



Neutral Citation Number: [2026] UKUT 00382 (TCC)

Case Number: UT-2025-000039

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

PROCEDURE – application to debar – whether HMRC’s case having no reasonable prospects of success – no – appeal dismissed

Heard on: 23 July 2026
Judgment date: XXX 2026

Before

THE HONOURABLE MR JUSTICE MARCUS SMITH
JUDGE MARK BALDWIN

Between

VNS WASTE SOLUTIONS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Michael Firth KC of counsel, instructed by The Khan Partnership

For the Respondents: Jenny Goldring and Aparna Rao of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant (“VNS”) appeals against the decision (“the Decision”) of the First-tier Tribunal (“FTT”) issued on 27 November 2024. In the Decision, the FTT refused VNS’s application for the Respondents (“HMRC”) to be barred from taking further part in the proceedings (which would have the consequence of summarily determining the appeal in VNS’s favour).

2. VNS had appealed against two decisions of HMRC, namely:

- (1) a decision deregistering VNS for VAT with effect from 1 August 2017; and
- (2) a decision and assessment denying VNS the right to deduct input tax of £1,818,418 in its VAT accounting periods 12/16, 03/17 and 06/17.

VNS withdrew its appeal against the deregistration decision on 6 November 2023.

3. In a Further Amended Statement of Case (the “SoC”) dated 29 January 2021, HMRC stated that the decision and assessment denying input tax had been made on the basis that it was not allowable under the principles in *Axel Kittel v Belgium State*, *Belgium State v Recolta Recycling SPRL* C-439/04 and C-440/04 (*Kittel*), i.e. VNS knew or should have known that the supplies were connected with the fraudulent evasion of VAT. That was stated to be HMRC’s primary case. But HMRC also put forward an alternative case that, although VNS held what purported to be VAT invoices, there were in fact no taxable supplies between 24 October 2016 and 28 June 2017. The primary argument was referred to in the Decision as ‘the *Kittel* case’ and the alternative argument as the “no supply case”.

4. VNS lodged an Amended Application to Debar on 22 November 2023. The application was made on the ground that HMRC had no reasonable prospect of succeeding. This was because, according to HMRC’s own pleaded case, there was no supply and it followed from this that VNS could have no liability to output tax. Pausing here, an unusual feature of this case (explained further at [9] et seq below) is that there was a circular chain of alleged supplies. It is now common ground that, if no supplies were made to VNS, no supplies would be made by it either. As the reduction in output tax was greater than the input tax HMRC were seeking to disallow, the overall result would be that there was no net amount of VAT due to HMRC, and the assessment must be discharged. Put another way, a victory for HMRC on the no supply argument would be a Pyrrhic one, because it would put any suggestion that VNS had a net liability to the sword.

5. In the Decision, the FTT held (at [73]) that there was no inference that HMRC thought there was no supply and, at [74], recorded HMRC’s counsel’s explicit statement that HMRC’s primary case was, and always had been, that there was a supply to which *Kittel* applied and that they did not contend that there was no supply, the point in HMRC’s pleading being framed as an alternative case. The FTT referred to two previous cases where it said there had been both a *Kittel* case and a no supply case: *Microring Limited v HMRC*, [2019] UKFTT 456 (TC) (“*Microring*”), and *Network Euro v HMRC*, [2011] UKFTT 255 (“*Network Euro*”). In fact, *Network Euro* is not a case where there were *Kittel* and no supply arguments. The second (non-*Kittel*) argument in *Network Euro* was about the non-payment of invoices and the applicability of section 26A of the Value Added Tax Act 1994. At [77], the FTT held:

“... I do not accept that, in putting the two alternative cases in this appeal, HMRC have adopted an irrational approach, as the appellant argues. It is not only possible to argue these two alternative cases but also acceptable to do so; it could be argued that it is good practice.”

6. At [78] of the Decision, the FTT rejected VNS's argument that HMRC had accepted that the question of whether there was a supply must be determined prior to determining whether the *Kittel* test was satisfied. The FTT then ruled at [79] that it was not necessary for the no supply case to be considered first. The FTT found at [81] that "HMRC's pleaded case is a 'Kittel denial of input tax' **and** a 'denial of input tax on the basis of no supply' in the alternative" (emphasis as in the original). The FTT refused the application for HMRC to be barred from taking further part in the proceedings.

7. VNS was refused permission to appeal by the FTT, but was granted permission to appeal by this Tribunal on the basis that the FTT erred in law by:

- (1) Deciding that a pleaded case of no supply does not take precedence over a pleaded case of 'Kittel'.
- (2) Adopting an incorrect approach to identifying a party's pleaded case
- (3) Failing to identify/correctly identify what HMRC's actual pleaded case was on the factual issue of whether there was a supply or not.
- (4) Deciding that it was HMRC's primary pleaded case that there was a supply.
- (5) Deciding that HMRC would succeed even if VNS did nothing.
- (6) Deciding not to debar HMRC.

These various grounds of appeal are somewhat interconnected.

BACKGROUND

8. Mr Firth KC, for VNS, told us that the theory behind what was meant to be going on here started with a site that contained waste which the owner/occupier wished to have removed. The site owner paid a third party to remove the waste, which would involve the third party supplying a service (waste removal) to the site owner and receiving payment for that service.

9. If we assume that supplies of waste removal were made and that VNS made and received supplies, what happened was:

- (1) The site owner engaged a company ("TD") to provide waste removal services.
- (2) TD wished to engage another company ("CSC") to carry out the waste removal, but CSC needed funds upfront which TD was not able to pay (due to having to wait to be paid by the site owner).
- (3) Instead, VNS arranged with TD for VNS to remove the waste and then VNS arranged with CSC for CSC to remove the waste.
- (4) VNS paid CSC at the outset whereas TD paid VNS sometime later (hence VNS financed the site clearance).

10. HMRC analysed the transactions as TD making a supply to CSC, CSC making a supply to VNS and VNS making a supply to TD. We were never told on what basis it is thought that TD supplied services to CSC, but that does not matter. What does matter is that VNS and HMRC are *ad idem* that this was an entirely circular arrangement, where each party has input tax and output tax and no one has a significant net VAT liability. VNS would have a small net VAT liability (as it charged TD more than it paid CSC).

11. If, which is HMRC's alternative case, there were no supplies (because all of this was no more than a paper exercise and nothing really happened at all), no input VAT would be recoverable by anyone but, equally, no output VAT would be due either. This is why it is common ground that, if these arrangements are no more than a paper exercise with no supplies

made, HMRC's assessments will fail: although VNS would not be entitled to input tax recovery, it would have no output tax liability either.

12. Mr Firth says that, whatever the point of this arrangement (one of HMRC's witnesses suggested it was money laundering), it was not to carry out VAT fraud and HMRC do not claim to have suffered any actual financial loss. HMRC's case is based on denying the input recovery in each trader whilst trying to hold on to its output liability. Mr Firth also says that VNS was the victim of the fraud because it paid CSC money upfront but was not paid itself. That remains the case to this day – VNS has suffered a large loss.

13. Mr Firth says that there is an important difference between these arrangements and a typical *Kittel* case: where (as is the usual case) HMRC are seeking to deny input tax to someone at the end of a chain of supply, they would succeed if they could show that there was no supply or, if there was a supply, that *Kittel* applied. So, he says, if VNS were successful in its application, this would not open the floodgates and undermine all cases where HMRC is running *Kittel* and no supply arguments in the alternative.

14. Mr Firth professes himself "puzzled" as to why HMRC continue to insist that there must be a full hearing of the underlying FTT appeal. He says that it is common ground that the burden of proving that the supplies took place rests on VNS and VNS will not seek to prove that there were supplies. To the contrary, VNS invited (and invites) the Tribunal to determine the appeal on the basis that there were no supplies. As the burden is on it, it would succeed by doing nothing in the appeal and it would be irrational for it to do anything else. So, he says, the FTT is bound to find that there is no supply, and this will destroy both the no supply argument and the *Kittel* argument as *Kittel* only applies where there is a supply.

15. Before considering each of VNS's grounds of appeal individually, we will address four preliminary issues: the power to debar, what it is that the parties have (so far) pleaded, some of the issues addressed in an earlier preliminary hearing and some points on the burden of proof.

THE POWER TO DEBAR

16. The power to debar a respondent from taking part in proceedings is contained in rule 8 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules"), which (so far as relevant) reads as follows:

"(3) The Tribunal may strike out the whole or a part of the proceedings if—

...

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

...

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings."

17. At all times the FTT must have regard to the overriding objective and that is to be found in rule 2 of the Rules and reads:

"(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

- (2) Dealing with a case fairly and justly includes—
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.”

18. The approach to be taken by the Tribunal when deciding whether to exercise the strike out power in rule 8 was explained by the UT in *The First De Sales Limited Partnership & Ors v HMRC*, [2018] UKUT 0396 (TCC) (“*First De Sales*”) at [33] as follows:

“... we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.

“i) The court must consider whether the claimant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success: *Swain v Hillman* [2001] 1 All ER 91

ii) A ‘realistic’ claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a ‘mini-trial’: *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

WHAT DID THE PARTIES PLEAD/EVIDENCE?

19. HMRC's original decision (in a letter dated 26 November 2018) denying VNS the right to recover input tax, and making a consequential assessment, only referred to the *Kittel* ground. The no supply ground was first added "in the alternative" in the original statement of case (dated 15 July 2019).

20. HMRC's currently pleaded case can be deduced from the following paragraphs in the SoC (references to a number in square brackets below are to the paragraph with that number in the SoC):

(1) [2]: "The refusal of the right to deduct input tax was made on the basis that those transactions were connected with a fraudulent tax loss and the Appellant knew or should have known that this was the case."

(2) [5]: "Although the decision to deny input tax on 26 November 2018 was made on the '*Kittel*' basis and there was a consequent assessment, in the alternative, the Respondents also rely upon the fact that taxable supplies did not take place between 24 October 2016 and 28 June 2017."

(3) [7]: "The right to deduct is therefore also refused on the basis that there was no taxable supply. The fact that a trader holds what purports to be a VAT invoice is not determinative of whether or not it has a right to deduct the input tax shown on the invoice or whether there has been a taxable supply."

(4) [10]: "By letter dated 26 November 2018, the Respondents denied the Appellant the right to deduct input tax on purchases made in its quarterly VAT periods ("the first decision") as follows ..."

- (5) Under the heading “Summary of the Respondents’ case”:
 - (a) [29]: “The Respondents’ case is that VNS’ transactions traced back to a fraudulent VAT default and the Appellant knew or should have known of the connection to the fraudulent tax loss.”
 - (b) [30]: “In the alternative the Respondents’ case is that the right to deduct is refused on the basis that there was no taxable supply to VNS.”
- (6) Under the heading “Tax Loss, Fraud and Connection”:
 - (a) [41]: “It is the Respondents’ case that the tax losses in the deals which form the subject of this Appeal were not the result of business failure or other innocent explanation.”
 - (b) [42]: “Each transaction, which is the subject of this appeal, has been traced back from VNS via Construction Supplies & Consumables Ltd (‘CSC’) to the fraudulent defaulting trader T Davies Utilities Ltd (‘T Davies’).”
- (7) Paragraphs [153]-[170] set out HMRC’s case that VNS knew or should have known of the connection to fraud: repeated deals; tracing to a fraudulent tax loss; consistency in composition of deal chains; orchestrated and contrived scheme; back-to-back transactions; the turnover. At [154], HMRC say:

“The Respondents’ primary case is that the Appellant knew that the transactions, which are the subject of this appeal, were connected with the fraudulent evasion of VAT. The Respondents’ alternative case is that the Appellant should have known that the transactions, which are the subject of this appeal, were connected with the fraudulent evasion of VAT. “
- (8) Under the heading “No supply”:
 - (a) [171]: “As stated above the alternative case is that there were in fact no supplies.”
 - (b) [172]: “In support of this scenario, it is not clear it is not clear how if these were genuine multiple waste transactions, how they were conducted by a sole director with no employees. The apparent speed with which the deals were undertaken suggests that nothing happened in reality and that the deals in fact a paper exercise.”
 - (c) [173]: “The Appellant has provided waste tickets showing in support of its transactions which have been confirmed to be false by Veolia. Veolia have confirmed that the waste tickets are not genuine and that they do not have any kind of relationship with the Appellant, CSC, T Davies or Chip Logistics.”
 - (d) [174]: “Finally, an analysis of the Appellant’s movement of waste figures provided, suggests that the results are both extraordinary and unachievable, even more so, from a company who has little to no knowledge in the waste industry trade sector.”

21. In their latest (31 January 2020) amended Grounds of Appeal (“GoA” - references to a number in square brackets below are to the paragraph with that number in the GoA), VNS say (at [6]): “The Appellant admits the details of its own sales and purchases, as evidenced by its purchase orders and invoices.” At [14] there is a reference to VNS “facilitat[ing] funding”. Ms Goldring says that might create an ambiguity to the extent VNS is suggesting that its role in the circular transactions was to provide finance rather than get involved in the chain of supplies. Just pausing here, it seems from the various documents we have read that, as well as there being

an issue about whether there were supplies at all (or whether the alleged factual matrix is really just a paper exercise), there is a further issue about the nature of any supply VNS made (whether it was a purely financial supply or whether it inserted itself into the chain of supply). Other passages where the question of supply is addressed:

- (1) [7]: “The Appellant puts the Respondents to proof of chains in relation to their contention that the Transactions are connected to the fraudulent evasion of VAT.”
- (2) [8]: “The Appellant puts the Respondents to strict proof of the chains of supply said to lead to the fraudulent evasion of VAT.”
- (3) [12]: “[It] is admitted that all of the Transactions were with Construction Supplies and Consumables Limited (“CSC”).”
- (4) [21]: “[It] is admitted that waste transactions were conducted by the Appellant’s director, without employees.”
- (5) [23]: “[It] is denied that the deals were nothing more than a paper exercise.”
- (6) [23A]: “The Appellant was dealing in waste processing services with its contractual counterparties. It did not deal with Veolia. It was not aware Veolia considers the waste tickets supplied to the Appellant by the Appellant’s counterparties not to be genuine.”
- (7) [24]: “The Respondents were, and are, wrong in fact and law to deny the Appellant’s right of deduction.”

22. In a witness statement dated 24 October 2019, Mr Mehta (the sole director of VNS) said (references to a number in square brackets below are to the paragraph with that number in the witness statement):

- (1) At [60] he referred to a visit to a site in Warrington where CSC was to contract with T-Davies to remove and process waste. He commented “This seemed a large project and a legitimate business opportunity. I had no reason to believe the opportunity was not a legitimate, physical business opportunity or that VNS would later be defrauded.”
- (2) At [61] he says that he was told that “there was a requirement for short-term capital funding and the provision of liquidity within the overall Contract, to enable CSC to remove the waste within the time limit assigned, given T-Davies’ and CSC’s limits of liquidity. VNS’ role was requested to be to provide liquidity to the Contract.”
- (3) [63]: “As an experienced businessman, I have access to a large range of contacts and potential investors. I believed providing cash-flow by injecting funds into the Contract was something we could assist with and thought that it was a legitimate and lucrative business opportunity that would allow me to get my foot in the door of the waste industry. Against that background, VNS agreed to provide finance and liquidity on the basis that it would make a return of 4% on each transaction”.
- (4) [75]: “It was agreed VNS would contract with T-Davies for the removal, processing and disposal of all waste from the Warrington site, on the express understanding VNS would sub-contract all services provision to CSC. VNS would then have visibility of the transactions with all waste physical removal and processing services being carried out by CSC.”
- (5) [86] “I visited the sites in Warrington and Chesterfield and also the offices in Stoke-on-Trent to monitor the progress on the project.”
- (6) [90] “On 7 November and 23 November 2016, Mr Cooke and I made further visits to Stoke on-Trent to visit Mr Wyld, to monitor the project.”

(7) [92]: “Due to the nature and size of the waste site, CSC were under pressure to perform and needed more liquidity to fulfil the Contract. From my various personal visits to the site and Mr Cooke’s reports to me, it was clear that despite the progress being made, this was a large project and there was a lot of further waste to remove.”

(8) [163]: “The arrangement between VNS and its trading counterparties was largely financial. Employees were not required because the tasks that were taken were to first receive an invoice from CSC and make payment, and second, to issue an invoice to T-Davies and Chip Logistics and seek payment within the agreed timeframe. VNS introduced the liquidity to the trading relationship which allowed the transactions to proceed faster.”

(9) [164]: “The role of VNS was realised by receiving waste tickets and then processing invoices and payments, the tickets clearly showed the waste was being collected. VNS was not involved in the physical collection or delivery of the waste nor its processing. In addition, Mr Sheth, Mr Cooke and I made regular visits to the Warrington and Chesterfield sites to check the operation was proceeding smoothly and as required under the Contract. The Chesterfield site, a waste transfer station, is where CSC would process a lot of the waste before sending the remainder to landfill. It was extremely busy, with lots of machines and people working on site and lorries regularly coming in and out of the site. VNS understood this was the operation that our funds and liquidity were needed for.”

23. In an application for specific disclosure dated 23 November 2020, VNS’s solicitors said, “It is the Appellant’s case that it genuinely believed it was engaged in a legitimate supply chain and indeed physically attended the sites to observe CSC’s waste removal operation.”

THE PRELIMINARY HEARING ABOUT WHERE THE BURDEN OF PROOF LIES AS REGARDS HMRC’S “NO SUPPLY” CASE

24. On 16 March 2021 the FTT (Judge Citron) issued its decision on a preliminary issue, described (at [4]) as “where the burden of proof lies as regards the ‘no supply’ case”. At [2] the judge explained why the preliminary issue had arisen, as follows:

“The preliminary issue arises because HMRC state their case on the input tax disallowance on an alternative basis; their primary argument (the “Kittel case”) is that input tax arising on the supplies is not allowable under the principles in *Axel Kittel v Belgium State*, *Belgium State v Recolta Recycling SPRL* C- 439/04 & C-440/04 (“Kittel”) – namely, that the appellant knew or should have known that the supplies were connected with the fraudulent evasion of VAT (I shall refer to this as a “Kittel state of knowledge”); their alternative argument (the “‘no supply’ case”) is that the supplies did not in fact occur (and therefore did not give rise to any input tax).”

25. At [3] he recorded that it was common ground that the burden of proof falls on HMRC as regards the *Kittel* case to prove that VNS’s state of knowledge was such that its purchases were outside the scope of the right to deduct. Having reviewed the authorities, he concluded at [14] that the burden of proof as regards the “no supply” case lay with the appellant. He went on to deal with VNS’s assertion that it would be unfair for both of HMRC’s grounds to be considered at the same hearing, on the basis that the burden of proof was on different parties for different issues. He rejected that assertion, holding that it would be perfectly fair to deal with both grounds in the same hearing. This decision has never been appealed.

26. Before moving on, we should note two points in relation to Judge Citron’s decision. First, he was clear that HMRC had a primary argument (*Kittel*) and an alternative (“no supply”).

27. Second, his finding of where the burden of proof lay on the “no supply” argument related to where the burden lay when HMRC were seeking to deny input tax on the basis that no supply had been made to the trader. He did not address the question whether the burden of proving a supply was still on a trader where the question was whether a supply had been made as a precursor to a *Kittel* denial of input tax. However, in its decision refusing permission to appeal against the Decision, the FTT clearly thought that HMRC bore the burden of proving a supply when this was a foundation for a *Kittel* denial. Judge Sinfield said:

“[15]...If both cases go forward, HMRC might discharge their burden and establish that there were supplies for the purposes of the *Kittel* case. In the alternative, they could rely on HMRC’s no supply case...”

THE BURDEN OF PROOF

28. A key plank in Mr Firth’s argument is his assertion that VNS bears the burden of proving that there was a supply and so, if VNS does not try to prove that there were any, *Kittel* cannot apply. Mr Firth points to an observation by Lord Hoffmann in *In re B (Children) (FC)*, [2008] UKHL 35. At [2] he said (we have underlined the sentence Mr Firth relies on):

“If a legal rule requires a fact to be proved (a “fact in issue”), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.”

29. We do not read Lord Hoffmann’s words as supporting the idea that whether a fact in issue is proved or not lies in the gift of the person who bears the burden of proving it (because if they do not try to prove it, or positively seek to disprove it, the fact is not proved). If we look at the underlined sentence in context, what Lord Hoffmann was saying was that a court or tribunal must decide whether a fact in issue is proved or not. It cannot sit on the fence and say that it might have happened. So, if the court is in doubt, it resolves its doubt by asking whether the party who bears the burden of proving the fact has done that. Questions of burden of proof do not represent a court or tribunal’s starting point. Many – most – factual questions are resolved on the evidence without reference to the burden of proof, because the issue is sufficiently clear cut for the court or tribunal to resolve the matter without such reference. It does not follow that, where the party bearing the burden declines to adduce any evidence, that the point falls to be resolved against that person. The court resolves questions of fact on the evidence before it. The rules as to burden of proof constitute the final step in the analysis if, having reviewed all the evidence, it remains in doubt as to whether the fact in issue is proved or not.

30. This reading of Lord Hoffmann’s analysis is an entirely conventional one, which clearly applies in a tax context, as we can see from these comments of Chadwick LJ in *Wood v Holden*, [2006] EWCA Civ 26:

“[33] In *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948, Lord Brandon of Oakbrook pointed out (*ibid*, 955H-956A) that a judge is not bound, always, to make a finding one way or the other with regard to facts averred by the parties: “He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden”. But that is not a course which should be adopted unless “owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take”. It is a

feature of tax litigation - not least where the litigation arises from a tax avoidance scheme – that, in the first instance, the facts are likely to be known only to the taxpayer and his advisers. The revenue will not have been party to the transaction; and will know only those facts which have been disclosed by the taxpayer or others; following, perhaps, the exercise of the revenue’s investigatory powers. I have no doubt that there are cases in which the evidence before the special commissioners is so unsatisfactory that the only just course for them to take is to hold that the taxpayer has not discharged the burden of proof which section 50(6) TMA 1970 has placed upon him. But, equally, I have no doubt that the judge was correct, for the reasons which he gave, to hold that the present case was not one of those cases. There was no reason to think that the material facts had not been disclosed; and the commissioners did not hold that it was for that reason that they were unable to decide the question of residence. I agree with the judge that, in the present case, the “third alternative” to which Lord Brandon referred in *Rhesa Shipping* was not one which was properly open to the special commissioners.”

31. The tribunal’s task is to try to give effect to the “venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the [Tribunal] in exercise of their statutory functions to have regard to that public interest” (Henderson J in *Tower MCashback LLP 1 v HMRC*, [2008] EWHC 2387 (Ch), as approved by Lord Walker at [2011] UKSC 19 at [15] and most recently by Sir Launcelot Henderson in *HMRC v Bluecrest Capital Management (UK) LLP*, [2025] EWCA Civ 23).

32. As we told the parties in the hearing, given the limited recourse courts and tribunals have to the burden of proof, we do not consider that where it lies should play a significant role in determining this appeal. On the other hand, if a particular fact needs to be established for a particular legal outcome to obtain (here that there needs to be a supply before there can be a *Kittel* denial of input tax), the fact (if such it is) that both parties say that the required fact is not present would clearly not be something the tribunal could ignore.

GROUND 1: THE FTT WAS WRONG TO HOLD THAT A PLEADED CASE OF NO SUPPLY DOES NOT TAKE PRECEDENCE OVER A PLEADED CASE OF ‘KITTEL’.

33. It is common ground that “*Kittel*” operates to deny a trader’s right to input tax recovery in certain circumstances. It only operates where a supply has been made to the trader. If no supply is made, there is no input tax to recover. As the UT pointed out in *Infinity Distribution Ltd (in administration) v HMRC* [2019] UKUT 0405 (TCC) at [47]:

“It is important to appreciate that the *Kittel* jurisdiction pertains where a taxable supply has already been established or is not contested. *Kittel* holds that in such a case, provided the taxable person knew or should have known that, in purchasing goods, he was taking part in a transaction connected with the fraudulent evasion of VAT, that person loses the right to deduct input tax that he otherwise would have”.

34. So, Mr Firth says, although HMRC regard no supply as their secondary argument, the Tribunal will first have to consider HMRC's pleaded case on whether there was a supply or not before considering HMRC's case on whether the *Kittel* test is satisfied. HMRC's (correct, he says) position here is that the burden of proof is on VNS to show that there were supplies and VNS says that there were none.

35. However, in the Decision (at [79]) the FTT held that there was no need for the no supply case to be considered first.

36. As the FTT observed (at Decision [74]) there are three possible outcomes in a substantive hearing of this appeal:

- (1) There was a supply that was connected to fraud;
- (2) There was a supply that was not connected to fraud;
- (3) There was no supply.

37. In *Microring Limited v HMRC* [2019] UKFTT 456 (TC) ("*Microring*"), which involved a *Kittel* case and a no supply case, the FTT declined to make a direction that either party be debarred or struck out noting that "the nature of the supplies made, if any, will like the state of Schrödinger's cat, be established when the full box of facts and argument is opened and examined at the substantive hearing of this appeal".

38. Whilst the FTT will clearly need to decide whether there was a supply before deciding whether the criteria for *Kittel* denial of input tax are met, it does not follow that the no supply argument needs to be determined first in isolation from the rest of the case.

39. We agree with the FTT's comments in *Microring*. An approach where all the issues and evidence are analysed together is much more likely to deliver a comprehensive and correct analysis than one where arguments and evidence are artificially separated and the appeal is determined without all the arguments and evidence having been considered. The first approach accords with the overriding objective and the "venerable principle"; the second does not.

GROUND 2 AND 3: THE FTT ADOPTED AN INCORRECT APPROACH TO IDENTIFYING HMRC'S PLEADED CASE; THE FTT FAILED TO IDENTIFY/CORRECTLY IDENTIFY WHAT HMRC'S ACTUAL PLEADED CASE ON THE FACTUAL ISSUE OF WHETHER THERE WAS A SUPPLY OR NOT WAS.

40. There is much overlap between these two grounds, and Mr Firth ran them together in his submissions.

41. Mr Firth says that the Tribunal analysed HMRC's case at too high a level. It should have looked at what HMRC had pleaded, rather than simply saying at [81] that their pleaded case was a *Kittel* denial of input tax. For there to be a *Kittel* denial, there must first be a supply to the taxpayer. So, unless HMRC plead that the supplies took place, their primary case cannot be a *Kittel* denial.

42. Mr Firth says that when one examines the SoC, the primary facts they assert are that nothing happened and they have evidence to support those claims. HMRC did not address the fact that their own pleadings of primary fact and evidence are to the effect that nothing happened. They cannot argue that these points are made in the alternative to a pleading which is not articulated anywhere.

43. Mr Firth says that these facts are not pleaded in the alternative. In the SoC HMRC say that, although the decision to deny input tax was made on the *Kittel* basis, they also "rely upon the fact that taxable supplies did not take place."

44. He also says that HMRC do not plead that supplies took place. They may have referred to *Kittel* and pleaded the second and third components of a *Kittel* denial (that the supply was connected to the fraudulent evasion of VAT and the taxpayer knew or should have known of that), but there is no pleading on the first component (that there was a supply to the taxpayer) and so they have not pleaded an essential ingredient of a *Kittel* denial. He says that their pleading is really that there was no supply, but if there was then *Kittel* would apply.

45. He also says that it is a legal impossibility for HMRC's case to be that there was a supply when their pleaded case is that the burden of proof is on VNS to prove that there were supplies.

46. We appreciate that there is an obvious tension between saying “You received supplies, but I can deny your ability to recover input tax on them” and “You didn’t receive any supplies” in the alternative. However, there may be good reasons why what appear to be mutually contradictory arguments are run in the alternative.

47. Ms Goldring, for HMRC, gives two reasons why HMRC are currently running *Kittel* as its preferred analysis with no supply as a fallback/secondary position. First, she says that VNS’s pleadings and evidence are inconsistent. There are points which are consistent with there being a supply and points which are not.

48. Secondly, she also says that VNS has consistently avoided clarifying its position by a process of requesting stays/making debaring applications whenever the evidence became due. By way of example, she says that on 10 June 2022, the date by which VNS was due to serve supplementary witness evidence, it filed an application for a stay of proceedings. This was resisted by HMRC and eventually, over a year later VNS confirmed that it was not pursuing the stay application. Shortly before the case management hearing listed for 13 October 2023 (to hear the stay application) VNS then served an application to debar. During the hearing on 13 October 2023 VNS intimated that a further hearing should be listed to hear the application to debar and that they should not be required to lodge supplementary witness evidence before that was heard. The Decision contains a summary of the relevant procedural history at [36]-[52].

49. In terms of the language of the SoC, Ms Goldring pointed us to references to transactions and deals (see the SoC extracts at [20] above), which she says are clearly references to supplies. Moreover, the GoA repeatedly assert that there were genuine transactions/supplies (see the extracts at [21] above). In context, she says that it is perfectly clear from the SoC that HMRC are clearly pleading (as their preferred argument) that there were supplies but *Kittel* applies.

50. In terms of evidence, Ms Goldring starts with the fact that VNS holds tax invoices and has completed VAT returns on the basis that there were supplies. She also points to admissions in the GoA and in Mr Mehta’s witness statement as supporting HMRC’s primary case that there were supplies (see the extracts at [20] and [21] above). The SoC does point to evidence relevant to the no supply argument, but this is clearly set out under the heading “No supply” which is described as an alternative case, and the SoC points to evidence which supports HMRC’s primary case.

51. Whilst we consider that the SoC could be more explicit in making the point that HMRC consider that VNS received supplies, we accept Ms Goldring’s submission that the SoC pleads as HMRC’s primary case that VNS received supplies and that the criteria for a *Kittel* denial of input tax on those supplies are met. Although this is a matter for the parties and the FTT (as HMRC would need permission to amend its SoC), we did suggest to Ms Goldring that HMRC might consider tightening up its pleading on the supply point, purely for the sake of clarification. Assuming HMRC still accepts that the no supply argument is a “hiding to nothing”, we wonder whether HMRC might simplify matters enormously and thus facilitate the efficient progress of this appeal if it withdrew its alternative argument altogether and simply focused on its *Kittel* argument.

52. We do not agree with Mr Firth that HMRC cannot say that the burden of proof is on VNS to show that there were supplies and at the same time say that there was a supply (on which they could then build a *Kittel* input tax denial). As we have observed, the burden of proof is where courts and tribunals go as a “tiebreaker” when they cannot otherwise determine whether a fact in issue is proved. So, assuming that Judge Sinfield was wrong and the burden of proving a supply in the context of a *Kittel* denial is on VNS, this will not prevent HMRC leading evidence that there was a supply or the FTT deciding that there was one. That would remain

the case even if VNS did nothing to prove that there was a supply, and even if it positively invited the FTT to conclude that there was no supply.

53. We agree with the FTT when (at [81]) it described HMRC's pleaded case as a "*Kittel* denial of input tax" **and** a "denial of input tax on the basis of no supply" in the alternative. As we have observed, there is an obvious tension between running a *Kittel* argument and a no supply argument, but we agree with the FTT that (at least as long as both arguments are properly pleaded and there is material to support each of them) there is nothing inherently wrong in seeking to advance both positions. Indeed, that approach has much to recommend it as it gives the tribunal greater flexibility (and thus enhances its ability to reach a fair/just outcome which determines the correct amount of tax) when (as the FTT put it in *Microring*) it comes to open the box of evidence and analyse what it finds inside.

GROUND 4: THE FTT WAS WRONG TO DECIDE THAT IT WAS HMRC'S PRIMARY PLEADED CASE THAT THERE WAS A SUPPLY.

54. Mr Firth says that, at Decision [74], the FTT recorded, and seemed to accept, HMRC's counsel's statement that HMRC's primary case was, and always had been, that there was a supply and that they did not say that there was no supply.

55. Mr Firth said that this is wrong. This cannot be found in HMRC's statement of case and runs contrary to the primary facts pleaded (as discussed above).

56. Most importantly, he says that it is logically impossible for HMRC's primary case to be that there was a supply when their pleaded case is that the burden of proof is on VNS to prove that there were supplies. It is well established (he says) that, if the party who bears the burden of proof fails to discharge it, the fact is treated as not having happened. HMRC's case amounts, he says, to a suggestion that, unless VNS discharges the burden of proving that there were supplies, the Tribunal should treat the existence of supplies as not proven and therefore proceed on the basis that the supplies did not happen.

57. We have dealt with this point already. It is clear from the SoC extracts at [20] and the passage from Judge Citron's decision reproduced at [24] that the *Kittel* argument has always been HMRC's primary argument, with no supply as an alternative/fallback.

58. We have already explained (at [52]) why we do not consider that it is logically impossible for HMRC's primary case to be that there was a supply whilst at the same time they say that the burden of proof is on VNS to prove that there were supplies. As Ms Goldring put it, where the burden of proof lies is fixed and there is nothing HMRC can do about it. If the burden of proving a supply in the context of a *Kittel* denial is on VNS, HMRC accepting this will not prevent HMRC leading evidence that there was a supply or the FTT deciding that there was one even if VNS says there were no supplies.

GROUND 5: THE FTT WAS WRONG TO HOLD (AT [82]) THAT HMRC WOULD SUCCEED EVEN IF VNS DID NOTHING

59. Mr Firth says that, if VNS did nothing, its appeal would succeed. He says this is the case because HMRC's clear, and correct, position on the issue of whether there were supplies is that the burden of proof is on VNS and it must follow that, if VNS does nothing to discharge that burden (which is what it is planning to do), the Tribunal must decide that there were no supplies. Mr Firth says that the FTT did not deal with this point.

60. Secondly, HMRC have not pleaded facts to the effect that there were supplies. In fact, HMRC pleaded facts that there were no supplies. If the FTT does not conclude that there were supplies, it cannot find in HMRC's favour on the *Kittel* principle, and HMRC's case must be struck out, because the effect of there being no supply is that VNS has no overall net VAT liability and the assessments will fall.

61. We do not agree that, if VNS does nothing, it would succeed. We say this because:

(1) Even if the burden of proving supplies is on VNS in the context of a *Kittel* denial, this does not stop HMRC seeking to prove, or the FTT concluding, that supplies were made to VNS; see [52] and [58] above.

(2) HMRC have pleaded that there were supplies in the context of its *Kittel* argument; see [49] and [50] above.

GROUND 6: THE FTT ERRED IN LAW IN DECIDING NOT TO DEBAR HMRC AND SUMMARILY DETERMINE THE APPEAL IN THE VNS'S FAVOUR

62. Mr Firth says that, if one were to look at the facts pleaded in the SoC (rather than a general descriptions of the principle HMRC refer to), those pleaded facts are all to the effect that there were no supplies (paper exercise, false waste tickets, unachievable economics). There are no “alternative” facts pleaded to the effect that this was not a paper exercise etc.

63. Applying the assumption that those facts are true, he says there is no alternative to concluding that there was no supply, so the *Kittel* question does not arise, and the appeal succeeds (because both the output and input tax fall away). In support of his assertion that we should focus only on the facts HMRC plead he points us to an observation by Picken J in *Arcelormittal North America Holdings LLC v Ruia & Others* [2022] EWHC 1378 (Comm) (“*Arcelormittal*”) at [29], where he said:-

“As to strike-out applications, under CPR 3.4(2)(a), the Court may strike out a statement of case if it appears that it discloses no reasonable grounds for bringing the claim. When considering an application to strike out, the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible (*King* at [27]; and *Allsop v Banner Jones Limited* [2021] EWCA Civ 7 at [7]); consideration of the application will be ‘confined to the coherence and validity of the claim as pleaded’ (*Josiya v British American Tobacco PLC* [2021] EWHC 1743 (QB)).”

64. The pleaded facts Mr Firth refers to are pleaded in relation to HMRC’s alternative (no supply) ground. It is clear from the references to “transactions”, “deals” and “deal chains” in the passages in the SoC dealing with their primary *Kittel* argument, that HMRC are pleading, in relation to their primary argument, that there were supplies made to VNS. If we assume (as Mr Firth says we must) that there were transactions, deals and deal chains, then there were supplies. In the context of their *Kittel* argument, HMRC plead facts to the effect that the supplies did happen. The facts pleaded as part of HMRC’s alternative no supply case serve a dual purpose in making good the fraud element in the primary *Kittel* case. Of course, what the facts are is not a matter for us, but for the substantive hearing.

65. This brings us back to where we started (see, although not quite at the beginning, [53] above): HMRC has pleaded two positions which contradict each other. Not only is it not possible for both positions to be correct, one position (no supply) actively undermines the other (*Kittel*).

66. However, as neither position has priority over the other and both positions will be considered together, the *Kittel* argument is fully pleaded (in the sense that what HMRC plead, if supported by the evidence when this is analysed at a substantive hearing, would prevail, thus meeting the *Arcelormittal* test) and HMRC can point to evidence (quite a lot of it coming from VNS) supporting their position, it is not possible to say that HMRC has no reasonable (realistic as opposed to fanciful) prospect of success on the *Kittel* ground. That would remain the case even if the same could also be said about the no supply argument.

67. In very broad terms, if we stand back and ask ourselves whether there is no reasonable prospect of HMRC succeeding, we see:

- (1) HMRC run *Kittel* input tax denial as their primary case.
- (2) They have pleaded all the elements of a *Kittel* denial.
- (3) VNS's Grounds of Appeal and Mr Mehta's witness statement contain admissions that support HMRC's argument.
- (4) Even if VNS bear the burden of proving a supply in the context of a *Kittel* denial, HMRC can seek to establish that themselves and the FTT can find that there was a supply.
- (5) HMRC are currently running a no supply argument. On its face, that undermines their *Kittel* argument, but it is pleaded as an alternative/fallback case.
- (6) The no supply argument should not be considered in preference to the *Kittel* argument. All the facts/arguments should be considered together by the FTT to decide whether one of these arguments is correct or whether the correct analysis is that there was a supply that was not connected to fraud.

That position does not seem to us to be one which has no reasonable prospect of success.

68. We agree with the FTT's conclusion at Decision [94] that the application to debar should be refused. It was, as the FTT observed, predicated on the basis that HMRC's pleaded case, on its own terms, must fail. Like the FTT, we do not agree with that view.

69. It is not the case that HMRC has no reasonable prospect of success.

70. Even if HMRC had no reasonable prospect of success, they should only be barred if it would be fair and just to do so. We consider that, even if we thought that HMRC had no reasonable prospect of success (which we do not), it would be premature to debar them when VNS's pleadings and evidence are inconsistent, and VNS has not clarified its position and made full disclosure as directed. There is a lot of uncertainty on the evidence and a lot of issues which should be fully explored at the substantive hearing.

CONCLUSION AND DISPOSITION

71. For the reasons set out above, this appeal is dismissed.

**THE HONOURABLE MR JUSTICE MARCUS SMITH
JUDGE MARK BALDWIN**

Release date: 13th October 2026