[2014] UKUT 0529 (TCC)

Appeal number FTC/66/2013

VAT – Missing Trader Inter-Community fraud, contra-trading, whether the appellant knew or should have known that the transactions were connected to fraudulent evasion of VAT. Was a Judge of the FTT biased or apparently biased or otherwise were there irregularities in the decision? No. Appeal dismissed.

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

(1) GSM EXPORT (UK) LIMITED (In Administration)

(2) SPRINT CELLULAR DIVISION LIMITED (In Administration)

Appellants

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: MRS JUSTICE PROUDMAN DBE

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 21, 22 and 23 October 2014

Andrew Trollope QC and Leon Kazakos instructed by Smith & Williamson LLP for the Appellants

Jeremy Benson QC and Robert Wastell instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by two closely related companies, GSM Export Limited (in administration) and Sprint Cellular Division Limited (in administration) (whom I shall together call "the appellants") against the decision released on 5 December 2012 of the First-tier Tribunal ("the FTT") (Judge Howard M Nowlan and Ms Elizabeth Bridge) finding in favour of HMRC. That was itself an appeal by the appellants against HMRC's refusal to allow VAT input claims totalling some £5.3m.

2. Input tax was denied in relation to 17 deals in mobile phones effected by one or other of the appellants. The two appellants were treated as one by HMRC and the FTT found that each participated in the deals with which they were respectively concerned in a similar manner. The parties have not sought to differentiate between the appellants for present purposes, nor do I propose to do so.

3. The first 10 deals were effected in April 2006. All involved purchases from a company referred to as Worldtech and all the supplies were to a Greek company referred to as Cellaway. Ten of the 17 transactions had taken place in April 2006; three, in May 2006; and four, in July 2006.

4. The FTT (Judge Nowlan, this time on his own) refused permission to appeal on 5 March 2013 but permission to appeal was granted by the Upper Tribunal (Judge Sinfield) on 7 June 2013.

5. The appellants were represented before me by Mr Andrew Trollope QC and Mr Leon Kazakos and HMRC by Mr Jeremy Benson QC and Mr Robert Wastell. They all also appeared in the FTT, although Mr Benson was also supported there by Ms Maria Roche.

6. HMRC's contention is that the input tax arose from transactions connected with the fraudulent evasion of VAT, a so-called Missing Trader Intra-Community ("MTIC") fraud, about which the appellants either knew or should have known. Put briefly, HMRC allege that there were input tax claims arising in the course of involvement in fraudulent chains. In those chains other traders had failed to account for input tax so that the claims for input tax were not matched by any payment of input tax elsewhere in the chain.

7. It was undisputed that the appellants had been trading for years in legitimate so-called "grey market" transactions (that is to say, transactions taking place outside authorised distribution channels) competing at auction for tail-end stock sold by reputable companies such as Tesco, Argos and O2 and then selling it on. However, (i) it was eventually conceded before the FTT that the disputed deals were traced to fraudulent tax losses. In other words, it was common ground that there was a fraud and the only question for the FTT was whether the appellants knew about it, (ii) it was also eventually confirmed that

the tracing by HMRC of transactions to the defaulters was correct and (iii) that the first UK party in all the deal chains was a fraudulent defaulter. It was not however admitted that there was, as HMRC alleged, a carousel fraud. The appellant conceded no more than the fact that there had been a fraud in the chain so that there could have been simply an acquisition fraud by the missing trader.

8. The principal issue before the FTT was whether the appellants, through Mr Andrew Payne, their director, "knew or should have known" that the transactions giving rise to input tax repayment claims were transactions "connected to fraudulent evasion of VAT". The FTT found that the appellants actually knew about the fraud in relation to the first ten transactions and either knew or should have known about the remainder. The FTT relied upon *Axel Kittel v. Belgium* (Joined Cases C-439/04 and C-440/04), [2008] STC 1537 and *Mobilx Limited (In Administration) and Ors v. HMRC* [2010] EWCA Civ 517, [2010] STC 1436.

9. The FTT sat from 9-31 August 2012, and it heard evidence from several witnesses, including Mr Payne, who is the sole shareholder in the first appellant and a small shareholder in the second appellant. The FTT did not accept Mr Payne's evidence in many respects for the reasons summarised at [9] of the decision.

10. Underlying the grounds of appeal is the contention that Judge Nowlan (and it is Judge Nowlan with which this appeal is concerned; Ms Bridge's involvement was hardly mentioned) exhibited a predisposition to making findings of fraud against the appellants and to find in favour of HMRC generally. I will refer to Judge Nowlan as "the Judge" in this decision.

11. There were 13 overlapping grounds of appeal. In the original application dated 17 January 2013 Mr Trollope and Mr Kazakos accepted that the grounds were interrelated and said that they could be grouped in the three themes of procedural unfairness, the FTT's evaluation of the evidence and errors of law. The grounds were as follows:

    Ground 1: Breach of right to a fair trial on grounds of bias;

    Ground 2: Breach of right to a fair trial on grounds of approach to fact finding role;

    Ground 3: Breach of right to a fair trial on grounds of failure fairly and impartially to assess the evidence of Andrew Payne;

    Grounds 4, 5 and 6: These grounds all related to the evidence of John Fletcher, who gave evidence for HMRC. They were however dropped before me in the light of the recent decision of the Upper Tribunal in *Edgeskill Limited v. HMRC* [2014] UKUT 0038 (TCC); [2014] STC 1174;

Ground 7: Failure in the finding as to the appellants' knowledge;

Ground 8: Giving weight to irrelevant material;

Ground 9: Considering evidence, or coming to conclusions based on evidence, which was not before the FTT;

Ground 10: Making findings on a case that was not pleaded by HMRC and therefore was not before the FTT.

Ground 11: Findings against the weight of the evidence or contradictory to earlier findings.

Ground 12: Misapplication of the relevant test as regards invoicing and trader's documentation.

Ground 13: Misapplication of the law.

12. Because of the overlap, I will consider the grounds in three groups:

- First, the appeal as to the legal test found in *Kittel*'s case and the reference to Directive 2006/112.
- Secondly, the appeal on the basis of the Judge's alleged bias, which Mr Trollope advanced at length in both his written and oral submissions and which might fairly be regarded as the appellants' primary case; and
- Thirdly, the remaining grounds. Broadly speaking they also relate, directly or indirectly, to bias.

Kittel's case

13. Taxpayer recovery of input VAT is a statutory right to be found in Art.186(a) of European Union Directive 2006/112 ("the Directive"):

> "In so far as the goods and services are used for the purposes of the taxed transaction of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due to or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person."

14. In *Kittel* at [61], the European Court of Justice held that this right to deduct input VAT may be refused if:

> "it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT."

15. This decision was subject to detailed consideration by the Court of Appeal in *Mobilx Ltd (In Administration) v Revenue and Customs Commissioners* [2010] STC 1436. The court construed *Kittel* in the light of *Optigen Limited v. Customs and Excise Commissioners* C-354/03 [2006] Ch. 218. *Optigen* was broadly concerned with the same subject matter, heard by four of the five judges in *Kittel* and handed down six months before *Kittel*.

16. In *Mobilx*, Moses LJ said at [59] that the test in *Kittel*'s case was "simple and should not be over-refined". Three key points were mentioned as to the required state of mind of the taxpayer:

    a. "Should have known" means "knowing or having any means of knowing"; at [51];

    b. The taxpayer should have known (or the taxpayer had the means of knowing) that the transaction was connected with fraudulent evasion of VAT; it is not sufficient to know or to have the means of knowing that there was a risk that the transaction might have been so connected (at [56]) or that it was "more likely that not" that the transaction was so connected; at [59]; and

    c. A taxpayer can be regarded as being in a position where he should have known that the transaction was connected with fraudulent evasion of VAT where he should have known that "the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud"; at [59] and [60].

17. It was as I have said common ground that the 17 transactions in the present case were connected to fraudulent evasion of VAT. The issue therefore entirely turned on the knowledge, or means of knowledge, of the appellants through their common director, Mr Payne.

18. Mr Trollope submitted that the FTT had erred in its interpretation and application of *Mobilx*. He said that the Court of Appeal in *Mobilx* had held that there should be either (i) actual knowledge of the connection to fraud on

the part of the taxpayer or, if not, (ii) no other reasonable explanation for the transaction in which the taxpayer was involved but such a connection to fraud. In the present case, however, there was such a reasonable explanation, namely the appellants' legitimate grey market trading.

19. However *Mobilx* does not purport to change the test in *Kittel*'s case. The requirement as to the taxpayer's state of mind squarely remains "knew or should have known". The reference to "the only reasonable explanation" is merely a way in which HMRC can demonstrate the extent of the taxpayers' knowledge, that is to say, that he knew, or should have known, that the transaction was connected with fraud, as opposed to merely knowingly running some sort of risk that there *might* be such a connection. The FTT rightly recognised this in its decision (at [121]–[122]). The FTT therefore did not incorrectly construe and apply the test in *Kittel*'s case.

20. Moreover, even if Mr Trollope had been correct in his interpretation of the test in *Kittel* post-*Mobilx*, he would still have lost ten out of the 17 cases. The FTT did not consider the *Kittel* test to have been satisfied because the appellants should have known of the connection of the transactions to fraudulent evasion of VAT. Rather, the FTT makes clear that it found that the appellants had actual knowledge of the connection to fraud for the majority of transactions: [133], [154], [155], [159] and [166]. On either view of *Kittel*'s test, this is sufficient to deny the appellants their right to deduct.

21. Even where the FTT made a finding of actual knowledge on Mr Payne's part, in [87] it also held that he should have known that the transactions were connected with fraud:

> "…he subjectively knew that the transactions were connected with fraud not just that the objective characteristics of the transactions meant that he ought to have known that fact (though we do also find that was the case)."

22. The FTT applied the test in *Mobilx*, basing its decision on all the evidence about the transactions. It considered that the difference between the terms of the contractual documentation and the manner in which the transactions were actually carried out was evidence that the company knew that the transactions were connected with fraud.

23. Mr Benson urged on me that the background to this case is that in a few days at the end of April, May and June 2006 the company, without the injection of any capital, made a profit of over £1.1m. That of course is by no means enough by itself for HMRC to have made out its case. I bear in mind that the burden of proof was on HMRC to prove that the company did have the relevant state of mind and although the standard of proof is the same in all civil cases, namely the balance of probabilities, the court must be particularly assiduous in assessing the evidence where allegations of fraud are made.

24. Nevertheless I am confident that the appellants' ground of appeal with respect to application of the law by the FTT cannot stand: the FTT identified the correct legal test and rightly considered it to be triggered as a result of its factual findings. The FTT never lost sight of the *Kittel* test.

The effect of Directive 2006/112

25. Directive 2006/112 specifies the details that invoices must contain for VAT purposes. Mr Trollope submitted, relying on *Mahageben kft v. Nemzeti Ado-es Vamhivatal Del-dunantuli Regionalis Ado Foigazgatosaga (C-80/11)* [2012] STC 1934, that as nothing further was required by legislation it was not open to a tribunal to deny a taxpayer its right to recover input VAT for the absence of other details. There was no duty or requirement to add further details. To the contrary, however, there are a number of instances in the FTT's decision where the lack of detail in the invoices was considered material: see e.g. [64], [65], [66], [69], [83], [101], [113] and [153].

26. The decision in *Mahageben* was to the effect that it was incompatible with the rules governing the right to deduct under the Directive to refuse the right to deduct input tax to a person who did not know, and could not have known, that the transaction concerned was connected with fraud. The case deals with case where *Kittel* does not apply: it does not restrict what evidence may be evaluated for the purposes of the *Kittel* test: see [45]-[47] of *Mahageben*.

27. The FTT was entitled to treat the lack of detail in the invoices for the very high value transactions in this case (some millions of pounds) as relevant to the question as to the appellants' state of knowledge as to uncommercial and artificial transactions. In any event, the terms of the invoices must be looked at in context: *all* the features of the transactions were treated as artificial: see [6] and [7] of the Reasons for the Decision on refusal of permission to appeal and [198] below.

28. The FTT's conclusion, considering the commercial state of the invoices and other documentation for the application of the test in *Kittel*, is similar to that reached in *Fonecomp Ltd v. HMRC* [2013] UKUT 0599 (TCC) (now awaiting judgment on appeal). There, Sales J and Judge Berner in the Upper Tribunal upheld the FTT in treating deficiencies in the paperwork as being relevant to the question of the taxpayer's knowledge of the connection to the fraud: see [50].

29. I therefore find that Mr Trollope was wrong in his submission that this documentation was, as a matter of law, irrelevant or immaterial.

Breach of right to a fair trial on grounds of bias

30. The appellants' case was that the Judge made a number of comments during the course of submissions and evidence at trial showing that he had already determined issues in favour of HMRC, either prior to evidence being given at all or before the evidence for the appellants had been completed.

31. I should note for the record that the Judge, in refusing permission to appeal, refuted in the strongest terms the suggestion that there had been bias on his part or on the part of the FTT. He also stated that both members of the FTT reached their conclusion independently. Although it is right to note the denial, it does not of course mean that there was in fact no bias or appearance of bias: see the observations of Peter Gibson LJ in *Southwark London Borough Council v. Jiminez* [2003] EWCA Civ 502; [2003] ICR 1176 (cited below).

The Law

32. I turn first to the law. Lord Hope set out the classic test for apparent bias in *Porter v. Magill* [2002] 2 AC 357, [103]:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

33. Gibson LJ explained this in *Jiminez* where he said (at [26]–[27]):

> "…it is important to stress that the test to be applied is an objective one. The fact that the tribunal were amazed at the allegation of bias or that the council and its legal advisers were surprised at what was said or regarded the comments as displaying bias cannot be determinative for the appellate tribunal which must conduct an objective appraisal of all the material facts. It is no less important to emphasise the qualities of the observer through whose eyes the appraisal is conducted, viz of being fair-minded and informed. The observer in the present case must be assumed to have been present throughout the hearing and to be aware that on 12 March 1999 the evidence was very largely completed but with submissions yet to be heard. The observer must also be taken to have informed himself of the procedure and practice of tribunals in this jurisdiction."

34. The premature expression of a concluded view or the manifestation of a closed mind may amount to apparent bias, but I bear in mind what Sir Thomas

Bingham MR (giving the judgment of the court) said in *Arab Monetary Fund v. Hashim* (1993) 6 Admin LR 348, 356 a–c:

> "In some jurisdictions the forensic tradition is that judges sit mute, listening to advocates without interruption, asking no question, voicing no opinion, until they break their silence to give judgment. That is a perfectly respectable tradition, but it is not ours. Practice naturally varies from judge to judge, and obvious differences exist between factual issues at first instance and legal issues on appeal. But on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be."

35. In *Jiminez* the chairman of an employment tribunal advanced some "preliminary thoughts" for counsel to consider after ten days of a hearing and before a two month adjournment. The Court of Appeal held that this did not amount to apparent bias. Peter Gibson LJ noted that *Peter Simper & Co Limited v. Cooke* [1986] IRLR 19, in which he had also given judgment, was an example of such a closed mind. There, remarks hostile to the employer and suggestive of a concluded view were made by the chairman in the course of the cross-examination of the employee on the opening day and at other times during the first and second day before the employer's case had been opened. In *Simper* Peter Gibson LJ had said at [17]:

> "Of course, we accept that the chairman, experienced as he was, would not have made a final decision until the end of the case; but we feel bound to observe that his comments were injudicious and untimely. In so saying, we do not in any way underestimate the value, both in the formal English judicial system as well as in the more informal tribunal hearings, of the dialogue that frequently takes place between the judge or tribunal and a party or his representative. Nor do we wish to cast any doubt on the right of the tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies. But there is a time and a place for the expression of concluded views by the tribunal. The middle of a cross-examination before the employers' case has been opened or the employers' arguments presented is, in our view, plainly not such a time for such strongly expressed views to be aired by the chairman."

36. The Court of Appeal in *Jiminez* then considered at [38] whether the preliminary remarks of the employment tribunal chairman constituted apparent bias:

> "The council's representatives could have been in no doubt that all the views which the chairman proceeded to give on 12 March 1999 were expressed to be preliminary views, and that included the view that the way the council treated Mr Jiminez was appalling. I have some difficulty in understanding why a strongly expressed view cannot be a provisional view, leaving it open to the party criticised to persuade the tribunal as to why that view was wrong and why the party's conduct was justified. Of course the more trenchant the view, the more the attachment of the label "preliminary" may need scrutiny to see whether the view was truly preliminary and not a concluded view. But it is in my judgment unduly cynical to reject the repeated assertions that the views were preliminary thoughts or views, particularly when the tribunal have gone to the trouble of pointing out the various matters which needed to be addressed in the submissions directions for which were given."

37. *El-Farargy v. El-Farargy and others* [2007] EWCA Civ 1149 concerned a matrimonial dispute. The wife was South African and the husband was Egyptian. A third party joined to the case was a Saudi Arabian Sheikh. All three were Muslim. During the course of the hearing, the judge made various comments about flying carpets, Ramadan, sifting through grains of sand (in preference to "leaving no stone unturned") and Turkish Delight, as well as indicating his own strong views on the outcome of various parts of the dispute before the hearing had concluded.

38. Ward LJ, giving judgment in the Court of Appeal, considered at [26] that the Judge's strong views as to the merits of the case did not constitute a closed mind:

> "This judge had already had to deal with this matter on many occasions for many days and, in the light of the husband's appalling forensic behaviour, no observer sitting at the back of his court could have been surprised that he had formed a "prima facie" view nor even that it was "a near conviction". A fair-minded observer would know, however, that judges are trained to have an open mind and that judges frequently do change their minds during the course of any hearing. The business of this court would not be done if we were to recuse ourselves for entering the court having formed a preliminary view of the prospects of success of the appeal before us."

39. However, Ward LJ said at [30]–[31] that the judge's other comments:

> "…will inevitably be perceived to be racially offensive jokes. For my part I am totally convinced that they were not meant to be racist and I unreservedly acquit the judge of any suggestion that they were so intended. Unfortunately, every one of the four remarks can be seen to be not simply "colourful language" as the judge sought to excuse them but, to adopt Mr Randall's submission, to be mocking and disparaging of the third respondent for his status as a Sheikh and/or his Saudi nationality and/or his ethnic origins and/or his Muslim faith. I have given most anxious thought to whether or not I am giving sufficient credit for the robustness of the phlegmatic fair-minded observer, a feature of whose character is not to show undue sensitivity. Making every allowance for the jocularity of the judge's comments, one cannot in this day and age and in these troubled times allow remarks like that to go unchallenged. They were not only regrettable, and I unreservedly express my regret to the Sheikh that they were made: they were also quite unacceptable. They were likely to cause offence and result in a perception of unfairness. They gave an appearance to the fair-minded and informed observer that that there was a real possibility that the judge would carry into his judgment the scorn and contempt the words convey."

40. In other words, the judge did not simply make remarks that could be perceived as prejudiced. Those remarks could rather be seen as directly hostile to a person involved in the litigation because of his Saudi nationality, his faith as a Muslim and his position as a Sheikh. I asked counsel about the ethnicity of Mr Payne and his sister and have been told that they have no obvious racial connection with Poland, Denmark, Africa or Greece. Thus none of the remarks complained of in the present case could be construed in the same light as those in *El-Farargy*. By itself that is not of course enough for there not to have been apparent bias, and I understand that Mr Trollope bases his case on a different ground of bias, but if there had been such links the position would have been different.

41. I now turn to the proceedings in the FTT with which I will deal, as did Mr Trollope, in chronological order.

Pre-reading

42. The appellants complain that the Judge expressed strong views that indicated a pre-disposition towards HMRC early in the proceedings.

43. Mr Benson pointed out that the Judge had had more than a day of reading time before the first day of oral submissions and evidence, and that, together with its written submissions, HMRC had provided the FTT with a schedule bundle (the "Schedule Bundle"), which proffered evidence on the overall scheme, including the tracing of payments, the chain of companies used and the profit

margins at each stage. Some of the key information as to the chain of transactions came from servers of First Curaçao International Bank NV, now under the control of the Dutch authorities, to which HMRC had access. Mr Benson also pointed out that the Judge would have read both sides' witness statements, including the two witness statements from Mr Payne dated 12 January 2009 and 22 June 2009 which formed the bulk of the appellants' evidence in chief.

44. He submitted that on this basis the fair-minded and informed observer would have been aware of this reading time and would have expected the Judge to have formed preliminary views on the issues arising from that reading.

45. Mr Trollope riposted that the existence of reading time positively helped the case on bias. The Judge had had an opportunity to read the appellants' written submissions and Mr Payne's evidence but his early interventions at the hearing suggested that the Judge had already reached firm views on key issues in dispute. This was emphasised, said Mr Trollope, by the fact that, in the Judge's early interventions, there had been "not a whisper" of the issues raised in favour of the appellants.

46. I agree with Mr Trollope that pre-reading is not an excuse for the Judge having made up his mind before the oral hearing. Our system is an adversarial one of submission and cross-examination and it is inexcusable for a Judge to have made up his mind on preliminary papers, even where he has had papers from both sides. The question is whether the Judge did.

47. In my judgment the fair-minded and informed observer would have formed the view that the FTT would have entered the tribunal chamber on the first day of oral submissions knowing that:

- The FTT had pre-read what it had been asked to pre-read;
- It was not disputed between the parties that there had been a fraudulent default, in the form of a failure to account for VAT that was neither accidental nor negligent but rather dishonest and deliberate;
- The issues to be decided by the FTT related to the application of *Kittel*'s case, namely (i) whether the appellants' 17 transactions were connected with that fraudulent evasion of VAT and (ii) whether the appellants knew or should have known of that connection;
- As to issue (i):
  - HMRC had pleaded that the transactions "were artificially contrived transactions and part of an orchestrated fraud on the Revenue" and had

provided some twenty pages of detailed written pleadings and a corresponding Schedule Bundle suggesting that the appellants' 17 transactions and the fraudulent default were connected and had been part of an overall scheme; and

- The appellants' written submissions had not substantially challenged this first issue. Instead they had in essence, put HMRC to proof of the allegation.

- HMRC's case was however forcefully challenged by the appellants on issue (ii) so that it was plain from the outset that the main issue was to be whether the appellants knew or should have known that the transactions were connected with fraud. In other words, this was to be the principal issue rather than any connection between the 17 transactions and the undisputed fraudulent default.

- Judges are trained to have an open mind and frequently do change their minds during the course of any hearing. As Ward LJ said in *El-Farargy*, "the business of this court would not be done if we were to recuse ourselves for entering the court having formed a preliminary view of the prospects of success of the appeal before us."

48. The fair-minded and informed observer would have also heard the following exchange between the Judge and Mr Trollope on the first day of the hearing:

> "THE JUDGE: It looks to me as if it is broadly implicit, though it's for the Crown to prove, but broadly implicit and perhaps accepted that there are chains of invoices from both GSM and Sprint from Worldtech and then from Balmoral and then from International Investments, and then from West 1.
>
> MR TROLLOPE: Yes.
>
> THE JUDGE: So that the chain to there is either conceded or is not seriously in contention.
>
> MR TROLLOPE: Yes."

49. Shortly afterwards, the Judge also said, suggesting that he had an open mind at this stage:

> "…in relation to knowledge or means of knowledge we both assume that it will be contended and very realistically contended that GSM and Sprint would have no knowledge…"

50. As Peter Gibson LJ said in *Jiminez*, it would be unduly cynical to reject such comments and I do not think that the fair-minded and informed observer would do so. I therefore reject the basic submission that the Judge had, or, perhaps more importantly, would be perceived to have had, an illegitimate predisposition to favour HMRC as a result of his pre-reading, in other words, a closed mind of the kind referred to in *Jiminez*. Rather this case falls on the *Jiminez* side of the line and the Judge's views were obviously preliminary views.

51. I now turn to the Judge's specific comments which are the subject of this appeal on grounds of bias.

Mr Lam's evidence on 13 August 2012 (the second day of the oral hearing after the pre-reading)

52. Mr Fu Sang Lam, an officer of and witness for HMRC, was giving evidence about a company called West 1 Facilities Management Limited ("West 1"). Mr Lam's evidence was that in January to June 2006 West 1 had fraudulently defaulted in an amount of over £125 million. West 1 was the company that had supplied the mobile phones that had passed through a chain to Worldtech Solutions Limited ("Worldtech"), which had then sold the phones to either Sprint or GSM, who had in turn sold them onto Cellaway, a Greek company.

53. As part of his oral evidence in chief, Mr Lam referred to a note of a visit to All System Courier Worldwide Limited ("ASC Worldwide"), which was the freight forwarder who had organised the shipment of the phones for the April 2006 transactions.

54. Mr Benson asked Mr Lam about that part of his note where he had asked ASC Worldwide whether it inspected the goods in its possession. ASC Worldwide had confirmed that it had done so in February 2006 by using a workforce of fifteen people under the direction of "a Polish chap" (in Mr Benson's words) called Mr Joseph. Two in ten pallets had been inspected and each inspection had taken at least six hours with, on average, three to four minutes spent on each phone. That inspection had cost some £10,000 to £15,000, which had been paid in cash. Importantly, Mr Lam's note stated that he had asked the question, "You must have concerns over the legitimacy of Mr Joseph and his crew?", and ASC Worldwide had confessed to him, "Yes. Quite a bit."

55. The first comment from the Judge of which the appellants complain came after the luncheon adjournment:

> "THE JUDGE: … Now, I think what we first learned this morning confused us a bit, but it seemed that what we learned at that stage was that West 1 used a slightly funny freight forwarder that appeared to operate through a sub freight forwarder. Was it West 1?
>
> MR BENSON: I think it was World --
>
> THE JUDGE: It was Worldtech, was it?
>
> MR TROLLOPE: Yes.
>
> THE JUDGE: And some flaky Poles -- probably it would have been West 1 as well I imagine but at any rate it was World. So we were learning something strange about the freight forwarder --
>
> MR TROLLOPE: Yes.
>
> THE JUDGE: -- the relevance of which at the time, and I think maybe even now, I am unclear about."

The Judge then asked for clarification on the relevance of the evidence to the case, thus making sure that Mr Lam was asked all necessary questions.

56. Mr Trollope said that "flaky Poles" was a pejorative phrase. There was no evidence that anyone other than Mr Joseph was Polish. The only evidence for the suggestion that the inspection team was "flaky" was a hearsay report of Mr Lam's and that evidence should not have been adopted so early on without critical consideration by the Judge. He submitted that the use of the expression showed a pre-disposition towards finding that all parts of the transaction chains were connected with the fraud.

57. Mr Benson submitted that the Judge was simply referring back to the evidence given that morning. Indeed, in the morning, the Judge had asked by way of clarification: "Is Mr Joseph 'the Poles'?" Mr Benson submitted that that same shorthand was simply being used again in the passage that was the subject of complaint. As for "flaky", the appellants had never challenged the proposition in Mr Lam's note that the legitimacy of Mr Joseph's business had been suspect at the time.

58. Later in the afternoon the Judge referred back to Mr Lam's evidence in the morning and asked counsel for HMRC:

> "I think the import of your questioning this morning was that -- I hope they're not in the room -- a bucket shop freight forwarder that wasn't, a

sort of almost virtual freight forwarder with the aid of some Poles who were a bit jokey about the whole thing, is relevant, because Mr Payne had contact with them, and implicitly they would have been the freight forwarder for everything in the chain or perhaps we know that they were -- I don't yet."

59. The Judge's characterisation of "the Poles" as "flaky" was simply referring back to the evidence from Mr Lam's note and not exhibiting a closed mind on the issue. The reference to "the Poles" was evidently no more than a shorthand reference to Mr Joseph and his workers.

60. Similarly, the suggestion that they "were a bit jokey about the whole thing" could be viewed as a shorthand reference to the concerns that ASC Worldwide had admitted to Mr Lam as to the legitimacy of Mr Joseph's operation. However, with this comment, the Judge was overstating HMRC's position on the freight forwarders. I read Mr Lam's note and Mr Benson's examination as saying that the question of Mr Joseph's illegitimacy was primarily connected to the fact that he asked to be paid a large sum of money in cash. Nowhere was there evidence (at any rate that I have been told about) that Mr Joseph's crew were "a bit jokey" in relation to the actual inspection of the goods. The Judge did appear to have concluded that the freight forwarders used in the April transactions were inadequate. However this was only a small part of the case against the appellants. The freight forwarders were using the warehouse of a different firm, Mr Payne did not know who carried the goods, the written instruction to inspect the goods was issued after the goods had been loaded, Cellaway paid for the goods, contrary to the purchase order terms, before they could have reached their destination and the inspection reports were poor.

61. There is therefore an issue whether a disposition against the freight forwarders translated into a pre-disposition against Mr Payne and the key issue of his knowledge or means of knowledge to the connection with fraud, days before he was due to give evidence. However the fair-minded and informed observer would know that the Judge was again seeking to clarify the relevance of, and thereby probing, the evidence. This in itself suggests a line of inquiry consistent with an open mind. I do not consider the passages, taken by themselves, to import apparent bias.

62. The third comment to consider from this day also occurred during the re-examination of Mr Lam. The Judge had (as he himself said) "jumped in" to clarify that the present evidence was directed towards establishing that there had been a fraudulent default. Mr Benson explained the relevance of Mr Lam's evidence about the freight forwarder, saying that "it may well be that I've simply laid a basis for cross-examination at a later date which may go to knowledge or should have known." The Judge then in effect asked what the basis of HMRC's case was going to be as to the issue of the appellants' knowledge or means of knowledge:

> "I see. I mean the contention that somebody was complicit in the fraud could, for instance, be based on these facts, could it not: it could be that the mastermind comes along and he finds the present appellant, and he says, 'You will do admirably as an exporter because you have an existing genuine trade. I'm not going to tell you a thing about the chain prior to the fact that you will actually buy from Worldtech, but you will be claiming back the VAT, which in fact has probably not been paid, or you will be claiming back the VAT.'… Now, that would be enough, even if the appellant was completely oblivious to the circumstances of any default to establish active participation in the fraud. We don't have to show you are a conspirator with every party going down the chain with the fraudulent defaulter."

63. Mr Trollope submitted that the "mastermind" was a construct of the Judge; it had been raised neither as part of the pleaded case of HMRC nor in course of the evidence and this was but the first of several references to a mastermind. Mr Trollope also noted the similarity between the above passage and the conclusion reached in the FTT's decision at [126]:

> "no better cover could be found by the mastermind behind fraudulent transactions than to channel fraudulent deals through a legitimate grey market trader, were there one who could be duped, or persuaded, to participate in the chains as the exporter."

64. Mr Trollope submitted that the comment showed a pre-disposition at a very early stage of the proceedings to find a mastermind behind all of the transactions connected to the fraudulent evasion of VAT, whatever the evidence and submissions by the appellants. Further, that pre-disposition to find a mastermind was implicitly followed by a pre-disposition to find that the appellants' transactions were connected with fraud and that the appellants' knew or should have know of that connection, both of which were the key matters of contention between the parties.

65. However a great deal of material had been provided to the FTT for pre-reading and the Schedule Bundle in particular suggested that the whole chain of transactions had been organised. It was pleaded that the transactions "were artificially contrived transactions and part of an orchestrated fraud on the Revenue" and that each chain's "true nature can be seen as part of a contrived scheme to defraud the revenue". HMRC's detailed skeleton argument made the same point several times, stating, for instance, that:

> "the Appellants must have been witting participants to what was an organised fraud using contrived transactions … the links between the parties at different ends of the chain by itself show that this was beyond coincidence and had to be an organised scheme which would only work with the Appellants as witting participants."

Indeed Mr Lam's own witness statement had concluded that West 1's defaults "were part of a deliberately contrived scheme".

66. I find, first, that the passage was simply part of a discussion between the FTT and HMRC's counsel in which the FTT, at an early stage, was trying to clarify which parts of the evidence presented by HMRC were intended to prove which parts of the *Kittel* test. The discussion on the necessary knowledge or means of knowledge of the appellants did jump ahead of the issues being raised by Mr Lam. However, that jumping ahead only took place after the Judge had clarified that Mr Lam's evidence was limited to the question of there being a connection between the transactions and a fraudulent default. Moreover, it went to the issue that the Judge would have identified from the pre-reading as being the key issue in dispute in the case. In other words, the FTT was doing no more than trying to establish the contours of the dispute.

67. Secondly, the Judge clearly expressed his point as a hypothetical example and not as a closed or concluded view. He appeared to do so merely in order to test the precise nature of the *Kittel* test as regards the required knowledge or means of knowledge.

68. Thirdly, it is artificial of Mr Trollope to suggest that the "mastermind" was a concept purely of the Judge's construction. HMRC's pleadings, written submissions and written evidence all pointed towards the overall scheme being organised. "Mastermind" may have been the Judge's choice of language, but "organiser" and "orchestrator" are labels for the same concept. Had the Judge adopted either of those labels, their linguistic derivatives in the pleadings could be identified precisely. In my view, nothing turns on the choice of the label "mastermind" which is therefore not a construct of the Judge.

69. Fourthly, the FTT evidently considered it to be unrealistic to assume that a fraud of this nature was not orchestrated by somebody, rather than just happening as an unrelated acquisition fraud. When in the Worldtech deals the payments in ten transactions were rotated through eight companies in roughly one hour per rotation it was inconceivable, found the FTT, that the 12 payment rotations could have been effected by pure chance. In any event, that was a preliminary view which could have been, but was not, changed when Mr Payne gave evidence or otherwise by the appellants.

70. Fifthly, just because matter ends up in the decision does not mean that the Judge had concluded his views on the matter at an earlier stage. It merely means that his preliminary view is the one which eventually finds favour.

71. I conclude that the fair-minded and informed observer would not have regarded this comment by the Judge as demonstrating a real possibility of apparent bias on the part of the FTT.

72. A last comment of the Judge on 13 August 2012 was made when Mr Lam's re-examination had concluded. The Judge asked Mr Lam a few questions on behalf of the FTT. His first question was this:

> "THE JUDGE: I wonder whether I could just ask you the one question. There was some respect in which some things were supplied late by West 1.
>
> MR LAM. Yes.
>
> THE JUDGE: Was that simply the provision of other supporting documentation, such as invoices and so forth, so that the initial return -- I know I've been taken to it but I've forgotten it -- actually included, in April, the figures that were eventually thought by the Revenue to be the correct ones, or was it, even though it was a contra-trader's return it was just a smaller contra-trader's return, and lo and behold, the Revenue discovered later facts, that actually there was vastly more involved than was initially revealed in the first return?"

73. Mr Trollope submitted that this was a leading question that suggested (especially because of the sarcasm inherent in "lo and behold" and the use of what he described as "HMRC parlance" in the apparently pejorative expression "contra-trader") that the FTT had already sided with HMRC on the question of the existence of a connection between the appellants' transactions and the fraud. The question also had the effect, he said, of adducing additional material that furthered HMRC's case.

74. However, the FTT was entitled to ask questions and leading questions are sometimes more efficient than open ones. The questions that the Judge asked do not suggest bias. They are simply part and parcel of the judicial process.

75. As for using HMRC language, such labels were used in HMRC's essentially uncontested evidence as well as the pleadings. The Judge would have substantially reviewed these during his pre-reading. Also, HMRC's skeleton quotes Christopher Clarke J in *Red 12 Trading Limited v. HMRC* [2009] EWHC 2563, which uses words such as "defaulter", "buffer" and "broker". Using HMRC labels in an effort to understand complicated factual issues in tax evasion disputes does not suggest bias. They are simply mechanisms to aid understanding and communication between counsel and the tribunal. Indeed I observed that even Mr Trollope only just managed to stop himself using such labels before me by prefixing them with "so-called".

76. A fair-minded and informed observer, aware of the types of questions asked by judges in tax disputes and the language used in such cases, would not have queried the Judge's question at the end of Mr Lam's evidence.

Mr Chambers's evidence

77. The second, third and fourth days of the hearing contained the evidence of Mr Alan Chambers, the officer of HMRC who had disallowed the appellants' input VAT for the 17 transactions in April, May and June 2006. His evidence was wide ranging. Counsel for HMRC was using his evidence in aid of its critical contentions that the appellants' transactions were connected to fraud and that they knew or should have known that they were so connected.

78. During the course of the afternoon of 14 August, Mr Trollope was cross-examining Mr Chambers on a repayment of £1.14m input VAT made by HMRC to GSM in August 2006 for the April 2006 period. Later correspondence from HMRC to the appellants had claimed that the April 2006 repayment had been made as a result of an administrative error. Mr Trollope was testing through cross-examination the proposition that the repayment had not been made in error but instead had been a deliberate decision on the part of HMRC after the process of "extended verification". There was the added implication that Mr Chambers was not being honest in his evidence. The appellants therefore wanted to establish that there had been no error.

79. The Judge intervened with the following observation:

> "I might say, I am slightly lost, because the only significance that I can see at present to the fact that the repayment claims were made might be an argument which would have very little relevance, to the effect that HMRC led the appellant to think that everything was fine. I say that has very little significance, because the test that the respondents have to establish is all to do with the actual knowledge of the appellant. It may be of some significance that HMRC were not putting it on notice at as early a point as they might have done, but the question is still going to be whether the respondents sustained their burden of proof in showing knowledge or means of knowledge, which is going to be the relevant question.
>
> I don't quite see the significance of whether these repayments were made wrongly or in a way that lulled the appellant into thinking that all was well, or whether the explanation for the fact that the repayments were made was an administrative error. I find it pretty odd that HMRC would advance the point that they made such a significant administrative error, if that were not the case. I must say, I'm rather inclined to accept that evidence at present."

A short exchange then occurred between counsel for HMRC and the Judge in which it was clarified that this repayment had occurred in August 2006. The Judge then said:

> "…surely the point is any indications and frames of mind induced by them in August are completely and utterly irrelevant to whatever was the only relevant matter, the state of mind in April, May and July?"

80. Mr Trollope immediately showed his disapproval at this intervention:

> "I'm deeply disturbed, if I may say so, by the remarks that are being made by the tribunal at the moment, which appears not only to pre-judge the end of my cross-examination, but appears to me also to ignore a glaringly obvious point, which is this: that these returns have been investigated by the Revenue under the extended verification procedure since their submission in May, June, July and August. After those investigations and in the light of those investigations, the payments were made.
>
> I am going to continue with this witness -- if I'm permitted to do so -- in relation to his contention that they were made by way of procedural error. It appears that this has central relevance -- that, if on investigation, the Revenue did not find either that my clients had the knowledge or means of knowledge of fraudulent tax loss in the deal chains for that month as of August 2006, the question then arises for them and for you, sir, as to what evidence thereafter which caused them to reverse this finding, demonstrates either that we have the knowledge or means of knowledge of the fraud alleged."

81. The Judge responded:

> "Since you have challenged me for pre-judging the issue, I will make it absolutely clear that I have not done so and that I have still utterly failed to understand your point.
>
> Firstly, you may have entire liberty to go on questioning Mr Chambers, because it would be good to have a question to Mr Chambers. You may continue questioning Mr Chambers about whether, in fact the repayments were made as an administrative error.
>
> All that I say is that I cannot understand, at present, any significance to any frame of mind that might have been engendered on the part of the appellant by whatever happened in August."

82. Mr Trollope then explained to the Judge that the question of whether or not there was a procedural error as to the repayment was a "clear indication of what the Revenue considered to be the position vis-à-vis the repayment claim" which was relevant as "contemporaneous evidence of the state of mind and of the perception that the Revenue had of the GSM claim for the period ending April 2006."

83. The Judge repeated that he was happy for Mr Trollope to continue but said that the fact that HMRC might not have been able to meet its evidential burden that GSM had the requisite knowledge or means of knowledge in August might be "of very marginal significance".

84. Mr Trollope submitted that the Judge had made a premature decision to accept the evidence of Mr Chambers without allowing the cross-examination to conclude, allowing the evidence as a whole to conclude or hearing argument on the point. It was also perverse because a trader was entitled to assume that, where prior HMRC verifications had taken place and repayments were made, he could continue to claim input VAT for subsequent similar transactions. The Judge's comments therefore amounted to another indication that the tribunal was pre-disposed to find in favour of HMRC.

85. However, I observe that the Judge went on to say,

> "I should be delighted for you to continue your questioning in a moment, but I still say that your safeguard is that the Revenue still has to demonstrate, in August 2012, if it is going to prevail in this case, that there is evidence that can be produced now that demonstrates the test that we all know –I won't bother to restate it– in relation to the means of knowledge of the appellant."

86. There are three issues to be considered here. First, I suppose, whether the Judge was right to regard the issue of whether a repayment in August 2006 was made intentionally or in error on the part of HMRC as largely irrelevant evidence for the purposes of the *Kittel* test. In my view, that would be the view of a fair-minded and informed observer. (I note in this context that only one of the appellants, GSM, was allowed to deduct input tax; in the case of the other, input tax was disallowed.) As the repayment was made after the relevant period, it could not have influenced the appellants' attitude at the time to the transactions under appeal. The Judge made his comments only after lengthy cross-examination and after an interjection by Mr Benson to the same effect. HMRC's reasons for repayment in August 2006, even if "by choice", are largely immaterial to Mr Payne's knowledge or means of knowledge in the earlier period. The tribunal is entitled to limit what it sees as irrelevancies.

87. Secondly, there is the issue of whether the Judge had a closed mind on the issue. He did not, as is shown by his use of the expression "at present", his acceptance of the "very marginal significance", "very little relevance", "very little significance" of this evidence (with an explanation of what it was) and his allowing the questioning to continue. The intervention, in that light, appears to me to fall squarely within what Sir Thomas Bingham MR (as he then was) saw as acceptable judicial behaviour in *Hashim*:

"on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking."

88. That tradition should of course be balanced against preventing counsel from proceeding with a line of questioning, even if the tribunal is likely not to give much weight to the evidence adduced from such a cross-examination. I do not believe that the Judge risked shutting down the line of questioning with his strong language ("completely and utterly irrelevant") as in the event Mr Trollope was expressly invited by the FTT to continue the questioning and did in fact do so. I cannot ignore the fact that the appellants were represented by competent and experienced leading counsel who was not frightened by the Judge and was well able to turn the FTT's views around.

89. Thirdly, I see nothing wrong in the Judge's wish to move the evidence on from a point that had now been made at length and which he considered to be largely irrelevant.

90. A fair-minded and informed observer would have considered that Mr Trollope had met a good deal of difficulty on this particular point. However, I do not think that this exchange would have made the postulated observer consider that there was a real possibility that the Judge had a general pre-disposition against the appellants. The Judge had simply again used colourful language to express his current thinking on the particular point that Mr Trollope was advancing at that time. He was not pre-judging the issue; he wished to have it clarified.

91. The second and third interventions on 14 August 2012 were as follows. Mr Chambers had just given evidence to the effect that HMRC had learnt of its error shortly after repayment had been made and before letters were sent to the appellants confirming those repayments. However, those letters had confirmed the repayments and did not mention any such error. The Judge then intervened:

"THE JUDGE: Can I just check two points, because at one point the questioning was proceeding on the assumption that these letters were sent before the mistaken repayments themselves had been paid?

MR CHAMBERS: No they were sent after, sir.

THE JUDGE: It only makes sense, they were sent afterwards.

MR CHAMBERS: Yes.

THE JUDGE: I imagine they were sent afterwards as being a sort of face-saving way of making it clear that the position remained open, without actually acknowledging that the payment had been erroneous.

Nevertheless, the letters did make the point that further inquiries were being conducted.

MR CHAMBERS: Yes, sir, but --

THE JUDGE: Am I now clear that something that appears very firmly to suggest that an administrative error occurred, namely that, with identical circumstances in both periods, the same traders, same phones, the erroneous payment to GSM was not matched by a payment to Sprint; is that right?

MR CHAMBERS: Yes, that's correct, sir, and --

THE JUDGE: Two near enough identical cases were dealt with quite differently, which of itself seems pretty crazy, as if perhaps it supports the administrative slip-up point."

92. The Judge intervened shortly thereafter on a similar point. Mr Trollope was asking Mr Chambers why it was that HMRC had not only made repayments in August 2006 but had also made a repayment supplement (essentially a penalty for delaying repayment) for the same period. He asked whether the repayment supplement indicated that the repayments had not been made in error but rather by choice after satisfaction of an extended verification process:

"MR CHAMBERS: I cannot explain why repayment supplement was made.

THE JUDGE: Can I just clarify, yet again there's a timing point, because you have just suggested that the sequence of events was one, make the main repayment claims, Mr Chambers says erroneously. Secondly, observe that that has been an error. Thirdly, and subsequently, still allow the repayment supplement to go out. Can I be clear, did the repayment supplement go out before, effectively, the two errors or even the first error had been detected?

MR CHAMBERS: It's my understanding that the repayment in error of the returns triggered the repayments supplement automatically.

THE JUDGE: And almost simultaneously?

MR CHAMBERS: I gather so, yes.

THE JUDGE: On the face of it, before the Revenue, in the sense of the Revenue knowingly appreciating what had happened, tumbled to the fact that there had been an error?

MR CHAMBERS: Yes, the secure note has gone off to --

> THE JUDGE: Liverpool or wherever --
>
> MR CHAMBERS: to make a payment, it's been processed in error and automatically the repayment is made and the repayment supplement is made."

93. Mr Trollope submitted that these exchanges supported the view that the Judge had already come prematurely to a settled opinion well before the end of cross-examination that the repayments, and repayment supplements, in August 2006 had been made in error. The leading questions above amounted to a re-examination by the Judge, taking on the role of counsel for HMRC, in order to disprove the line of argument that, at that moment, was being advanced by Mr Trollope.

94. However I am satisfied that the questions largely consisted of the Judge clarifying the issue and were not made in order to support a conclusion that the Judge had already made. The Judge's exchanges with Mr Trollope and Mr Chambers would again have confirmed to a fair-minded and informed observer that Mr Trollope was failing to make progress on this evidential point. The observer would also have noted that Mr Trollope had been allowed to continue his line of questioning and indeed had done so at some length. The exchange therefore falls squarely into the allowance made by Sir Thomas Bingham MR in *Arab Monetary Fund v. Hashim*:

> "…a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be."

95. By this time it was seems clear that the FTT was going to find against the appellants on this point but it had allowed Mr Trollope to continue making it for some time. A predisposition on a particular point will not, without more, translate into a general disposition against a party.

15 August 2012

96. Two of the Judge's interventions from 15 August 2012 are complained of. He opened proceedings by requesting that counsel, at some point, spend a little more time on the "elementary bits" of the transaction including the appellants' documentation. The Judge commented in passing that those documents were "utterly silent on everything".

97. Mr Trollope again submitted that this showed a pre-disposition against the appellants, providing a platform for the Judge to then fire sustained criticism at the appellants on a number of issues. His conclusion eventually appeared in a similar form in the FTT's decision at [69]:

> "Turning finally to the Appellants' invoices, they simply referred to the number and model of phones, did not repeat the Cellaway wording about 'Spec', and were otherwise entirely silent in relation to terms."

98. However the Judge was to my mind primarily expressing a view as to the usefulness of the invoices in assisting the FTT's understanding of the transactions that had taken place. The invoices did in fact contain no terms and the Judge was not stating a closed view because he expressly prefaced his statement as follows:

> "I quite follow that some of this would come out during the cross-examination of Mr Payne, but that is still some days off…"

Although he was expressing his disapproval of the form of the invoices, that could only have been provisional as he was well aware, as can be seen from this comment, that Mr Payne would have the opportunity of explaining it.

99. The second remark took place just before the end of the day and also related to the due diligence documentation relied upon by the appellants to evidence how they had endeavoured not to become involved in chains of dealing where there might be fraudulent evasion of VAT. The Judge observed:

> "I think Lord Justice Moses makes it perfectly clear in *Mobilx* that we must look not just at the due diligence, which I have to say often seems to me to be staggeringly meaningless, just in the sense that, from February 2006 onwards, after the decision in *Optigen*, it was perfectly clear that the strategy of fraudsters, where there were fraudsters, would be to see that the immediate parties had VAT numbers that would pass the Redhill tests and so forth.
>
> We're encouraged to look more at the overall circumstances, and that will certainly, in time, include everything in relation to the payment terms and the credibility of the overall trading contracts. Maybe it is not at this stage, and we will remain patient, but we will certainly want to know what the terms were in relation to these deferred payments where we see in relation to the Worldtech/Cellaway deals, Worldtech is seemingly being paid in three amounts. It may be that it is giving a bit more credit, which, having regard to the fact it's already given 1.5 million credit, would not be particularly significant, but we will need to understand all that in due course."

100. Mr Trollope submitted that this comment was "highly significant". During the morning's cross-examination, correspondence between HMRC and the appellants on the question of due diligence had been considered at length. In particular, evidence had been adduced of Mr Payne's actual due diligence as to the companies immediately linked to the appellants in the transaction chains. Mr Trollope had submitted to the FTT that this due diligence demonstrated Mr Payne's bona fides.

101. He submitted that, despite this earlier evidence, the Judge's comment on the "staggeringly meaningless" value of due diligence showed that he was disposed to pre-judge a trader's documentary evidence with general disbelief. He had a settled view that due diligence could never acquit a trader of having the knowledge, or means of knowledge, required by the *Kittel* test. There was an assumption of fraud on the part of a category of traders and the appellants clearly fell into that category. All this was before the evidence had been fully heard and, indeed, contrary to the evidence that the appellants had adduced thus far. Mr Trollope said that this approach was the opposite of what was required by the relevant case law: reasonable steps taken by a trader to ensure that there was no connection to fraud could constitute sufficient due diligence.

102. He also said it was significant that a version of this comment had also found its way into the FTT's decision at [60]:

> "We attach little importance to due diligence, save where facts actually revealed by it pose obvious questions. Generally however, when the fraudsters have been distanced from the broker or exporter by some mastermind by the insertion of a string of buffer companies that will inevitably have accounted for their VAT on their thin margins, due diligence generally proves of no assistance in testing the knowledge and means of knowledge issue in MTIC appeals."

103. However it is plain that the Judge was not making a sweeping statement applicable in all cases and was not abdicating his responsibility to look carefully at the evidence in the present case. Indeed he used the word "often". He was simply making it clear that he would look beyond the due diligence documentation and consider the overall circumstances in order to ascertain whether the appellants knew, or should have known, that the transactions were connected to fraud. He was meaning to pre-judge neither the evidence on due diligence that had been raised that morning nor the evidence that was yet to come. He was simply saying that he expected counsel to cover more than just due diligence when seeking to prove or disprove Mr Payne's knowledge or means of knowledge.

104. In this he was only following *Mobilx* in which Moses LJ said at [75]:

> "The ultimate question is not whether the trader exercised due diligence but rather whether he should have known that the only reasonable explanation for the circumstances in which his transaction took place was that it was connected to fraud."

And at [82]:

> "… Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was."

16 August 2012

105. Most of the appellants' criticisms relate to the evidence of Mr David Farmer, a senior HMRC officer in the MTIC fraud team. A good deal of the day was taken up with the evidence in the Schedule Bundle which purported to explain how the 17 transactions under appeal were connected to the fraudulent evasion of VAT.

106. The Judge's primary concern was to understand Mr Farmer's very technical analysis of each of the 17 transaction chains in order to determine whether HMRC could make out its case.

107. The FTT was considering a transaction in which it was common ground that two companies either side of the appellants in the chain were controlled by the same person, based in Telford. One of the companies, called Trading Point, was a Danish company. The Judge noted that "Trading Point" was a "well-known Danish name".

108. Mr Trollope submitted that this sarcasm was aimed at the key issue of Mr Payne's knowledge or means of knowledge. In other words, the Judge was implying, despite having not heard substantial evidence, that it would not have taken much for Mr Payne to realise that the two companies either side of him in the chain were connected.

109. I do not think that a fair-minded and informed observer would have made an inference that wide in scope. The remark is limited to its face value, namely that Trading Point is an English name, not a Danish one. One cannot

reasonably take the comment beyond that, and certainly not so far as to say that it was seriously intended to doubt Mr Payne's position as to lack of knowledge.

110. The second, third and fourth comments took place when the FTT was examining Mr Farmer's diagrams of the transactions. These diagrams purported to show the circularity of the transactions, in other words, that they amounted to carousel fraud.

111. The second comment is contained in the following exchange:

> "THE JUDGE: But I think what I am expecting to see is that the first two deals that we have been dealing with here will be -- is this right, the same phones, the same amounts?
>
> MR TROLLOPE: No.
>
> MR BENSON: No, the same phones.
>
> MR TROLLOPE: Ah, well, that will be a matter however --
>
> MR BENSON: Same model.
>
> MR TROLLOPE: Well, excuse me, that will be a matter of cross-examination. Could I say this, sir, that the tribunal barely need reminding that not only is March not under appeal, there have been no assessments in relation to March. The repayments were claimed and made in accordance with the procedures then in existence and it is very difficult to see how in terms of knowledge or means of knowledge any supposed pattern of payments in March could conceivably relate to the appellant's knowledge or means of knowledge in April, May and June. So although Mr Benson and Mr Farmer can present this evidence as they choose, I'm bound to say that our submission in due course will be that it's got absolutely no relevance whatsoever on the key issue of knowledge or means of knowledge. And I don't accept either Mr Farmer's analysis in terms of either tracing or in terms of following the goods in the invoices. But that will be a matter for cross-examination.
>
> THE JUDGE: I'm just trying to see what I should have -- could I go very slowly? Can you make sure that I have got the best chart, the Paris server chart, for the first deal in March, which I imagine is SB1/36?
>
> MR BENSON: Yes, it is.
>
> THE JUDGE: Where can I get the best chart for the second deal?

MR BENSON: SB1/38.

THE JUDGE: That's what I thought. Now, I thought you told me that I was wrong when I had said that it was my assumption that we were dealing with 9,000 Nokia 8800s in both transactions?

MR BENSON: It's because you said March and April.

THE JUDGE: I certainly didn't mean to. I meant the first deal in March and the second deal in March --

MR BENSON: Yes.

THE JUDGE: -- are the same numbers of the same phones.

MR BENSON: The same model of phone, yes.

THE JUDGE: The same model of phone.

MR BENSON: Yes."

112. The third passage read:

"THE JUDGE: So that in a sense what we're seeing here, albeit that they're framed as two deals, is exactly what we see in relation to April, where within the one deal it appears that chunks of money I think go round at least twice, discharging the debt – perhaps I'm jumping ahead.

MR BENSON: We're going to come to it.

THE JUDGE: You're going to come to that.

MR BENSON: We're going to come to it.

THE JUDGE: But in the sense it's the same point here. We have two different deals here. The same chunk of money does double service, it seems. The appellant may suggest otherwise.

MR BENSON: If the tracing is right.

THE JUDGE: But in the April deal it's the same point, but within one deal, the 173 and the 175?

MR FARMER: Sorry?

THE JUDGE: I may have jumped the gun. Let's wait till we get there."

113. The fourth passage took place a little later, just before the end of Mr Farmer's evidence-in-chief. The circularity of funds point was put to the witness by the Judge with respect to another transaction under appeal: "Before we leave A, is there any evidence of the same money going round in circles again here or not?"

114. Mr Trollope again submitted that the Judge was presupposing fraud in the Taxpayer's transactions by suggesting that the same phones had been used in more than one of them. He further submitted that the diagrams produced by Mr Farmer were highly contentious but that the Judge appeared to be accepting the information contained in them at face value and arriving at premature conclusions.

115. The evidence of Mr Farmer was complex and detailed and the transcript showed that the Judge was simply trying to understand the meaning and implications of the diagrams ("I'm just trying to see what I should have…could I go very slowly?") and of HMRC's evidence-in-chief. This exchange is a case in point. At first, the Judge mistakenly thought that the diagram showed that the same phones were circulated but, as can be seen by the later exchange, it was then clarified that the diagram merely referred to the same models of phones as opposed to specific phones. As for the contentious nature of the diagrams, it is important to bear in mind that HMRC were, at this point in time, submitting their evidence on this issue. The Judge was trying to understand it. If Mr Trollope considered that the Judge's understanding needed to be corrected, he still had the opportunity to do so as he had not yet cross-examined Mr Farmer. Indeed, in the third passage, the Judge noted that the appellants would "suggest otherwise" with respect to the circularity of the transactions.

116. The next two judicial interventions in issue are as follows.

> "Let me see if I can make my point and if I'm completely off target you'll have to let me know. If we looked at matters solely for one set of transactions and we did not use VAT monies that come back in respect of a previous claim for a previous period … and we did not apply monies in paying off a loan, but we just looked at the trading payments, we would surely not expect United to end up with cash in hand equal to the gross VAT because we would have expected certain amounts of profit to be left in each of the participants, a big amount in the hands of the broker and trivia in the hands of each of the buffers, and the ultimate net extraction to whoever it is, the foreign mastermind, would definitely not have been 17.5 per cent equal to the VAT loss. The extraction would have been 17.5 per cent minus the profit margins left in the hands of the UK participants, surely."

And:

> "So that I expect some foreign entity – and I think we were calling it United for a moment -- to end up at the end of the day, depending on which each schedule is meant to show, of course. It may he that this schedule isn't showing the cycle that I am looking at. Indeed, I think it isn't, because, we're using a VAT repayment for an earlier period into the cash flow here. …
>
> But we're not using part of it because we're saying that is loan repayment, because we've got all sorts of muddled items in here. But just on the simple cycle, I am expecting the 17.5 to be shared out smidgens to the brokers, a good chunk varying between 5 -- we see here even up to 10 per cent to the broker that exports, assuming the money is recovered from the Revenue, and the balance then of those amounts over and above the tax that is not accounted for is the profit to the mastermind."

117. Mr Trollope has two issues with these passages. The first is the use of the "mastermind". The second is the use of pejorative terms such as "brokers", "buffers" and "smidgens". These are just some of the examples of the Judge's frequent use of these terms during the course of the hearing. Mr Trollope submitted that this showed a pre-disposition to treat all companies within the chain of transactions as culpable in the fraud which was inconsistent with HMRC's actual treatment of these companies. HMRC has not denied these companies their entitlement to recover input VAT.

118. I reject this point for the same reasons as before. These terms are primarily used by the FTT as shorthand expressions that convey an understanding as to each company's physical place in the overall chain of transactions. They do not, by themselves, convey an implication that the tribunal was pre-disposed to find that all of the companies connected to the fraud were culpable in the fraud. Moreover, these terms could be found in many places across the Schedule Bundle being considered by the FTT. A fair-minded and informed observer would expect that a judge would use the linguistic labels found in the evidence under consideration in order to both critically engage with it, and in order to effectively question counsel and witnesses on the basis of it.

119. As to HMRC's position, HMRC do not accept that the other companies were not part of the fraud. They merely say that they have not, for one reason or another, denied their input tax reclaims. The issue, of which the Judge was well aware, was whether *the appellants* satisfied the *Kittel* test or not.

120. The next comment by the Judge of which the appellants complain came just before lunch on 16 August 2012. Mr Benson was tackling the loan that Worldtech had made to the appellants. The Judge said:

> "…But then no terms govern the risk implicitly assumed by Worldtech on the April deal outstandings, whereas the March deal we have seen a scruffy loan agreement, with a few misprints, that imposes a penalty rate on that on my rough calculation…"

121. Mr Trollope submitted this statement showed that the FTT was taking a hostile view of the loan arrangements between the appellants and Worldtech long before Mr Payne was able to give evidence on the matter. By "scruffy loan agreement", the Judge was implying that the loan agreement was a worthless commercial document. This gave rise to a perception that the tribunal was biased.

122. This is yet another example of the Judge's use of colourful language. By itself, I do not think it would give rise to the perception that there was a real possibility of bias on the part of the tribunal. The Judge used the phrase "scruffy loan agreement" as a shorthand reference, flagging his disquiet.

123. The final subject of complaint from this day is that during the course of the afternoon the Judge effectively took over questioning of Mr Farmer on the amounts and timings in the "rotations" as set out in the Schedule Bundle's diagrams. The passage in question is rather lengthy and, as little turns on the context and the exact wording, I do not set it out.

124. Mr Trollope submitted that these questions were not so much directed at clarifying the evidence as asking leading questions in a tone that indicated scepticism of the appellants' case. In other words, the Judge was presupposing what the evidence was about to be.

125. In my view the Judge was merely comprehensively going through Mr Farmer's complex diagrams in order to consolidate his understanding of them. Although the wording is again colourful, I do not consider that a fair-minded and informed observer would, from this passage, conclude that the FTT was pre-judging the issues in dispute. The comments made cannot reasonably be construed to that end in a context where the parties did not dispute that there had been a fraudulent evasion of VAT and there was no real contention that the transactions in question were not connected to that fraud. Mr Trollope still had cross-examination ahead of him at this point. He could have dealt with any of the answers that the Judge had obtained from his questioning at that time.

22 August 2014

126. Mr Fletcher was HMRC's expert witness on grey markets in the case. His cross-examination and re-examination had just come to an end and the Judge asked some questions of his own about "box-breaking" (i.e. selling phones that had been removed from their original packaging):

> "Can I ask you a question about changing plugs and so forth. I personally would not buy a phone unless it was in a box that had got a wrap around it that looked as if it had never been opened. Now, I'm very muddled by this. I think if I was in Africa and I was an African, I perhaps wouldn't mind because I would expect that it had may be come through -- it had been ditched by Tesco, flogged on to the grey market and it had come to me pretty cheap, so I wouldn't be too fussy about the cellophane wrapping. But I am right, aren't I, that if these particular phones here had come into the UK, most obviously they would have 3 pin plugs and now they haven't got 3 pin plugs, so somebody has opened every single neat box and when I open a box I tend to tear it, because they tend to have those things that sort of go in and rather lock the box, and I have taken the cellophane off."

127. Mr Trollope remarked that this comment was distasteful, unpleasant and nationalistic. He submitted that it showed that the Judge had an attitude towards the grey market that was informed not by the evidence but rather by personal taste and prior experience. The Judge was vocalising an assumption that box-breaking was an activity limited to "Africans in Africa" and did not take place in the UK. On that basis, the Judge was prepared to dismiss all of the appellants' evidence to the contrary.

128. At first sight, the comment does seem alarming. However, Mr Benson, took me to material that provided the all-important context:

- The two experts, Mr Fletcher and Mr Attenborough, had disagreed on the ease of entry to the box-breaking market in the UK. Mr Fletcher believed that Mr Attenborough had underestimated the infrastructure and resources required for a trader to take part in this market.

- The two experts had also disagreed on "dumping" activity in the grey market, that is to say, the selling of volume handsets into overseas markets. During Mr Trollope's cross-examination of Mr Fletcher during the previous afternoon, attention had been drawn to an exhibit to Mr Attenborough's expert report: a *Mobile News* article from March 2010 entitled "*RP Europe: Distribution's Number Two?*" The following excerpts from the article were read out to the FTT:

"Many European dealers now view Asia and Africa as a convenient dumping ground for unsold stock. Highly subsidised and frequently replaced, the European handset is cheap and prevalent. Dealers constantly battle to manage their stock and anticipate consumer demand. Outdated models, in reality, less than twelve months old, frequently find their way onto the grey market. A high handset churn rate in Europe, the US and the Middle East has even opened up smaller routes to market in the form of recycling schemes.

…

In an interview with Bangladeshi magazine, *New Age*, Nokia's General Manager for Customer and Market Operations in emerging Asia, admitted that until 1995 as many as 85 per cent of all Nokias sold in Bangladesh were sourced from the grey market. The figure, Prem Prakash Chand says, has now dropped about 40 per cent following nationwide consumer education programmes.

India is where many observers look to when assessing the grey market. At its grey market peak in 2001 it was estimated 89 per cent of all mobile handsets in circulation were purchased outside of official channels. The market was fuelled by rapid demand for handsets in a geographically dispersed country that couldn't be catered for by the official outlets and by high taxes on mobile products.

A steady supply of handsets, many refurbished models from South East Asia and the Middle East and many smuggled into the country, helped to meet demand and allowed handsets to be sold between 20 and 40 per cent less than their official counterparts."

- Mr Trollope had then taken the FTT to an email from Tesco to the Appellants which said that a batch successfully acquired by the latter from the former were "to be exported from the UK, preferably to Africa or the Far East, proof of export required."

129. The Judge was therefore reacting to the evidence being presented to him by the appellants themselves and not imposing personal assumptions or knowledge on the present case. Although as a matter of form he could have referred to Africa, India or the Far East rather than simply to an "African", he cannot be faulted on the grounds of bias, apparent or actual. As to substance, it appears that the Judge was forming a view on the conflicting expert evidence as to the extent of a box-breaking market in the UK. But this was at the end of the lengthy evidence given by Mr Fletcher. It was reasonable for a tribunal to have formed such views by that point.

130. The second intervention on this day came towards the end of the afternoon. Mr Attenborough was now being cross-examined. The Judge remarked:

> "Could I just make one observation? It really is only an observation, and it is the feature that the fraudsters behind these transactions were dealing in a risky product, just in the sense that however quickly they circulated it, it was an expensive product and they would ultimately need to put it back into the genuine market and sell it.
>
> Exploring that point here, because we know that these transactions are in fact fraudulent, we don't know that they are carousel transactions, that the same phones come back round and round again, and it is theoretically possible that some of the March phones might be exactly the same phones as some of the April ones, or the May ones, but on the assumption that this was all trading in different phones there's no reason to suppose these phones went into the genuine grey market or retail market in any of the periods April, May, June or July. They may not have done.
>
> So it is possible that we have a source of 70,000 phones actually sitting in this room, so to speak, being the March and the April volume sales that doubtless, I mean, the fraudsters would not have said 'well, I have whirled them round MTIC cycles, however many times. I have made X. I will now just dump the lot and chuck them in the channel', they would surely unload these into the genuine market. So these would be there to be sold."

131. Mr Trollope again submitted that the Judge had a closed mind. He had reached a view about the grey market before conclusion of the evidence. However it is clear to me that the Judge is merely speculating aloud ("theoretically possible") ("It is speculation … there are a lot of speculations." "We don't know they are carousel transactions".) The issue here was that this particular transaction involved a very high proportion of the overall number of a particular model of phone in circulation in the market. The Judge was trying to understand what would have been done with these phones after the fraud and was speculating that they would have been reintroduced into the legitimate grey market. The only closed view that a fair-minded and informed observer would be able to identify in the above passage is that there was a fraudulent evasion of VAT, which was common ground between the parties in any event.

23 August 2012

132. The final judicial intervention criticised by the appellants before Mr Payne gave evidence came during the evidence of Ms Louise Payne, Mr Payne's sister, who kept the appellants' books.

133. During the morning, Mr Benson cross-examined Ms Payne on her role at the companies and had just finished considering some of the documentation relating to the April 2006 transactions under dispute. The Judge intervened:

> "THE JUDGE: I wonder, before we leave that one, can I just see that I have this right: we seem to have some slightly confusing points. We have the instruction -- was it at page 18 -- to the freight forwarder, which said, 'Please release to Greek company, freight forwarder, somewhere in Germany'. At the bottom that said 'please inspect, rather than 'you must have inspected, but please send us the report'. The witness said that that release satisfied the 'Don't release until inspected' on the CMR.
>
> MR BENSON: It doesn't say 'inspected' on the CMR. That is on Cellaway's invoice.
>
> THE JUDGE: No, what I meant was, did not --
>
> MR BENSON: Release until written instruction.
>
> THE JUDGE: The CMR.
>
> MR BENSON: The CMR had an instruction, 'Do not release until written instruction'.
>
> THE JUDGE: Until written instruction, but the witness's evidence was that the written instruction was indeed page 18.
>
> MR BENSON: Yes.
>
> THE JUDGE: We seem to be releasing -- on the face of it -- before the goods could have been inspected and if we were expecting them to be paid for as I think their purchase order said, only when they had been inspected, presumably by the German freight forwarder. We are then surprised again because in fact it looks as if the payments -- we don't quite know the timezones -- but the payments almost exactly coincided with the points at which the goods would have been en route to Dover.
>
> MR BENSON: Yes.
>
> THE JUDGE: Because the payments were about 5 or 6 o'clock.
>
> MR BENSON: Payment is likely to have been made after the document which purports to be the release is sent. They are released before the payment.

THE JUDGE: Just, but nevertheless before the goods could have been inspected in Germany.

MR BENSON: Yes.

THE JUDGE: They have two oddities?

MR BENSON: We would say yes, but that's a matter for submission.

THE JUDGE: Yes.

MR TROLLOPE: And evidence.

MR BENSON: And evidence.

MR TROLLOPE: Further evidence.

THE JUDGE: It does stand to reason that the evidence is that these goods -- I think we're talking about the 25th now -- did not arrive at the gates of Eurotunnel until, I think, 7.51."

134. Mr Trollope submitted that this passage, which came in the middle of cross-examination, showed a concluded view because it presupposed, before Mr Payne had given evidence, that the evidence would show that the appellants would not have received payment for their goods until after release.

135. However the start of the exchange ("can I just see that I have this right") showed that the Judge was simply concerned with understanding HMRC's submissions. Further, the issue of timing of payments was relevant to the appellants' knowledge of the fraud and thus the application of *Kittel*'s case. Where he moved onto points that had yet to be covered, counsel pointed out that this was a matter for further submission and evidence and, at that point, cross-examination resumed. I do not think that this intervention would be regarded by a fair-minded and informed observer as the basis for perceiving a real possibility of bias.

The overall position before cross-examination of Mr Payne

136. Mr Trollope submitted that Mr Payne, by the time he entered the witness box in the afternoon of 23 August 2012, must have felt that he could not persuade the Judge to change his stated views on a number of key factual issues that pointed towards the appellants knowingly playing a part in the fraudulent evasion of VAT. These were that:

- That there had been a mastermind behind the fraud;

- That the freight forwarders and their subcontractors were "bucket shop" and "almost virtual" so that he was damned for having used them;
- The whole chain of companies were involved, and perhaps even implicated, in the fraud as "buffers", "brokers" and so on;
- the repayments relating to the April 2006 transactions had been made in error and not following satisfaction through extended verification on the part of HMRC;
- The appellants' documentation was "scruffy" and inadequate to the point of being uncommercial, both as regards its invoices and its financing arrangements with Worldtech;
- The appellants' due diligence was useless because it was "staggeringly meaningless";
- The fraud was likely to have taken the form of a carousel fraud, with the same money, and perhaps even the same phones, being rotated;
- "Trading Point" was an English-sounding name, despite being a Danish company, and Mr Payne should have realised this;
- The legitimate grey market in the UK was less likely to include box-breaking than in the developing world; and
- It was a badge of fraud that the buyer paid the purchase price to the appellants with respect to some transactions while the goods were in transit rather than after their inspection. In other words, it was surprising that the payments almost exactly coincided with the points at which the goods would have been en route to Dover, rather than once goods had been released to the buyer.

137. However the legal test for apparent bias is not how Mr Payne actually perceived matters to be before giving his oral evidence. Instead, it is the objective test whether a fair-minded and informed observer would have considered there to be a real possibility that there was bias.

138. In my view, the fair-minded and informed observer would not have considered that to be the case as that observer would not have considered most of the comments and interventions to give rise to any issue at all. Mr Payne had provided a witness statement and he was not going give any evidence on a number of these matters, such as whether there was an element of circularity in the funds passing through the chain of transactions or whether HMRC had allowed the recovery of input VAT for the April 2006 in error. The FTT was entitled to express its views by this stage of the trial about matters that were not going to be addressed by Mr Payne.

139. I make the preliminary observation that a judge (and the fair-minded informed observer) is well aware that a case may be turned on its head when the tribunal has heard evidence from the defence and therefore any views expressed before such evidence can only be provisional.

Mr Payne's oral evidence

140. Mr Payne gave his oral evidence during the course of the 23 August, 24 August and 28 August 2012.

141. The first judicial intervention complained of took place early during the morning of 24 August 2012. Mr Payne had just been cross-examined on a due diligence visit report on Cellaway from a separate case that HMRC had adduced as evidence in this case in order to challenge some of Mr Payne's evidence as to his own knowledge of Cellaway. Mr Payne made a comment on that document that produced the following exchange:

> "MR PAYNE: Can I just -- can I say something on this last document?
>
> MR BENSON: Yes, certainly.
>
> MR PAYNE: The CTM document [i.e. the due diligence visit report]. At the end of the conclusion, you read the first part, but on the second part it says: 'The Greek tax authorities have checked that there are no VAT risks with Cell Away, and at this stage with their trading patterns, none are apparent.'
>
> MR BENSON: Yes.
>
> MR PAYNE: This was done in June 2006, when they had already traded. So if the Greek tax authorities, that would have access to a lot more information than me, don't think there is a risk, then how would I have made the wrong decision?
>
> MR BENSON: Except, of course, there is no risk to the Greek tax authorities, because the goods never come in or go out and. Therefore they --
>
> MR PAYNE: Nevertheless, they are the tax authority.
>
> MR BENSON: As far as their own -- this is perhaps a matter of argument --
>
> MR TROLLOPE: It certainly is. If they were engaged in fraud, the idea that the Greek tax authorities wouldn't have an interest in participation in Europe-wide MTIC fraud is absurd.
>
> THE JUDGE: Although we are talking about Greece."

142. Mr Trollope submitted that this was a flippant, unpleasant and nationalistic comment. The Judge was bringing his prejudices to bear on the case. It also

was a dismissive attitude to adopt towards a valid point made by Mr Payne, namely that if the relevant tax authorities did not appear to have the means of knowledge as to Cellaway's fraudulent activities then it was not reasonable to expect otherwise of Mr Payne.

143. However the document in question was primarily relevant because Mr Payne had visited Cellaway in Greece and had claimed to visit the offices from which they operated. This report suggested that Cellaway actually operated from a domestic residence. Further, the force of Mr Payne's point on this unofficial report on the Greek tax authorities' position was considerably muted by the facts (a) that no tax was payable in Greece anyway and (b) that other evidence had been given to the FTT that showed that the Greek tax authorities were in fact suspicious of Cellaway's activities.

144. In my view, the Judge should not have said what he said. It may have been intended as a joke, but it was not funny. But that is because it might have been perceived as jingoistic, and not because the fair-minded and informed observer might have taken the comment as meaning that there was a real possibility that the Judge was biased against the appellants.

145. The second and third comments came shortly afterwards. Mr Payne was now being cross-examined on the written contracts that had been in place between the appellants and Worldtech and Cellaway:

> "MR BENSON: At this point in time did you have a contract with Worldtech for these goods?
>
> MR PAYNE: No.
>
> MR BENSON: No?
>
> MR PAYNE: No….
>
> MR BENSON: You say that you don't have a contract with Worldtech. Do you have a contract with Cellaway?
>
> MR PAYNE: No. We don't have a contract with any of our suppliers or customers.
>
> MR BENSON: If the goods --
>
> THE JUDGE: I wonder, could I just be clear about that? You say you didn't have a contract, but of course at R4/20 and R4/21, we have your purchase order and their invoice.
>
> MR PAYNE: Yes, I mean I don't --

THE JUDGE: Admittedly, as contracts go, it is diabolical and it does say 'cash basis', and I have no idea what that means. It doesn't particularly say credit, it doesn't say anything, but that, on the face of it, is a contract.

MR PAYNE: I would disagree with that, respect[full]y. Because when we dealt with the iPods with Asda. Asda ordered million worth of iPods on a purchase order and then when they realised they couldn't sell the stock they tried to back out of it. And my conversation with the purchasing department was, 'We've got a purchase order', and they said, 'Yes, that's just a purchase order, we don't have a contract'.

THE JUDGE: I think my knowledge of contract law is rather better than yours.

MR PAYNE: Yes, it is, yes.

MR BENSON: It is what he thought.

MR PAYNE: I am only going by experience.

MR TROLLOPE: One has to listen to the witness as to what he thought. Of course his understanding of contract law will be different, of course, from yours, sir … It may well be that what he thought Mr Benson was talking about is a written contract, because that's a matter of complaint that is frequently made by respondents in cases such as this. …"

146. Mr Trollope said that both remarks ("diabolical" and as to a contract) showed hostility to the witness. The second remark was a dismissive approach to a response by Mr Payne as to why there were not detailed written contracts. Mr Payne's comment that there was not a contract was simply a reflection of the common mistake made by lay persons that contracts must be in writing.

147. As to the first comment, I consider that the fact that the documentation was inadequate was a view that the FTT, at this stage of the evidence, was entitled to express. There were indeed few written terms and, where there were written terms, Mr Payne's evidence was that they did not reflect the substance of the bargains between the parties. As to the second comment, the Judge should not have snapped at the witness for his mistake in not knowing that a contract did not have to be in writing. But that did not in the event affect Mr Payne's evidence. The Judge was evidently frustrated by Mr Payne and, importantly, did not believe him.

148. Therefore I do not think that the two comments would prompt the fair-minded and informed observer to consider that there was a real possibility of bias.

149. The fourth passage came when Mr Payne was being cross-examined on the financing provided to the appellants by Worldtech. The Judge sought to clarify whether the loan documentation contained a typographical error such that it referred to the wrong model of phone and remarked:

> "That's the only thing that would make sense. Ergo, their invoice rather like the loan agreement, rather like the skimpy terms in every other piece of paper, whenever anything is written down, it seems to be wrong?"

150. Mr Trollope again submitted that this evidenced the same dismissive and hostile attitude as seen in the preceding passage and further suggested that the tribunal had a closed mind on the subject of the adequacy of the documentation for the transactions.

151. However by this stage the witness had been giving evidence for about a day and was plainly found not to be credible. The Judge's statement that "whenever anything is written down, it seems to be wrong", was borne out by the evidence that the FTT had already considered at length. It was open to the witness to correct the Judge but he could not do so. Thus the Judge was entitled to form the view which he did.

152. The final judicial intervention to consider arose on the last day, 28 August 2012. Mr Benson was still cross-examining Mr Payne when the Judge asked him:

> "These payments, on Mr Farmer's payment flows, which are replicated in what counsel did on page 16 of the summary note that we were given, as requested … seems to show payments that considerably exceed the invoice prices. Am I reading that correctly? The explanation is that the payments were also for something else?"

153. Mr Trollope again submitted that this showed that the Judge had come to a conclusion as to the evidence. Had the Judge really wanted to clarify the evidence, that question would have been directed to the witness.

154. However, I note the start of the exchange:

> "I'm getting confused about something – unless you are going to come to this – I'm puzzled about the relationship between the invoice prices and what was actually paid…"

And, later on:

> "I hear what you say. You must understand that we're struggling to understand this…"

155. It is therefore ludicrous to suppose that this comment taken by itself could give rise to the perception that there was a real possibility of apparent bias.

Conclusions on this Ground of Appeal

156. I have considered each of the comments and interventions of the Judge that, in Mr Trollope's submission, constituted instances where the test for apparent bias was met. In my view, none of these comments, by themselves, would meet the test for apparent bias.

157. There is however another issue, namely whether the comments would have produced a different result in the mind of the fair-minded and informed observer when taken as a whole. The relevant comments are:

- Mr Joseph's inspection team were described as being "a bit jokey about the whole thing", overstating HMRC's evidence on this point;
- The Judge was minded very early on to find that the repayments with respect to the April 2006 transactions were made in error;
- The financing documentation between the appellants and Worldtech was pejoratively described as "a scruffy loan agreement"; and
- The Judge's dismissive attitude to Mr Payne, when giving evidence, on two occasions:

    1. First, in dismissing Mr Payne's point on the due diligence visit report out of hand with a glib joke that could be perceived as nationalistic; and

    2. Secondly, in describing Mr Payne's contractual arrangements as "diabolical" and then snapping in evident frustration at Mr Payne's mistaken assumption that there could not be a contract without a formal written document.

158. I say yet again that the test is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. That observer would have been at the back of the chamber in Bedford Square for the whole of the trial, which took the best part of a month. He or she will have been informed as to general tribunal procedure and practice, including pre-reading and the contents of the written submissions and evidence that the parties had put before the FTT, including the materials that the Judge was likely to have reviewed during the pre-reading time.

159. I do not consider that such an observer would have considered that the Judge's remarks, taken together, constituted apparent bias on the part of the FTT. They must be placed in context: they constitute a very small selection from over 1,400 pages of transcript. These four short passages (indeed all the passages complained of taken together) are insufficient to infect the whole hearing. The appellants have attempted to isolate small points in the evidence and construct a case around them on the basis that they would have coloured and informed the FTT's view of the whole. The FTT found the evidence against the appellants to be overwhelming in various respects, all of which they dealt with carefully and in detail in the Decision. I do not forget that I heard less than three days of argument in a case in which below there was nearly a month of argument and evidence and in which, as I have said, the appellants were represented by leading counsel.

160. I infer from the terms in which the Judge refused permission to appeal that he would say that his mode of expression in this case was because it was a plain one. However, he is evidently a man who expresses himself forcefully. He seems to invite criticism by repeatedly using extravagant qualifying adjectives, such as "utterly", "utterly and completely", "entirely", "staggeringly", "wholly", "abundantly,", "extremely", "astonishing[ly]", "manifestly", "remotely", "totally", "completely", "fully", "absolutely", "decidedly", "perfectly" and the like. And that is just his use of adjectives. He did not like the appellants' case, nor did he believe Mr Payne (for all sorts of reasons), and he said so in no uncertain terms. His language was colourful. As in *Simper*, I feel bound to observe that his language and a few of his comments during the course of the hearing (namely his comments about the "jokey" inspection, the Greek tax authorities and his put-down to Mr Payne about his grasp of contract law) were "injudicious", but I also find, as in *Jiminez*, that the parties, and a fair-minded and informed observer, could have been in no doubt objectively (and as I have said, the test is an objective one) that the views which he expressed were only preliminary views and that there was no real possibility of bias.

The other Grounds of Appeal

The Upper Tribunal's jurisdiction

161. An appeal only lies on a point of law: s. 11 of the Tribunals Courts and Enforcement Act 2007. It is not therefore open to this court to consider appeals on findings of fact by the FTT. Indeed, the court has consistently warned against shoehorning challenges to findings of fact into appeals on errors of law. In *Georgiou v. Customs and Excise Commissioners* [1996] STC 463, 476, Evans LJ cautioned:

> "…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 abused in this way. … 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."

162. As to when incorrect findings of fact can amount to errors of law, Lord Radcliffe said in *Edwards v. Bairstow* [1956] AC 14, at 39:

> "[An appeal court's] duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado…"

163. This was set out in slightly greater detail by Briggs J in *Megtian Limited v. HMRC* [2010] EWHC 18 (Ch); [2010] STC 840, at [11]:

> "The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view. An error of law may be disclosed by a finding based on no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact."

164. In *Georgiou* Evans LJ went on to set out a four-stage process for examining challenges to findings of fact, as follows:

> "…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."

Mr Trollope has not engaged with this four stage process, addressing only the first and the third stages.

165. The principle in *Edwards v. Bairstow* was not specifically invoked to demonstrate that this tribunal must assume that some misconception of law is responsible for the decision. I consider that, in places, the appellants were not appealing on points of law but instead, making general complaints as to the FTT's finding of facts which are beyond the jurisdiction of the Upper Tribunal unless they fall within the *Edwards v. Bairstow* principle.

166. Mr Trollope submitted that the FTT committed breaches of the appellants' right to a fair trial because of various failures, with which I will deal in turn.

The FTT's approach to its fact finding role: several instances in which the FTT allegedly considered evidence not put forward by either party at the hearing

167. First was the comment at [38] of the FTT's decision that a particular rotation of funds "beat the record". The sentence to which exception was taken is:

> "One particularly swift rotation of payments through the 8 companies took 42 minutes, though once the cash had reverted to its starting point, three minutes later it commenced another rotation and beat the record, returning to the starting point after 36 minutes."

168. Mr Trollope submitted there was no such record and, in any event, this had not been raised at trial for the appellants to deal with.

169. This is clearly a jocular reference to the fact that the rotation in question was quicker than earlier rotations in the same case. I reject Mr Trollope's suggestion that "the record" was based on the Judge's experience in other cases.

170. Secondly there were the references to the "mastermind" at [41], [60], [126], [130] and [153] of the Decision. Mr Trollope submitted that this was never part of HMRC's case and was not properly put to Mr Payne in his evidence. It was submitted that the "mastermind" construct was used to circumvent evidential difficulties in finding that Mr Payne had actual knowledge of the fraud. Mr Trollope also objected to the fact that this "mastermind" finding was applied to other companies, and not just the appellants, as well as to periods outside that in dispute.

171. This is essentially a continuation of the "mastermind" point in the appeal on bias which I have already rejected. I find that HMRC both sufficiently pleaded and advanced evidence such that the FTT was entitled to reach this finding. I note that HMRC's evidence in this regard included information relating to the other companies in question and to periods outside those at the

heart of the dispute. It is not open for this tribunal to review the FTT's factual finding on this evidence. In any event I would not choose to do so.

172. Thirdly there were the findings made at [158] about the grey market. Mr Trollope submitted to this tribunal that these were pure supposition and that there was no evidence adduced at trial in support of them. However every one of the factual findings made in the relevant paragraph of the FTT's decision can be traced to the expert reports of both parties and to some of the other witness statements of various HMRC officers.

173. Fourthly, Mr Trollope submitted that the FTT had incorrectly made factual findings at [38], [52], [60] and [113] against other companies in the transaction chains where no evidence was adduced that those parties had been fraudulent. However the FTT did not go beyond the evidence set out in HMRC's Schedule Bundle and in particular the diagrams produced from data on the servers of First Curaçao International Bank NV. As there was evidence upon which these findings could reasonably be made, it is beyond the jurisdiction of this tribunal to look any further.

174. Mr Trollope's final submission on this ground of appeal was that the FTT's finding that these companies were, in some sense, complicit in the fraudulent evasion of VAT did not match HMRC's own assessment of the situation as none of these companies has been denied the right to recover input VAT. I have already dealt with this matter. Whatever the position of HMRC outside the tribunal setting (which may include considerations of practicality and resourcing), the FTT was entitled to make this factual finding from the evidence and, at the risk of repetition, this tribunal's jurisdiction does not include reviewing the FTT's findings of fact.

The FTT allegedly failed fairly and impartially to assess the evidence of Mr Payne

175. This ground of appeal is essentially a re-working of some of the remarks and interventions made by the Judge during the course of Mr Payne's oral evidence.

The FTT allegedly failed to evaluate the evidence relating to the appellant's knowledge

176. Mr Trollope submitted that the FTT's finding that the appellants had actual knowledge of the connection to the fraud was in error because:

- It either ignored or failed to give sufficient weight to HMRC's concession that they had no link with the defaulting traders;
- There was no evidence that they knew of the role of the defaulters or that there would be a default;
- It placed disproportionate weight on the loan agreement between the appellants and Worldtech, which it wrongly considered to be uncommercial and thus fraudulent, and ignored similar such loans made between the parties for legitimate grey market activity; and
- The appellants' loss with respect to the Cetro Tek deal could not, *contra* the FTT at [172] – [173], support the case against the appellants because (i) it contradicted a previous finding that speed and immediacy of payments were important to establishing the requisite knowledge element of the *Kittel* test and (ii) was "unfair", "unreasonable" and in parts "pure supposition".

177. This is again an attempt to circumvent the principle in *Edwards v. Bairstow.* It is not open to this tribunal to review the findings of fact made in the FTT. The FTT's findings were made on the basis of evidence put before it by HMRC and were plainly not unreasonable. Taking each point briefly in turn:

- The absence of a link between the appellants and the defaulting traders does not bar a finding of actual knowledge on other evidence before the FTT;
- Likewise, the lack of evidence about the appellants' knowledge of the defaulter does not bar a finding of actual knowledge on other evidence before the FTT: see e.g. *Edgeskill v. HMRC* (above) at [126] per Hildyard J;
- It is not (absent *Edwards v. Bairstow*) open to the appellants to challenge the weight that the FTT gave to different parts of the evidence, as that amounts to an appeal as to fact, but I would note that the FTT's negative view of the loan agreements appears to be based on evidence before it; and
- The relevant paragraphs of the FTT's decision simply held that (i) the fact of non-payment was unusual in the circumstances but (ii) that fact could not relied upon in order to rule out a connection to VAT fraud.

178. Accordingly, I dismiss this ground of appeal also.

The FTT allegedly failed to evaluate the evidence correctly by considering, or coming to conclusions based on, evidence not before it

179. Mr Trollope submitted that the FTT considered evidence that had not been before it. However, the one example cited is the comment in the FTT decision

at [7] that relatively small margins are "common among buffer companies". This reflected Mr Chambers's evidence that:

> "A common feature of MTIC fraud is the differing profits enjoyed by the broker and buffer traders. Typically the profit margin achieved by the buffer is substantially less than 1% whilst the broker margin is up to 10% or even more…"

There was also evidence about this in the witness statement of Mr Rod Stone, another officer of HMRC. I am satisfied on this basis that there *was* evidence before the FTT on this point.

The FTT allegedly failed to evaluate the evidence properly by making findings on a case that had not been pleaded by HMRC

180. Mr Trollope submitted that HMRC did not plead, submit or adduce evidence that supported the FTT's findings: (i) relating to the knowing involvement of buffer companies (ii) that there was a "mastermind" behind these companies and (iii) that the appellants were persuaded to act as a front for the "mastermind".

181. Mr Trollope referred to *Armitage v. Nurse* [1998] Ch 241, at 254–257 where Millett LJ held that:

> "fraud must be distinctly alleged and as distinctly proved … if the facts pleaded are consistent with innocence, then it is not open to the court to find fraud. … an allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud."

182. This principle applies to tax disputes: *Blue Sphere Global Limited v. HMRC* [2008] UKVAT 20694, [30] per Judge Wallace. Further all allegations of impropriety and lack of bona fides should be exhaustively and unequivocally particularised in writing prior to cross-examination: *Pegasus Birds v. HMRC* [2004] STC 1509, [38] per Carnwath LJ.

183. However, HMRC need do no more than plead and prove *Kittel*'s test: *CallTel Telecom Ltd v. HMRC* [2009] EWHC 1081 (Ch), [58]–[73] per Floyd J and *Megtian Limited v. HMRC* [2010] STC 840, [30]–[39] and [40]–[50] per Briggs J. Thus it only needs to plead: (i) that there is a connection between a taxpayer's transaction and the fraudulent evasion of VAT and (ii) that the taxpayer knew, or should have known, of that connection.

184. Indeed Hildyard J rejected a similar contention by Mr Trollope in *Edgeskill* at [126]:

> "…The Appellant's contention that the FTT erred in law in disallowing deduction in the absence of a plea and proof of conspiracy is untenable also. I accept the Commissioners' submission that the test is the same in the context of contra-trading cases as in others: did the claimant/Appellant know or should it have known of the connection between its transaction and the fraudulent evasion of VAT or its disguise?
>
> I accept further that there is no requirement upon the Commissioners to prove either that the Appellant knew that the chains in which it was involved were part of a contra-trading stratagem, or the identities of the companies involved.
>
> It is the knowledge of fraudulent evasion which is of the essence; not its mechanics or labels…"

185. Turning to the three specific instances raised by Mr Trollope (see [181] above), I do not consider that any one of them allows this appeal to succeed.

186. As regards (i), I am satisfied that this finding was justified on the basis of the evidence in the Schedule Bundle and HMRC's written pleadings and submissions as presented to the FTT. I have identified the relevant parts of the HMRC's submissions and evidence in the appeal on bias, and it is unnecessary to repeat them.

187. As regards (ii) and (iii), for the reasons already given in the appeal on bias, I am clear that there were sufficient pleadings and evidence to justify the FTT's use of the label "mastermind" to reflect the fact that the fraud was organised.

188. Moreover, as regards (iii), the FTT found both that the transactions were part of an organised scheme fraudulently to evade VAT and, that in some of the cases the appellants knew of that connection. Accordingly, it is only common sense to find that that the organiser or mastermind would have had to have persuaded or otherwise induced the appellants to take part. In any event the point is immaterial to the application of the test in *Kittel*.

The FTT allegedly failed to evaluate the evidence by making findings against the weight of the evidence or contradictory to earlier findings

189. First, the FTT made a finding at [42] and [130] that the appellants had been "extremely lucky" to recover input VAT for transactions in March 2006. Mr Trollope submitted that this was "tantamount to a finding of participation in fraud" that was contrary to HMRC's actions with respect to this repayment.

190. However the FTT properly considered the March 2006 transactions in order to assess the wider circumstances in which the appellants operated. When considering the appellants' knowledge or means of knowledge, it was reasonable to consider the March transactions, which were for present purposes very similar to the disputed April transactions. It is not within this tribunal's jurisdiction to subject this finding to more searching review.

191. Secondly, Mr Trollope submitted that although the FTT found that the Worldtech loan to the appellants was suspicious, it failed properly to consider the unchallenged evidence that (i) a very similar loan had been made in the preceding period with respect to a legitimate transaction and (ii) another similar loan had been made subsequently with respect to another legitimate transaction.

192. However, the FTT considered at length a good deal of evidence on the Worldtech loan and gave a detailed assessment of the loan in its decision at [70] – [78]. This tribunal will not reopen the FTT's factual findings on these financing arrangements.

193. Thirdly, Mr Trollope submitted that the FTT came to an incorrect finding as to Mr Payne's integrity, contradicting the evidence as to the appellants' trade in the legitimate grey market.

194. The FTT's decision records the argument at [5] and [118] that as the appellants also had a legitimate grey market trade this was highly relevant to Mr Payne's integrity. Nevertheless, the FTT concluded (see e.g. [9]), as it was entitled to do, that Mr Payne had given untruthful, incomplete, unsatisfactory and conflicting evidence ("wholly unconvincing") at trial. [127] simply notes that Mr Trollope's submissions as to Mr Payne's integrity did not reflect the evidence before the FTT. The FTT was entitled to reject Mr Trollope's submissions on this issue if it felt that the evidence did not support the submission. It is not open to this tribunal to overturn the FTT's first hand assessment of the witness.

The FTT allegedly failed to apply the relevant test as regards invoicing and trader's documentation

195. In so far as I have not already dealt with this matter I deal with it under the next heading below.

The FTT allegedly failed to evaluate the evidence properly by giving weight to irrelevant material

196. Mr Trollope submitted that the FTT erred in its evaluation of the evidence by giving weight to the absence of terms in the invoices. He said that the

appellants had furnished the FTT with invoices from legitimate grey market transactions between the appellants and leading UK supermarkets, which were similarly lacking in detail beyond that required by European legislation. The state of the invoices was, he said, therefore irrelevant to the matters before the FTT.

197. The FTT was entitled, as a matter of law, to treat the lack of commercial terms in transaction documentation as relevant to the *Kittel* test. The position of leading supermarkets is simply different. It was not irrelevant for the FTT to consider the invoices for the transactions under appeal. It is not therefore open to this tribunal either to reassess the weight placed on the invoices by the FTT or to do anything else that might amount to considering an appeal from the factual findings of the FTT.

198. In any event, the terms of the invoices were by no means the only feature of the disputed transactions that prompted the FTT's finding that they were inconsistent with bona fide deals. The FTT looked at the transactions in the round in deciding that they were artificial. I quote the Judge's refusal to grant permission to appeal (on the ground of "obvious maths") at [70]:

> "…I refer to a few paragraphs of the decision that make it clear that it is decidedly odd that product can be imported into the UK, then exported back to Europe, and a relatively stable profit of 6% to 10% can be made without effort. Having regard to the absolutely obvious reality that in honest trading VAT will merely reduce profits in that scenario (by a cash flow disadvantage), and that the double transport costs, freight forwarder costs and insurance costs will render such "in and out" transactions unviable, very special circumstances apart, I see nothing exceptionable in just commenting on something that must be obvious to everyone."

Conclusion

199. For the reasons given above, I would dismiss the appeal on all grounds and uphold the decision of the FTT.

THE HON MRS JUSTICE PROUDMAN DBE

RELEASE DATE: 27 November 2014