquaintance, and therefore a relationship, with Coracle and its directors. Nevertheless, we deduce that it was significantly less close than his relationship with Sceptre. The F-tT added at [136] that it thought Mr Charles would have discussed the risks of fraud with Coracle personnel, but without explaining why it reached that conclusion. However, since the F-tT found (as we have said) that there was no reason to think that Mr Charles was aware of the nature of the relationship between Sceptre and Coracle (indeed, it suggested, also at [135], that Sceptre and Coracle may have used him without his knowledge) and since there is no finding that Mr Charles knew that, in the case of the Sceptre transaction, the goods had been bought by Sceptre from Coracle, what he may or may not have known about Coracle seems to us to be of comparatively little significance.

59. It has, of course, to be borne in mind that the F-tT was dealing with three groups of transactions—the Sceptre, Maystar and Grandbyte deals as they were termed—and that although the issue of connection had to be considered chain by chain, some of the evidence relating to Mr Charles' knowledge informed the

conclusion in respect of all of the transactions. As we have said, there was general criticism of Mr Charles' due diligence, of his record-keeping and of his rather casual manner of trading. There was more specific criticism in relation to the Sceptre transaction, including the observations we have set out about Mr Charles's sharing of facilities. The F-tT drew the threads together in this way:

> "[137] … it should, the tribunal finds, have occurred to the Appellant that he was trading with companies that were or might be taking excessive risks of being involved with fraudulent trades. And he should have taken precautions accordingly. If it did occur to him, then that was not his evidence to the tribunal. Nor is there evidence of any precautions being taken beyond token enquiries and reports to Redhill that, from evidence of timing noted above, the tribunal finds were not serious checks undertaken by the Appellant but rather checks he felt he ought to conduct to meet HMRC enquiries. Had he made those enquiries, then he would have had good reason, in the tribunal's view, to question why Sceptre and Coracle were conducting their business in what appeared to be a non-commercial way. But he did not.
>
> [138] The tribunal was left to conclude that the Appellant thought he knew them too well for that, but in taking that view he was wrong. They were 'in the know' if not in the fraud. Further, the tribunal finds that if he had proceeded as he should have done he would probably have realised he was wrong. The test to be applied at this stage is the test in *Mobilx* at para [68]:
>
> > 'the question then arises as to whether, on the application of the correct test, the true and only reasonable conclusion is that the trader knew or should have known that his transactions were connected with fraud or that there was no reasonable possibility other than that they were connected with fraud.'
>
> Applying that test, the tribunal finds no actual knowledge but finds the test satisfied to the required standard of proof that the Appellant should have known not only of fraud in the market but fraud in the deal through Sceptre and Coracle."

60. Mr Brown criticised the F-tT's statement at [137] that it should have occurred to Mr Charles that he was trading with companies which might be taking excessive risks. He said—and we agree correctly—that the *Mobilx* test is not whether there is merely a risk of fraud. As Moses LJ pointed out in *Mobilx*, at [60], the *Kittel* principle does not extend to a trader who knew or should have known only that it was more likely than not that his transaction was connected with fraud. An actual, rather than probable, connection must be established, albeit the standard to which it must be established is the balance of probabilities.

61. However, we do not agree that at [137] the F-tT fell into the error of misunderstanding, or incorrectly applying, the test. The F-tT was not saying that the existence, or knowledge or means of knowledge of, risk is enough to satisfy the *Kittel* test. It was saying that his knowledge or means of knowledge of that risk should have caused Mr Charles to take further precautions. It did not limit those precautions to credit checks and Redhill enquiries, and plainly had in mind enquiries about Sceptre's business. In the context of the close relationship the F-tT had found between Mr Charles and Sceptre, Mr Charles had the means available to make further enquiries of Sceptre, and the F-tT here found that he should have made them. That conclusion was plainly open to the F-tT in the

context of its conclusions that Mr Charles knew of the risk of fraud and was likely to have discussed it with Sceptre, and the close relationship would have made such enquiries possible.

62. The F-tT found at [134] that Sceptre must have known of the connection of its transactions to fraud (so that it cannot have been taking adequate precautions against its participating in such transactions) and was conducting its business in a non-commercial way. There was no challenge to that finding which is in any event consistent with the findings of the tribunal which dealt with Sceptre's own appeal.

63. Although we do not accept that the F-tT fell into the error of which Mr Brown complained, we have nevertheless encountered some difficulty in following the reasoning in [137] and [138]. The paragraphs contain a mixture of criticism of what Mr Charles did, or more often did not do, and of only partly articulated conclusions about what he would have learnt had he undertaken further enquiries, or undertaken those he did make with greater diligence. In particular, it is not clear whether the F-tT was of the view that more rigorous enquiries of Sceptre would have revealed to Mr Charles that the pattern of trade between Sceptre and Coracle was, as it had found, "most unusual" and "non-commercial", or that Sceptre knew of the connection of its transactions to fraud, and that in consequence his assumption that he could trade safely with them was misplaced.

64. The acid test, however, is whether there was material before the F-tT from which it could make the finding with which [138] concludes, that Mr Charles should have known that his purchase from Sceptre was connected with fraud elsewhere.

65. As Mr Margolin pointed out, although the F-tT concentrated in its conclusions on what Mr Charles knew or should have known—or could have found out—about Sceptre and Coracle, it described elsewhere in its decision a good deal of evidence about Mr Charles' knowledge of the prevalence of fraud in the market in which he was trading and of the precautions he should have taken, evidence with which we have dealt already, and of factors which suggested that the transactions he undertook were non-commercial. The fact that Sceptre was willing to release goods to him before payment might be attributable to the closeness of their relationship. But the minimal character of Mr Charles' paperwork, even accepting the fact that he had no obligation to keep more than statutory records, is not consistent with the proposition that he was a trader in what he knew to be a risky market who was anxious to ensure that he was not involved in transactions connected to fraud. There was ample evidence before the F-tT, as the decision makes clear, that Mr Charles' transactions and his due diligence were poorly documented and, moreover, that the latter was poorly undertaken. At [131] the F-tT said this:

> "The tribunal finds that the Appellant's approach was to rely on those with whom, for whatever reasons, he felt comfortable doing business. He restricted those with whom he traded as both suppliers and as customers. He inspected some premises and he met some individuals and, in his own evidence engaged in 'general fact-finding' and 'general due diligence'. But this was without a system or a specific set of points to be satisfied. In particular, there was no systematic attempt to engage in credit checks or

> checks on the companies' register or similar use of official records to look beyond or behind what could be deduced from visits, inspections or conversations. Even the Redhill inspections, of which there was evidence, were not entirely systematic. For example, the Redhill check on Tradius [one of Mr Charles' customers] in connection with the onward sale on 11 and 12 09 2006 was received on 13 09 2006, after the goods had been released and after payment was made by the appellant to Maystar, but before payment had been received from Tradius. That left the appellant exposed to risk as he neither had the money nor the goods in his control for a period."

66. We recognise that due diligence, however good, will not uncover everything and that a first-instance tribunal should not concentrate overly on it; but when a trader carries out minimal or ineffective due diligence despite knowing that he is trading in a risky market it is difficult to refrain from the conclusion that the enquiries have not been made, or the answers not properly scrutinised and acted upon where necessary, either because the trader knows that the enquiries are, as Mr Margolin argued, no more than window-dressing, or because he does not care. Like poor quality documentation, the absence of adequate due diligence, in our view inevitably, undermines a trader's evidence that he was taking care to avoid being caught up in fraudulent chains of transactions and it may suggest that he did not undertake due diligence, or undertook it inadequately, because he knew that it was purposeless. We do not need to go so far in this case, but we are satisfied that the evidence described by the F-tT in its decision is a sufficient foundation for the conclusions reached at [131].

67. In addition, although the F-tT did not make this observation, it seems to us that it would have been entitled to conclude, from the fact that Sceptre and, in other transactions not directly relevant to this appeal, Coracle were willing to sell goods to him which he could immediately sell to overseas customers at a substantial profit that Mr Charles must at the least have suspected that there was something untoward about the transactions. Both Sceptre and Coracle were known to Mr Charles as established traders in electronic goods; and although he may not have been privy to the finer details Mr Charles' relationship with Sceptre, at least, makes it impossible to believe that he did not know that Sceptre exported goods on occasion.

68. We agree with Mr Brown, as we have said, that the F-tT erred in some respects but what we must determine, as we have also said, is not whether the F-tT was right in every particular but whether there was evidence before it which supported its conclusion. The question to be addressed by the F-tT, consistently with the *Mobilx* test, was whether when he entered into them Mr Charles, if he applied his mind properly to the matter, could have thought that there was a reasonable, meaning possible and plausible, explanation for the transactions other than that they were connected with fraud. It is important also to bear in mind that the F-tT had the advantage of hearing Mr Charles' evidence, at some length. As we have said, the F-tT treated Mr Charles as an essentially honest witness, and did not find that he had actual knowledge of fraud elsewhere in the chains, but it is apparent from what it said at [137] and [138], and despite the misgivings we have expressed about those paragraphs, that it found he took too much on trust and did not properly consider the extent of the risks he was running, even though he was well aware that there were risks.

69. In our judgment the F-tT was entitled to find, as it did at [137], that it should have occurred to Mr Charles that he was running risks and that he should in consequence take additional precautions. It seems to have accepted Mr Charles' evidence that he did not realise the extent of the risks that he was running, but there is nothing in either *Kittel* or *Mobilx* which supports the proposition that a distinction is to be drawn between a trader who deliberately closes his eyes to the obvious and one who, for whatever reason, merely fails to act upon the evidence available to him. When one combines Mr Charles' knowledge of the trade and the presence of fraud in it with the findings and evidence of:

a. his failure to assess fully the risks to which he was exposing himself;

b. the poor quality of his paperwork and due diligence;

c. the unexplained $2,000 commission on the transaction (F-tT [72]);

d. the back to back nature of his purchase from Sceptre and export;

e. the size of this transaction in the context of Sceptre's relative inexperience in the market;

f. the fact that these were items with only a transient presence in the UK (see F-tT [70]) and in whose trade and export VAT fraud was known;

g. Mr Charles' knowledge that Sceptre exported;

h. Sceptre's apparent willingness to sell him goods on which he could make a ready profit by exporting; and

i. his relationship with Sceptre which was close and gave him some insight into its trade;

it is plain that there was material before it sufficient to support the conclusion that Mr Charles should have known of the connection to fraud in respect of the goods he bought from Sceptre in the relevant transaction.

Disposition

70. The appeal is dismissed. Any application for costs must be made within the prescribed time limit but need not be accompanied by a schedule of the costs claimed.

Colin Bishopp
Upper Tribunal Judge

Charles Hellier
Upper Tribunal Judge

Date of release: 24 July 2014