[2021] UKUT 0153 (TCC)

Appeal number: UT/2019/0042(V)

VAT – missing trader fraud – whether FTT entitled to conclude that there was no fraudulent loss of VAT – no – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
-and-	
ALAN McCORD T/A HI-OCTANE IMPORTS	**Respondent**

TRIBUNAL **JUDGE JONATHAN RICHARDS**
JUDGE GUY BRANNAN

Sitting in public by way of video hearing treated as taking place at the Royal Courts of Justice, Belfast on 3 June 2021 and having considered written submissions provided by the Appellants on 23 June 2021 (the Respondent having decided not to provide any such written submissions in response to our invitation)

Lucy Wilson-Barnes, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

Joe Brolly, instructed by Finucane Toner Solicitors for the Respondent

DECISION

1. The appellants ("HMRC") appeal against a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 12 November 2018. The hearing before us took the form of a fully remote video hearing, neither party having argued that the hearing should be in a different format.

2. The Decision concerned what HMRC considered to be a case of "missing trader" or "MTIC" fraud. The Respondent, to whom we will refer as "Hi-Octane" after the trading name that he used for his business as a sole trader, incurred input tax in his 9/12 and 10/12 VAT periods on 16 transactions for the purchase of vehicles. In an ordinary case, he would be entitled to credit for that input tax against any output VAT due in those periods and a repayment of VAT to the extent his input tax exceeded output tax. However, HMRC formed the view that the principle formulated in *Kittel v Belgium* (Case C-439/04) applied so that Hi-Octane was not entitled to input tax credit. By decision letters dated 12 September 2014, HMRC refused Hi-Octane's claim for a repayment of VAT of £52,919.05 in respect of the 9/12 period, and determined that instead Hi-Octane owed £13,777.37 for that period. HMRC also refused Hi-Octane's claim for a VAT repayment of £27,074.83 for the 10/12 period, agreeing only to repay the lesser sum of £4,020.67.

3. Hi-Octane appealed to the FTT against HMRC's decision. It was common ground before the FTT, as before us, that in order for HMRC to be entitled to invoke the *Kittel* principle to deny Hi-Octane credit for input VAT, the following four requirements needed to be present:

> (1) There needed to be a loss of VAT.
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> (2) That loss needed to result from fraudulent evasion.
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> (3) Hi-Octane's purchases of vehicles needed to be connected with that fraudulent evasion.
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> (4) Hi-Octane either needed to know, or have the means of knowing, that its purchases were connected.

4. HMRC's case on issues (1), (2) and (3) was that Hi-Octane had purchased its vehicles directly from Q Autos Limited ("QAL") and Patrick McGourty ("PM"), both of whom had fraudulently failed to account for VAT that was due. Its case on issue (4) was that Hi-Octane either knew, or should have known, that its purchases were connected with fraud.

5. As is usual for this kind of dispute, the FTT was taken through the details of each transaction of purchase and sale. The FTT reached the following conclusions:

> (1) It did not accept HMRC's case that QAL was responsible for any loss of VAT in connection with the various transactions. Accordingly, limb (1) of the *Kittel* test was not satisfied in relation to purchases from QAL (transactions 1, 6, 7, 8, 9, 10, 11, 12, 14, 15 and 16). It followed that, in the

FTT's judgment, HMRC were not entitled to deny or restrict Hi-Octane's input tax credit in respect of any purchase from QAL.

(2) It accepted HMRC's case that PM was responsible for a fraudulent evasion of VAT. It concluded that limbs (1) to (3) of the *Kittel* test were satisfied in relation to purchases from QAL (transactions 2, 3, 4, 5 and 13). It followed that Hi-Octane could be denied credit for input tax on these purchases provided that limb (4) of the *Kittel* test was satisfied.

(3) Where Hi-Octane's customer was based in the UK, as distinct from the Republic of Ireland (transactions 1, 6, 9, 10, 11, 13, 15) then the FTT concluded, to the extent relevant, that Hi-Octane could not have known, or had the means of knowing, that the transactions were connected with fraud. That finding was strictly unnecessary in relation to Hi-Octane's purchases from QAL since, as noted above, the FTT had already found that QAL was not responsible for any loss of VAT and still less a fraudulent loss. However, this finding did preclude HMRC from denying Hi-Octane input tax credit on transaction 13 (a purchase from PM with a customer based in the UK).

(4) The FTT's above findings meant that, in its judgment, only transactions 2, 3, 4 and 5 (being purchases from PM with a customer based in the Republic of Ireland) were potentially subject to input tax restriction. The FTT concluded that, Hi-Octane should have known that these purchases were connected with PM's fraudulent evasion of VAT. Therefore, the FTT upheld HMRC's decision to deny input tax recovery on transactions 2, 3, 4 and 5 and allowed Hi-Octane's appeals in relation to all other transactions.

6. HMRC appeal to this Tribunal against the FTT's decision summarised in paragraph 5(1) above. HMRC put forward a number of grounds, and sub-grounds of appeal. However, those involve two distinct challenges to the FTT's decision-making:

(1) First, HMRC make what we will term the "Procedural Challenge". The essence of their argument is that Hi-Octane had expressly conceded, in its skeleton argument, that QAL was responsible for a fraudulent loss of VAT and it was not open to the FTT to make findings to the contrary. Alternatively, HMRC argue that the effect of *Fairford* directions[1] made as part of the case-management of Hi-Octane's appeal prevented the FTT from concluding that QAL was anything other than a fraudulent defaulter.

(2) Second, HMRC make what we will term the "Factual Challenge". Even if the FTT was entitled to make findings as to QAL's status as a fraudulent defaulter, the findings that the FTT did make were not available to it. Various arguments are advanced in support of this proposition, including an argument that the FTT's findings were perverse, took into account irrelevant considerations, or failed to take into account relevant considerations. There is also a procedural aspect to the Factual Challenge. HMRC argue that it was unfair for the FTT to make the findings that it did without giving either its counsel, or its witnesses, an opportunity to address its reservations.

[1] After the decision of the Upper Tribunal in *HMRC v Fairford Group plc* [2014] UKUT 329

The Procedural Challenge

Background

7. As is usual in cases involving alleged "MTIC" fraud, the Statement of Case that HMRC served in the FTT set out a detailed case as to why all 4 limbs of the Kittel test were satisfied. In particular, it set out a basis for HMRC's view that both QAL and PM had fraudulently defaulted on their VAT obligations. For example, HMRC's Statement of Case pleaded that QAL had filed only two VAT returns, the first for 06/12 showing tax due of £1,192.73; the second for 09/12 claiming a repayment of £38,413. It also pleaded that HMRC had visited QAL's declared trading address but had seen no signs of trading activity and that HMRC had seen sales invoices suggesting that QAL had been party to transactions generating a liability to output tax much greater than that appearing in QAL's returns. Similar facts were pleaded in relation to PM. HMRC alleged that he had never filed VAT returns and had sold cars without declaring output tax due on them, had his alleged commercial premises at a residential address and failed to reply to HMRC correspondence.

8. HMRC's Statement of Case also contained the "deal sheets" usually seen in MTIC cases. Those deal sheets identified the specific vehicles on which HMRC sought to deny Hi-Octane input tax recovery and traced transactions in those cars both backwards (to Hi-Octane's suppliers) and forwards (to Hi-Octane's customers).

9. The FTT proceedings had a difficult procedural history which is comprehensively set out in a decision of Judge Christopher McNall released on 9 August 2017, following a contested interlocutory hearing (the "FTT Interlocutory Decision"). At that hearing, Hi-Octane was, among other matters, denying that it had received certain directions of the FTT. The summary below is drawn from the FTT Interlocutory Decision which was not the subject of any appeal:

> (1) Following service of HMRC's Statement of Case, on 6 February 2015, HMRC and Hi-Octane agreed directions between themselves which the FTT endorsed on 7 July 2015. Paragraph 6 of those agreed directions, included a requirement, which evidently drew inspiration from *Fairford*, for Hi-Octane to serve a "Notice of Issues" to confirm whether it accepted that limbs (1) to (3) of the *Kittel* test were satisfied in relation to the relevant transactions. On 26 August 2015, Hi-Octane served its Notice of Issues indicating that it did not accept that these limbs were satisfied (see [10], [13] and [20] of the FTT Interlocutory Decision). However, Hi-Octane's position on this issue was to change as discussed in more detail below.
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> (2) Hi-Octane's approach in the Statement of Issues meant that the parties were a long way apart on the question of the estimated length of hearing. The FTT eventually became concerned at the lack of progress towards listing and, of its own motion, listed a case management hearing to be held on 14 October 2016 (see [23] to [33] of the FTT Interlocutory Decision).
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> (3) In advance of the case management hearing, HMRC applied for more extensive *Fairford* directions, requiring Hi-Octane to set out its position on limbs (1) to (3) of Kittel with more specificity. On or around 19 September

2016, the FTT made those directions (the "September 2016 Directions") and vacated the case-management hearing. Hi-Octane was required by the September 2016 Directions to (i) explain whether it accepted the accuracy of HMRC's deal sheets and, if it did not, to explain which chains it considered to be incorrectly described, (ii) give reasons for any argument that there was no tax loss, or no fraudulent tax loss; and (iii) explain which aspects of HMRC's witness evidence was in dispute ([35] to [45] of the FTT Interlocutory Decision).

(4) The FTT concluded that Hi-Octane did not comply with the September 2016 Directions. On 1 December 2016 it made directions (the "December 2016 Directions") which included the following provisions:

> "1. It shall be assumed at the hearing of this appeal that the deal sheets prepared by the Respondents and annexed to the Statement of Case are accurate in every respect and that the tax losses on which the Respondents rely occurred as stated by them, and no challenge by the Appellant to such matters shall be entertained.
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> 2. The Respondents may rely at the hearing of this appeal upon the witness statements of Garth Armstrong, Bernadette O'Neill, Lisa Wilkinson and Paul Goodman served in this appeal and on the exhibits to those statements without calling the witnesses to give oral evidence and without tendering them for cross-examination and no challenge to the accuracy of what is set out in the witnesses' statements shall be entertained."

(5) Hi-Octane's application to set aside the December 2016 Directions was dismissed ([81] of the FTT Interlocutory Decision).

10. The FTT Interlocutory Decision largely determined outstanding case management disputes and the appeal was listed for hearing on 9 and 10 April 2018.

11. Since HMRC bore the burden of proof, they served their skeleton argument in the FTT proceedings first, on 26 March 2018. In paragraphs 6 and 7 of that skeleton argument, HMRC referred to the December 2016 Directions and recorded their position as follows:

> "7. Accordingly, there are no issues as to the existence of tax losses or the deal chains. Further, it is plain that the Appellant's transactions were connected with those tax losses, as they were incurred by traders who were the Appellant's supplier."

12. Paragraph 5 of Hi-Octane's skeleton argument, served on 2 April 2018 identified the issues for determination by the FTT as:

> "a. Whether the Appellant's purchases are bona fide or related to the unlawful evasion of VAT, thus resulting in a loss of revenue;
>
> b. Whether the Appellant knew or should have known that his commercial activities were concerned with the fraudulent evasion of VAT."

13. Paragraph 6 of Hi-Octane's skeleton argument set out the text of the December 2016 Directions and at paragraph 7 and 8, Hi-Octane's position was recorded as follows:

> "7. The Appellant acknowledges the "Fairford Direction" referred to and does not take any umbrage with the suggestion of a tax loss or indeed the deal chains referred.
>
> 8. The Appellant does however advance the position that at all material times, in reference to the transactions in question, that he had no knowledge or indeed had no reason to suspect that he was [complicit] in any wrongdoing or indeed that he has potentially exposing himself to any wrongdoing on his part."

14. Paragraphs 47 and 48 of Hi-Octane's skeleton argument contained an express concession in the following terms:

> "47. The Appellant, by virtue of the Fairford direction given on 11.10.16[2] concedes that the tax losses as set out by the Respondent occurred, as stated by them.
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> 48. The only remaining question and the central pillar to the Appellant's case is whether, on the balance of probabilities evidence can be adduced by HMRC to indicate that the Appellant knew or should have known that the transactions he had involved himself in [were] inherently a fraudulent evasion of VAT."

The FTT's approach to limbs (1) to (3) of the Kittel *test*

15. The FTT was fully aware of the December 2016 Directions and quoted from them at both [33] and [114] of the Decision. It had also read Hi-Octane's skeleton argument, noting at [109] of the Decision that Hi-Octane:

> "… does not dissent from the statement that QA and PM are defaulting traders and that the tax losses stated by HMRC occurred. Nor do they contest that the appellant's transactions were connected with those losses."

16. The FTT nevertheless considered that it was entitled to consider whether limbs (1) to (3) of the Kittel test were satisfied saying, at [115] of the Decision:

> "115. We do not read [the December 2016 Directions] as saying that it must necessarily be held by the Tribunal that there are tax losses arising from the fraudulent behaviour of QA and PM, and that we are not able to make a decision on this issue ourselves. What we take it to mean is that the evidence that HMRC put forward to substantiate their claim that there were tax losses cannot be challenged by the appellant, and that we must accept as fact and only consider the evidence so put forward."

[2] We do not understand this reference. We consider that Hi-Octane must have been referring to the December 2016 Directions as the wording of the concession tracks the wording of those directions.

17. At [116], therefore, the FTT asked itself "What then does the evidence show?" and proceeded to examine statements made in the witness statement of Officer Wilkinson, which dealt with matters relating to QAL. The FTT concluded that Officer Wilkinson's evidence did not satisfactorily demonstrate that HMRC had suffered any loss of VAT in relation to QAL, still less a fraudulent loss for, among others, the following reasons:

> (1) Officer Wilkinson's evidence was that QAL's purchases of vehicles in its 09/12 quarter exceeded its sales by £265,410. However, in the FTT's view, even if that excess was eliminated, and a small profit margin added, QAL would still not have had a net obligation to account for VAT in 09/12. The FTT considered that Officer Wilkinson was not suggesting that there were unrecorded sales (see [118] of the Decision).
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> (2) Officer Wilkinson did not seem to be suggesting that QAL had failed to account for VAT on sales made to Hi-Octane specifically (also in [118] of the Decision).
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> (3) For 12/12, QAL had submitted no VAT return and accordingly, output VAT on sales to Hi-Octane had not been accounted for. However, Officer Wilkinson accepted that it was possible that QAL was acting as a "buffer" trader (i.e. a trader who purchases and on-sells at a small margin) as part of a chain of transactions that trace back to a defaulting trader. If Hi-Octane was a buffer, it might have incurred input tax on its acquisitions with the result that it had no, or no significant, obligation to make a net payment of VAT to HMRC (see [121] and [122] of the Decision).
>
> (4) If QAL was a buffer trader in 12/12. It is likely that it would also have been a buffer in 09/12, supplying a further reason why there might be no overall "loss" of VAT due from QAL in 09/12.

18. These reservations about Officer Wilkinson's evidence were not brought about as a result of submissions made by Hi-Octane since, consistent with the position in its skeleton argument, Hi-Octane did not suggest that HMRC had any difficulty in establishing limbs (1) to (3) of the *Kittel* test. The FTT did not raise its reservations with HMRC's counsel during the hearing, or at any point before releasing its decision and so HMRC had no opportunity to call Officer Wilkinson to answer questions from the FTT. Therefore, the first HMRC knew of the FTT's reservations was when they received the Decision.

Discussion

19. Mr Brolly, in his clear and considered submissions on behalf of Hi-Octane, sought to persuade us that there was nothing objectionable in the FTT's approach. He argued that the December 2016 Directions, and *Fairford* directions generally, were simply a "tool of efficient case management" that restricted Hi-Octane's rights to cross-examine but did not deprive the FTT of its primary function of decision making. That conclusion, he argued, was only emphasised by the fact that the FTT made the December 2016 Directions at an interlocutory stage and without any consideration of the evidence. Against such a background, the 2016 Directions could not be intended either to release

HMRC from the burden of proving each constituent part of their case or to absolve the FTT from its duty to find the relevant facts.

20. The first difficulty with these submissions is that they proceed at a high level of generality as to the perceived "purpose" of *Fairford* directions in the abstract, without engaging sufficiently with what happened in these particular proceedings. In these proceedings, Hi-Octane expressly and unambiguously conceded that limbs (1) to (3) of the *Kittel* test were all satisfied. That was clear from Hi-Octane's skeleton argument which made it abundantly clear that the only factual issue in dispute was whether Hi-Octane knew or should have known of the undisputed fact that its transactions were connected with the fraudulent evasion of VAT. That concession in turn shaped Hi-Octane's oral arguments which raised no suggestion to the effect that Officer Wilkinson's evidence was insufficient to establish limbs (1) to (3) of the *Kittel* test in relation to purchases from QAL.

21. The second difficulty is that Mr Brolly's submissions in effect assume what they seek to prove. Mr Brolly starts from the proposition that the FTT has the "primary function" of deciding for itself whether HMRC had established that limbs (1) to (3) of the *Kittel* test were satisfied and from that, deduces that there was nothing wrong in the FTT deciding that matter even though Hi-Octane had conceded the issue and was putting forward no argument on it. However, the starting premise is not correct, or at least not formulated with sufficient precision. As May LJ explained in *Jones v MBNA International Bank* [2000] EWCA Civ 514 at [52]:

> "Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised."

22. Those comments were made in the context of an attempt by a litigant to advance, on appeal, an argument that he had not advanced at first instance. That is not (quite) the situation in these proceedings although HMRC are correct to observe that, by contesting their appeal and adopting the FTT's reasoning, Hi-Octane is in effect seeking to withdraw the concession it made before the FTT. However, May LJ's comments emphasise the adversarial nature of the legal tradition in this country. If a party does not put a particular issue before the court, the court will not, at least normally, decide that issue.

23. There was nothing abnormal about Hi-Octane's concession that limbs (1) to (3) of the *Kittel* test were satisfied. The evidence relevant to whether QAL was a fraudulent defaulter was, almost entirely, within HMRC's knowledge and outside Hi-Octane's knowledge. Taxpayers frequently take a pragmatic decision that they will not incur the effort and expense of challenging HMRC's case on limbs (1) and (2) of *Kittel*. No authority is needed for that proposition, that is well-known to anyone familiar with "MTIC" litigation, but a specific example can be seen in the case of *HMRC v Beigebell Limited* [2020] UKUT 176 (TCC) to which HMRC referred. Nor was there anything

abnormal about Hi-Octane's concession that limb (3) of the *Kittel* test was satisfied since Hi-Octane had purchased from the very persons who were said to be the defaulters.

24. Hi-Octane argues that it would be absurd if, having identified legitimate concerns as to whether Officer Wilkinson's evidence proved the satisfaction of limbs (1) to (3) of the *Kittel* test, the FTT was precluded by mere interlocutory directions from reaching a decision based on that evidence. We reject that submission. First, it ignores the fact that Hi-Octane expressly and unambiguously conceded the point. It is no answer to say that this concession was only made in response to the December 2016 Directions. There was no appeal against either those directions or the FTT's refusal to set them aside. Whether or not Hi-Octane felt that it had no choice, it remained bound by the concession. Second, the December 2016 Directions were not made in a vacuum. They were made only because the FTT considered that Hi-Octane had not complied with the September 2016 Directions. There was nothing to suggest that Hi-Octane could not have complied with the September 2016 Directions or in some way was prevented from doing so. On the contrary, Hi-Octane was given the opportunity to clarify its case and it did not do so. We see nothing inherently absurd or unfair about the proposition that a litigant who fails to take up an opportunity to explain whether, and if so on what grounds, it wishes to challenge an opponent's case should face the sanction of being denied the ability to challenge that case. If Hi-Octane considered that this sanction was inappropriate in this particular case, its remedy was to appeal against the December 2016 Directions, or the refusal to set those directions aside.

25. On the contrary, we consider that it was absurd for HMRC to be put in the position in which they now find themselves. They saw that Hi-Octane had conceded the presence of limb (1) to (3) of *Kittel*. Nothing before or during the hearing before the FTT, would have suggested that they needed to explain their case on those aspects of the *Kittel* test. Nor would they have had any idea that the FTT had reservations that needed to be allayed. Yet, on opening the FTT's decision, they would have seen that they had failed in a material aspect of their case on a ground that was not even in dispute. The word "ambush" is sometimes overused in litigation. We do not consider it an overstatement to say that in these proceedings regrettably HMRC were ambushed, not by their opponent, but by the FTT itself.

26. That conclusion also deals with Mr Brolly's submissions that HMRC's appeal involves them impermissibly seeking to relitigate an issue on which they were unsuccessful before the FTT. HMRC are not "relitigating" any issue because since Hi-Octane had conceded that limbs (1) to (3) of the *Kittel* test were satisfied, that issue did not fall to be "litigated" at all. For all those reasons, we allow HMRC's appeal based on the Procedural Challenge.

The Factual Challenge

27. The FTT was wrong in principle even to consider the question whether limbs (1) to (3) of the *Kittel* test were satisfied in circumstances where this issue had been conceded. We do not, therefore, need to address HMRC's arguments to the effect that the FTT's

factual conclusions on this issue were vitiated either by errors of law of the kind set out in *Edwards v Bairstow* or by further procedural irregularities.

Disposition

28. The Decision was vitiated by an error of law. We therefore set aside that aspect of the Decision that determined that limbs (1) to (3) of the *Kittel* test were not satisfied in relation to Hi-Octane's purchases from QAL.

29. Having set aside this aspect of the Decision, we must, by s12(2) of the Tribunals, Courts and Enforcement Act 2007, either remake the Decision or remit it back to the FTT with directions for reconsideration.

30. We have considered whether we should remake the Decision by releasing Hi-Octane from its concession as regards limbs (1) to (3) of *Kittel* and forming our own view as to whether those aspects of the *Kittel* test were satisfied. We have, however, reached the clear conclusion that this would not be an appropriate course of action. As we have explained, there was nothing abnormal about Hi-Octane's concession and no sufficiently good reasons have been given as to why, at this very late stage of the litigation, it should be released from that concession. Accordingly, our first step in remaking the Decision is to substitute the conclusion that limbs (1) to (3) of the *Kittel* test were satisfied in relation to purchases from both QAL and PM, consistent with Hi-Octane's concession below.

31. Because of our conclusion set out at [30] above, HMRC would be entitled, provided that limb (4) of the Kittel test was satisfied, to deny Hi-Octane input tax recovery on transactions 7, 8, 12, 14 and 16 (which involved Hi-Octane purchasing from QAL and selling to a customer in the Republic of Ireland) in addition to transactions 2, 3, 4 and 5 (on which the FTT upheld HMRC's decision to deny input tax recovery)[3]. However, the FTT stated at [141] of the Decision that it did not need to consider limb (4) of the Kittel test in relation to "deals 7, 8, 14 and 16"[4] because its conclusion to the effect that there was no tax loss in relation to QAL meant that input tax on these transactions was immune from challenge.

32. Nevertheless, the FTT's own findings made it clear how it would have determined limb (4) of the Kittel test in relation to transactions 7, 8, 12, 14 and 16. Those were all transactions where Hi-Octane's customer was based in the Republic of Ireland. At [139] of the Decision, the FTT concluded that all of Hi-Octane's transactions with customers

[3] Even taking into account our decision at [30], HMRC are not able to restrict Hi-Octane's input tax recovery on transactions 1,6, 9, 10, 11, 12, 13 and 15 since those transactions involved Hi-Octane selling to a customer based in the UK and there is no challenge to the FTT's conclusion at [140] of the Decision that Hi-Octane neither knew, or should have known, that these transactions were connected with fraudulent evasion of VAT.

[4] The FTT seems to have forgotten about transaction 12 which involved a sale to Gavin Murphy who, as noted at [80] of the Decision was established in the Republic of Ireland. When releasing this decision in draft, we asked the parties for submissions as to whether input tax should be denied on transaction 12. Only HMRC chose to provide such submissions and we agree with them that Hi-Octane is not entitled to input tax recovery in connection with transaction 12.

in the Republic of Ireland were "too good to be true". It found that, Hi-Octane's customer and its supplier in those transactions were more likely than not to be "in league" and that these transactions were contrived. On their own, the findings at [139] were not expressly to the effect that Hi-Octane should have known that transactions involving a Republic of Ireland customer were connected with fraudulent evasion of VAT. However, the FTT did conclude, at [141], that because they were "obviously contrived and too good to be true", Hi-Octane should have known that deals 2, 3, 4 and 5, which involved purchasers in the Republic of Ireland, were connected with fraud. It is clear from the Decision that the FTT concluded that the only thing saving transactions 7, 8, 14 and 16 was the fact that, on the FTT's view, QAL was not a defaulting trader.

33. Hi-Octane has not sought to challenge the FTT's conclusions at [139] and [141] of the Decision. Mr Brolly did argue, in his oral submissions, that the FTT's reasoning at [139] and [141] was compressed and that it would therefore be appropriate for the question of Hi-Octane's knowledge or means of knowledge in transactions 7, 8, 12, 14 and 16 to be determined following a remittal to the FTT. However, he did not identify anything in particular about transactions 7, 8, 12, 14 or 16 that might suggest that Hi-Octane had no means of knowledge in relation to those transactions, even though it did with transactions 2, 3, 4 and 5.

34. On balance we prefer HMRC's submission that the appeal should not be remitted. The FTT heard the evidence and concluded, at least in relation to transactions 2, 3, 4 and 5 that the factors identified at [139] of the Decision supported the inference of means of knowledge at [141]. Hi-Octane has not sought to appeal against that conclusion, or argue to the contrary in a respondent's notice. There is nothing on the face of the Decision that suggests any material difference between transactions 2, 3, 4 and 5 on the one hand and transactions 7, 8, 12, 14 and 16 on the other. Neither Hi-Octane's skeleton argument, nor Mr McCord's witness statement served in the FTT proceedings suggested that there was any relevant difference. In both sets of transactions, Hi-Octane's customer was based in the Republic of Ireland and the only distinction that the FTT drew in relation to limb (4) of the *Kittel* test were based on the location of Hi-Octane's customer (see [139] and [140] of the Decision). In those circumstances, we consider that it is inevitable that if the FTT had concluded, as it should have done, that QAL was a defaulting trader, it would have concluded that input tax should be denied on transactions 7, 8, 12, 14 and 16 which involved purchases from QAL and sales to a customer based in the Republic of Ireland.

35. We therefore remake the Decision as follows:

> (1) HMRC's decision to deny input tax recovery on transactions 2, 3, 4, 5, 7, 8, 12, 14 and 16 is upheld.
>
> (2) HMRC's decision to deny input tax recovery on the other transactions is set aside.

Signed on Original

JUDGE JONATHAN RICHARDS

JUDGE GUY BRANNAN

RELEASE DATE: 24 June 2021