[2018] UKFTT 0249 (TC)

TC06481

Appeal number: MAN/2006/0642

FIRST-TIER TRIBUNAL
TAX CHAMBER

INFINITY DISTRIBUTION LIMITED (In Administration) **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 13 April, 2018

Having heard Mr I Bridge for the Appellant and Mr J Benson QC for the Respondents

IT IS DIRECTED that

(1) In relation to the Appellant's appeals against the denial of deductions of input tax on the grounds of an alleged contravention of Regulation 14(1) of the Value Added Tax Regulations 1995 (1995/2518) ("Regulation 14(1)) (hereinafter referred to as the "Invalid Invoice Claims"), the Respondents are barred from taking further part in the proceedings and the appeals are summarily determined in favour of the Appellant.

(2) In relation to the Appellant's appeals against the assessments to VAT and adjustments to the VAT due from the Appellant on the basis that there was insufficient evidence of export and that the conditions for zero-rating the supplies of the relevant goods had not been satisfied (hereinafter referred to as the "Export Claims"), the Appellant's application for the Respondents to be

barred from taking further part in the proceedings and for the appeals to be summarily determined in favour of the Appellant is dismissed.

(3) The directions which follow at (4) to (13) below, both inclusive, relate solely to the appeals in relation to the Export Claims and replace all earlier directions in respect of those appeals apart from the direction set out at (2) above. References in those directions to "the appeals" are to the appeals in relation to the Export Claims.

(4) Save to the extent that it has filed in the Tribunal (without exhibits) and served on the Respondents (with exhibits) any witness statement(s) (including updates of witness statement(s) previously so filed and served) upon which it intends to rely in the final hearing of the appeals before the First-tier Tribunal by the date (the "Direction (4) Date") falling 60 days after the date on which these directions are released, the Appellant shall be barred from filing and serving any further witness statements in the appeals provided that, if there is/are one or more appeals in relation to the direction set out at (2) above, the Direction (4) Date shall be, instead of the date set out above, the date falling 60 days after the date on which the decision in respect of the last of those appeals to be made is released.

(5) By no later than 56 days from the Direction (4) Date, the Respondents shall:

(a) file in the Tribunal (without exhibits) and serve on the Appellant (with exhibits) the final redacted version of the witness statement of Ms Holden which complies with the order made by the Court of Appeal;

(b) file in the Tribunal (without exhibits) and serve on the Appellant (with exhibits) any witness statement(s) (including updates of witness statement(s) previously so filed and served) upon which they intend to rely in the final hearing of the appeals before the First-tier Tribunal; and

(c) notify the Tribunal and the Appellant of any witness statement upon which they intend to rely in the final hearing of the appeals before the First-tier Tribunal and in relation to which they wish not to make the relevant witness available for cross-examination, together with the reasons why they wish to rely on the relevant witness statement without making the relevant witness available for cross-examination.

(6) By no later than 14 days after the date on which the Respondents have complied with the direction set out at (5) above, the Appellant shall notify the Tribunal and the Respondents in writing of:

(a) which, if any, of the Respondents' witnesses it requires to be made available for cross-examination at the final hearing of the appeals before the First-tier Tribunal; and

(b) if the Respondents have specified any witness statement pursuant to (5)(c) above and the witnesses which the Appellant requires to be made available for cross-examination pursuant to (6)(a) above include any witness whose witness statement has been so specified, the reasons why the Appellant wishes the relevant witness to attend the hearing and be available for cross-examination and any matters of which the Appellant wishes the First-tier Tribunal to be aware in considering whether or not to direct the attendance of that witness.

(7) By no later than 14 days after the date on which the Appellant has complied with the direction set out at (6) above, each party shall provide to the Tribunal in writing (and copy to the other party):

(a) the expected number of persons which it anticipates attending the the final hearing of the appeals before the First-tier Tribunal on its behalf, in order to assist the Tribunal in identifying an appropriate venue;

(b) the anticipated duration of the hearing; and

(c) its dates to avoid for the hearing for the 4 month period commencing 60 days from the date by which it is required to comply with this direction.

(8) By no later than 42 days prior to the date of the final hearing of the appeals before the First-tier Tribunal, the Respondents shall provide to the Appellant a draft index to the hearing bundle.

(9) By no later than 35 days prior to the date of the final hearing of the appeals before the First-tier Tribunal, the Appellant shall provide to the Respondents any amendments which the Appellant proposes to the draft index to the hearing bundle referred to at (8) above. To the extent that the Appellant does not provide an amendment to the draft index to the hearing bundle within 7 days of the Respondents' compliance with the direction referred to at (8) above, the draft index to the hearing bundle will be deemed to have been agreed.

(10) By no later than 28 days prior to the final hearing of the appeals before the First-tier Tribunal, the Respondents shall provide to the Appellant an indexed, paginated and bound bundle of documents.

(11) By no later than 14 days prior to the final hearing of the appeals before the First-tier Tribunal, each party shall file with the Tribunal and serve on the other party its skeleton argument, including details of any legislation or case law authorities to which it intends to refer at the hearing.

(12) By no later than 7 days prior to the final hearing of the appeals before the First-tier Tribunal, the Respondents shall provide to the Appellant one copy of a bundle of authorities (comprising the authorities mentioned in each party's skeleton argument).

(13) The Respondents shall bring 3 copies of the documents bundle and 2 copies of the bundle of authorities to the hearing centre on the morning of the hearing by no later than 9.30am, unless the Tribunal notifies the Respondents that the copies of the bundles should be delivered to the Tribunal at an earlier date.

(14) Each party shall have liberty to apply at any time for the directions set out at (4) to (13) above, both inclusive, to be amended, suspended or set aside or for further directions.

REASONS

The reasons for the directions set out at paragraphs (1) and (2) above are set out below.

The Invalid Invoice Claims

2. The Respondents have based the denial of input tax deductions which has given rise to the Invalid Invoice Claims on the allegation that the invoices received by the Appellant in relation to the relevant supplies did not comply with the requirements of Regulation 14(1). In particular, the Respondents allege that the invoices did not meet the requirements of paragraphs (g) and (h) of Regulation 14(1) because they did not contain "a description sufficient to identify the goods" or "for each description a quantity of goods". This is not because the invoices in question failed to specify either the goods purportedly supplied or the quantity of those goods. Instead, it is because the goods described in the relevant invoices did not exist at the time of the relevant supply and therefore could not have been the items that were the subject of the purported supply. Thus, the Respondents contend that the invoices do not comply with paragraphs (g) and (h) of Regulation 14(1) because the invoices do not correctly describe the goods and the quantity of goods that were actually supplied.

3. But, crucially, in relation to the Invalid Invoice Claims, the Respondents have not alleged that the Appellant either knew or should have known – ie had either actual or constructive knowledge – that the goods in question did not exist at the time of the relevant supply.

4. The Appellant alleges that there is a series of decisions by the European Court of Justice (the "ECJ") to the effect that, where the recipient of a supply does not have actual or constructive knowledge of the non-existence of the goods that were the subject of the relevant purported supply, then, as long as it holds an invoice that is in the form prescribed by Regulation 14(1), its claim to deduct the input tax which is attributable to the supply referred to in the invoice must succeed even if that invoice mis-states the goods and/or the quantity of goods in question. The Appellant argues that this means that, even if the Respondents are correct in their contention that the relevant goods did not exist and therefore the relevant invoices did not correctly describe the goods or the quantity of goods which were the subject of the purported supplies, the Appellant would still be bound to succeed in its appeals. In the view of the Appellant, the failure on the part of the Respondents to plead that the Appellant had actual or constructive knowledge of the non-existence of the goods at the time of the purported supplies is fatal to the Respondents' case.

5. The Respondents allege that there is no authority for this contention and that, if they are able to succeed in establishing that the relevant goods did not exist and therefore the relevant invoices did not correctly describe the goods or the quantity of goods which were the subject of the purported supplies, then the invoices did not comply with the requirements of paragraphs (g) and (h) of Regulation 14(1) and the Appellant should fail in its appeals. So the Respondents argue that the appeals in relation to the Invalid Invoice Claims need to proceed to a full hearing at which the evidence in relation to whether or not the goods existed, and therefore whether or not the invoices correctly stated the goods and the quantity of goods that were supplied, in accordance with the requirements of paragraphs (g) and (h) of Regulation 14(1), can be presented.

6. If the Appellant is correct, then there is no need for any evidence to be presented in order to determine the appeals. This is because there is no dispute between the parties as to the fact that the Appellant holds invoices in the form prescribed by Regulation 14(1). Those invoices describe both the goods purportedly

supplied and the quantity of those goods. The only dispute between the parties as to the facts is whether the goods and the quantity of goods described in the invoices actually existed at the time of the purported supplies and therefore whether those invoices correctly described the goods and the quantity of goods that were the subject of the relevant purported supplies. Those questions are irrelevant if the Appellant is correct. In effect, the failure of the Respondents to plead, and subsequently establish, that the Appellant had actual or constructive knowledge of the non-existence of the goods would be fatal to the Respondents' case. I would therefore be empowered to bar the Respondents from taking further part in the proceedings in relation to the Invalid Invoice Claims and to determine the appeal in relation to those claims against the Respondents in accordance with Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules").

7. In contrast, if the Respondents are correct, then it will be necessary for the appeals to proceed a full hearing before the First-tier Tribunal at which each party can provide its evidence and challenge the other party's evidence in relation to whether or not the goods in question existed and the quantity of those goods so that the First-tier Tribunal will be able to reach a view on the facts necessary to determine the appeals.

8. In short, I need to decide whether:

> (a) the determination of the appeals in relation to the Invalid Invoice Claims depends in any way on whether the goods and the quantity of goods that were described in the relevant invoices actually existed at the time of the purported supplies (and therefore whether the invoices correctly stated the information required by paragraphs (g) and (h) of Regulation 14(1)); or
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> (b) assuming that the relevant goods did not exist at the time of the purported supplies, and therefore that the relevant invoices did not correctly state the information required by paragraphs (g) and (h) of Regulation 14(1), the mere fact that the Appellant had no actual or constructive knowledge of that fact and held invoices in the form prescribed by Regulation 14(1) means that it is bound to succeed.

9. The Appellant has pointed me to a number of ECJ decisions in support of its position although, for present purposes, I need refer to only two of them – *Mahageben and David* [2012] STC 1934 (Cases C-80/11 and C-142/11) ("*Mahageben*") and *Stroy Trans EOOD* (Case C-642/11) ("*Stroy Trans*").

10. One of the circumstances that was in issue in *Mahageben* concerned a supply of unprocessed acacia logs. A subsequent enquiry by the tax authority into the position of the supplier revealed that the supplier did not have any reserve of logs and that the quantity of logs that it had purchased during the relevant period was insufficient to fulfil the orders that had been invoiced to the taxpayer. The tax authority therefore refused the input tax deduction claimed by the taxpayer on the grounds that the invoices could not in those circumstances be regarded as authentic.

11. In answering the questions put to it in relation to that circumstance, the ECJ held that the right to deduct input tax "can be refused only where it is established, on the basis of objective evidence, that the taxable person concerned knew, or ought to have known, that the transaction relied on as a basis for the right to deduct was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of

supply" (see paragraph [52]). Citing the earlier case of *Kittel v Belgium, Belgium v Recolta Recycling SPRL* [2008] STC 1537 ("*Kittel*"), the ECJ pointed out that a taxpayer which takes every precaution that could reasonably be required of it to ensure that its transactions are not connected with fraud must be able to rely on the legality of those transactions without the risk of losing its right to deduct input tax. The ECJ went on to answer the questions that had been put to it in relation to this circumstance as follows:

"…arts 167, 168(a), 178(a) and 273 of Directive 2006/112 must be interpreted as precluding a national practice whereby the tax authority refuses the right to deduct on the ground that the taxable person did not satisfy himself that the issuer of the invoice relating to the goods in respect of which the exercise of the right to deduct is sought had the status of a taxable person, that he was in possession of the goods in question and was in a position to supply them, and that he had satisfied his obligations as regards declaration and payment of VAT, or on the ground that, in addition to that invoice, that taxable person is not in possession of other documents capable of demonstrating that those conditions were fulfilled, although the substantive and formal conditions laid down by Directive 2006/112 for exercising the right to deduct were fulfilled and the taxable person is not in possession of any material justifying the suspicion that irregularities or fraud have been committed within that invoice issuer's sphere of activity" – see paragraph [66] in *Mahageben*.

12. Whilst the judgment did not deal expressly with the point, it is implicit in the judgment (because the case in question concerned supplies of logs that were alleged not to have been available to the supplier at the time) that, in the absence of actual or constructive knowledge of the fraud by the taxpayer seeking the input tax deduction, the fact that the invoices relied on by the taxpayer in relation to the relevant supplies must necessarily have mis-described the goods that were the subject of the relevant supplies should not preclude the right to claim the input tax deduction.

13. The circumstances that were in issue in *Stroy Trans* concerned purported supplies of diesel fuel to a road haulier. Following an investigation, the tax authority concluded that there had been no actual supplies of the goods in question and refused the road haulier's claim to input tax deductions in respect of the purported supplies. One of the questions referred to the ECJ in that case was whether the principles of fiscal neutrality or proportionality and the protection of legitimate expectation were infringed by a practice in the administration and in the courts under which the recipient of an invoice is refused the right to deduct the input tax shown on an invoice in circumstances where there has been no adjustment made to the VAT for which the issuer of the invoice is required to account and "it is not possible to establish that the goods or services were actually supplied".

14. In answering that question, the ECJ held, at paragraph [44] of its judgment, that the principles of fiscal neutrality and proportionality and the protection of legitimate expectation did not preclude the recipient of an invoice from being denied a deduction in respect of the input tax shown on the invoice in circumstances where there is no taxable transaction. However, it then went on to say, at paragraphs [49] and [50] of its judgment, that, on the basis of its decision in *Mahageben*, a national court that is called upon to decide whether, in a particular case, there is no taxable transaction "must ensure that the assessment of the evidence does not result in [the decision in *Mahageben*] being rendered meaningless and in the recipient of the invoice being indirectly obliged to carry out checks of the other party to the contract which, in principle, are not a matter for him". The ECJ concluded, at paragraph [52] of its judgment, that, "if, in the light of fraud or irregularities, committed by the issuer of the invoice or upstream of the

transaction relied upon as the basis for the right of deduction, that transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring of the recipient of the invoice checks which are not his responsibility, that he knew or should have known that that transaction was connected with VAT fraud".

15. So the decision in *Stroy Trans*, whilst starting from the proposition that a taxable transaction is actually required before an input tax deduction can be claimed, went on to state, in my view somewhat confusingly, that the absence of an actual taxable transaction is not a bar to input tax recovery where the recipient of the invoice has no actual or constructive knowledge of that fact.

16. In their response, the Respondents have pointed me to a number of first instance decisions where the fact that the goods described in the relevant invoice did not exist at the time of the supply (and/or the relevant invoice mis-described the supply) precluded the recipient from claiming a deduction for the input tax described in the relevant invoice. Examples of this include *GSM Intertrade Ltd v Commissioners for HM Revenue and Customs* [2014] UKFTT 399 (TC) ("*GSM*"), *Devi Communications v Commissioners for HM Revenue and Customs* [2015] UKFTT 02016 (TC) ("*Devi*"), *McAndrew Utilities Ltd v Commissioners for HM Revenue and Customs* [2012] UKFTT 749 (TC) ("*McAndrew*"), *Plazadome Ltd v Commissioners for HM Revenue and Customs* [2009] UKFTT 229 (TC), *Pexum Ltd v Commissioners for HM Revenue and Customs* [2007] VTD 20083 and *Micropoint (UK) Ltd v Commissioners for HM Revenue and Customs* [2006] VTD 19630. The Respondents also seek to rely on the decision of Judge Herrington in refusing the application of the appellant in *McAndrew* permission to appeal to the Upper Tribunal and to the decision of the ECJ in *Reisdorf v Finanzamt Koln-West* (Case C-85/95) to which reference is made in Judge Herrington's decision.

17. In *McAndrew*, the First-tier Tribunal held that, in order to obtain a deduction for the input tax shown in an invoice, that invoice needs to meet the requirements of Regulation 14(1). It went on to hold that most of the invoices failed to meet those requirements because they did not include the name, address and registration number of the supplier and did "not have sufficient detail to properly identify the goods and services supplied, the quantity of goods or the extent of the services".

18. In refusing permission for the appellant to appeal that decision to the Upper Tribunal, Judge Herrington held that that interpretation was correct and that the contrary argument of the appellant based on *Stroy Trans* had no prospect of success before the Upper Tribunal. Judge Herrington held that the appellant's submissions in this regard "ignore that there is [a] clear distinction between the exercise of the right of deduction and the evidence that is required to prove that right" and that this distinction was clearly recognised in paragraph [19] of the ECJ decision in *Reisdorf*, where the court stated that "it is necessary to distinguish the provisions of the directive relating to the exercise of the right to deduct input tax from those concerning proof of that right after a taxable person has exercised. The distinction between the exercise of the right and proof of it on subsequent inspections is inherent in the operation of the VAT system". In the view of Judge Herrington, in *Stroy Trans*, "there was no question as to the validity of the invoices concerned; the focus of the case was on the supply side of the transaction, and the court having held that [the] output tax shown on an invoice was payable notwithstanding that the transaction concerned may not have taken place it was not surprising that the court held that the input tax was deductible, in the absence of participation in a fraud. In contrast, here, there is a clear finding by the FTT that the invoices concerned were invalid and did not meet the requirements of regulation 14…The ground of appeal under consideration here starts with the

false premise that the invoices did comply with regulation 14; had that been the case then the position would have been different but from the findings of fact that the FTT made it was entitled to reach the conclusions it did…".

19. The other cases referred to above do not really advance the position either way on the point that I am required to decide. Most of them preceded the ECJ decisions in *Mahageben* and *Stroy Trans* and, in the only cases that didn't (*Devi* and *GSM*), the taxpayer in *Devi* was found to have had actual or constructive knowledge of the fact that there was fraud – with the result that the two ECJ decisions referred to above were not in point - and the Tribunal in *GSM* appears not to have been directed to those decisions by either party. So it is really only the first instance decision in *McAndrew,* and the reasons given by Judge Herrington for refusing permission for the appellant in that case to appeal to the Upper Tribunal, which need to be considered in this context.

20. In reaching my conclusion, I am bound by the ECJ decisions referred to above. Article 4(3) of the Treaty on the Functioning of the European Union requires member States, including their courts, to respect the primacy of European law. This means that national courts must refuse to apply domestic legislation which conflicts with European legislation – see *Amministrazione della Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, at paragraph [24] of the judgment. It also follows that lower courts and tribunals must depart from the case law of higher courts, even if that case law would be binding as a matter of domestic law, where it is necessary to apply European law correctly – see the opinion of Advocate General Cruz Villalón in *Åklagaren v Åkerberg Fransson* (Case C-617/10)(12 June 2012, unreported), at paragraph 112.

21. Thus, I am bound to apply the ECJ decisions cited above, whether or not they are consistent with the decision of Judge Herrington in *McAndrew.*

22. And, in that regard, it seems to me that both *Mahageben* and *Stroy Trans* are saying that, where the taxpayer has no actual or constructive knowledge that a purported supply has not occurred, it should be both entitled to deduct, and actually able to deduct, the input tax described in the invoice that it holds as long as the invoice meets the formalistic requirements of the rules relating to invoices and despite the fact that the invoice refers to a supply of goods that did not exist at the time of the supply.

23. To say otherwise would completely emasculate the conclusion reached in *Mahageben* (and *Kittel* before that) to the effect that the recipient of a supply should not have the burden of establishing that the supply was actually made. There would be little point to the conclusion reached by the ECJ in *Mahageben* if the taxpayer's right to deduct the input tax shown on the invoice relating to the purported supply (which right was held in *Mahageben* to be preserved by the absence of actual or constructive knowledge of the fraud on the part of the taxpayer) would inevitably prove to be valueless in practice because the invoice produced by the taxpayer in exercising that right was deficient by referring to a non-existent supply. So the only logical conclusion to be drawn from the decision in *Mahageben* is that the absence of actual or constructive knowledge of the fraud on the part of the taxpayer must be sufficient both to give rise to the right to deduct the input tax shown on the invoice and also to enable the taxpayer to rely on the relevant invoice to exercise that right notwithstanding the fact that the information set out in the relevant invoice is inevitably incorrect.

24. In that context, I have noted the reference in paragraph [52] of the decision in *Mahageben* to the fact that the question asked of it must have been "based on the premise that the substantive and formal conditions provided for by Directive 2006/112 for the exercise of the right to deduct are fulfilled, in particular the condition which requires the taxable person to be in possession of an invoice which confirms that the goods were actually supplied and which complies with the requirements of that directive" and the reference in the answer given by the ECJ in paragraph [66] of that decision to the pre-condition that "the substantive and formal conditions laid down by Directive 2006/112 for exercising the right to deduct were fulfilled". In my view, the only conceivable interpretation of those words in the context of the case are that, before the taxpayer can exercise the right to deduct input tax in respect of the purported supply, it needs to hold an invoice relating to the purported supply in the form prescribed by the directive. The ECJ cannot by those words have been suggesting that an invoice in the form prescribed by the directive which improperly described the goods or the quantity of goods that were the subject of the supply did not "comply with the requirements of the directive" or "fulfil the substantive and formal conditions laid down by Directive 2006/112 for exercising the right to deduct" for those purposes because, by definition, the invoice in the circumstances which the ECJ was addressing would always be bound to have failed in that regard.

25. Moreover, it seems to me that, whilst the conclusion that I have drawn in relation to invoicing set out above can merely be inferred from the terms of *Mahageben* – in that that case did not deal expressly with what constituted a valid invoice in circumstances where the goods purportedly supplied did not exist but focused instead on whether or not the taxpayer was required to satisfy itself that its supplier was in possession of, and in a position to supply, the relevant goods – it is more clearly covered in *Stroy Trans* because the ECJ in that case was expressly considering the terms of the relevant invoice. The answer which the ECJ gave to the second question in *Stroy Trans* was that, where there has been no actual taxable transaction but the taxpayer has no actual or constructive knowledge of the fraud in question, it would be wrong to deny the taxpayer a deduction for the input tax shown on the invoice on the basis that there has been no actual supply because to do so would render the decisions in, inter alia, *Kittel* and *Mahageben* meaningless – see paragraph [50] in *Stroy Trans*, set out above. In my view, it inevitably follows from that conclusion that, as long as the taxpayer does not have actual or constructive knowledge of the fraud in question, the fact that the invoice does not correctly describe the goods or services supplied (because there has been no actual supply) cannot be a bar to the taxpayer's deducting the input tax. If the deficiencies in the invoice relating to the fact that there has been no actual supply would inevitably prevent the invoice from being used in order to exercise the right to deduct, the substance of the decision would be completely undermined. At the very least, one would have expected the ECJ to have said something about that.

26. I have considered whether the fact that both the UK domestic legislation (in Section 24(6)(a) of the VATA and Regulation 29 of the Value Added Tax Regulations 1995 (1995/2518)) and the two relevant European directives (Articles 180 to 182 in Directive 2006/112 and Article 18(3) in the Sixth Directive) give a national tax authority the discretion to accept alternative evidence of a supply (instead of an invoice) in enabling a taxpayer to exercise a right of deduction should in any way affect the above conclusion. It is true that that discretion does give rise to the possibility that a taxpayer that has a right to deduct input tax pursuant to the principles laid down in *Mahageben* and *Stroy Trans* might be able to exercise that right without

providing an invoice that properly describes the goods or quantity of goods that were the subject of the purported supply. However, I do not think that the ECJ can possibly have intended that a taxpayer in this situation would inevitably have had to rely on that residual discretion in every case. In the first place, if that had been the case, the ECJ in *Mahageben* would not have based its answer on the premise as to invoicing set out in in paragraph 24 above. More significantly, the ECJ in *Mahageben* said expressly in answering the questions asked of it that the taxable person in this situation did not need to be in possession of documents other than the invoice in order to maintain its right to deduct the input tax – see paragraph [66] in *Mahageben*, cited at paragraph 11 above. Since it would clearly be impossible for the taxpayer to avail itself of the national tax authority discretion without any evidence of the supply other than the invoice, it must follow that the ECJ cannot have been expecting the exercise of the national tax authority discretion to be the means of succeeding in the claim for the deduction in these circumstances.

27. Given the analysis set out above, I believe that the answer in this case is clear – the fact that invoices satisfying the formalistic requirements of Regulation 14(1) may incorrectly describe the goods and the quantity of goods supplied because the relevant goods were not actually supplied is not a bar to deducting the relevant input tax if the Appellant did not have actual or constructive knowledge of the fraud.

28. Since the ECJ decisions take priority over decisions of the UK courts, it is not strictly necessary for me to reach a view on the extent to which the decision of Judge Herrington in *McAndrew* is consistent with the above decisions. The facts in *McAndrew* were slightly different from the present facts in that the defect in the invoices in that case were that they did not set out the name, address and registration number of the supplier and did not have sufficient detail to identify properly the goods and services supplied, the quantity of goods or the extent of the services (see paragraphs 113 and 114 in the decision of the First-tier Tribunal in *McAndrew*). This means that, at least so far as paragraphs (g) and (h) of Regulation 14(1) are concerned, the failure in that case was not that the goods and services, and the quantity and extent of those goods and services, were both fully stated but were incorrect but rather that the goods and services, and the quantity and extent of those goods and services, were not properly described. So, in that case, the invoices in question clearly did not satisfy the formalistic requirements of Regulation 14(1). If the decision is to be read as saying that a failure to produce an invoice that satisfies the formalistic requirements of Regulation 14(1) is fatal to the recovery of the input tax shown on the invoice, then it is not inconsistent with the ECJ decisions cited above. However, this case is then distinguishable from *McAndrew* because, here, the invoices did comply with the formalistic requirements of Regulation 14(1). It is just that the goods and the quantity of goods described in the invoices were incorrect.

29. It is possible that the decision of Judge Herrington in *McAndrew* was intended to extend beyond an invoice that fails to satisfy the formalistic requirements of Regulation 14(1) and to cover, in addition, an invoice that meets those formalistic requirements but mis-states the relevant information. After all, that was the case in relation to the wrongly-stated name, address and registration number of the supplier cited in paragraph 113 of the First-tier Tribunal decision – the breach of paragraph (d) of Regulation 14(1) – even if it was not the case in relation to the failure to satisfy paragraphs (g) and (h) of Regulation 14(1). It is not apparent from the decision of Judge Herrington in *McAndrew* that he was drawing a distinction between, on the one hand, a failure to satisfy the formalistic requirements of Regulation 14(1) and, on the

other hand, a mis-statement of the information set out in an invoice that complies with those formalistic requirements. Instead, the decision appears to deal generically with both failures.

30. If the decision was intended to extend beyond a failure to satisfy the formalistic requirements of Regulation 14(1) and to cover a mis-statement in an invoice that satisfies those formalistic requirements, I do not think that it is consistent with the ECJ decisions referred to above. Moreover, I am not sure that I understand the points made in the part of Judge Herrington's judgment which is cited in paragraph 18 above, in rejecting the submissions of the appellant in that case that were based on *Stroy Trans*. The invoices in *Stroy Trans* referred to transactions which had not occurred and so, unless Judge Herrington was drawing the distinction I mention in paragraph 28 above and referring to an invoice that satisfies the formalistic requirements which are required of an invoice but mis-states certain information as a valid invoice, there must have been a question in *Stroy Trans* as to the validity of the invoices concerned. And the focus of *Stroy Trans* was not solely on the supply side of the transaction but instead on both the supply side of the transaction (question 1) and the recipient side of the transaction (question 2). In addition, I do not understand why the fact that the supplier was required to account for VAT in respect of the supplies referred to in the invoices necessarily changes the answer in this context given that the essence of this line of case law is about the extent to which the recipient of a supply who has no actual or constructive knowledge of any fraud is required to concern itself with whether or not its supplier is a taxable person or has accounted for VAT on the supply.

31. Finally, I do not think that the ECJ decision in *Reisdorf* affects the conclusion which I have reached above. *Reisdorf* concerned the question of whether, in order for a taxpayer to claim an input tax deduction, the taxpayer was obliged to rely on the original of the invoice evidencing the relevant taxable supply or could rely instead on a copy of that invoice. The contrast that was being drawn in that case was between the exercise of a right to deduct by the presentation of an invoice and the subsequent proof of that right after it has been exercised – see paragraph [26] of the decision. In any event, the case does not deal with the situation where there has been no taxable supply because of fraud of which the recipient of the purported taxable supply has no actual or constructive knowledge and so it is not relevant in this case.

32. It follows from the conclusion set out above that, in my view, the failure of the Respondents to plead that the Appellant had actual or constructive knowledge of the non-existence of the goods which were purportedly supplied to the Appellant and were referred to in the invoices presented by the Appellant to the Respondents is fatal to the Respondents' case in the appeals in relation to the Invalid Invoice Claims regardless of whether or not the goods actually existed and therefore whether or not the invoices correctly stated the goods and the quantity of goods that were supplied, in accordance with the requirements of paragraphs (g) and (h) of Regulation 14(1).

33. This means that, in my view, the Respondents have no reasonable prospect of succeeding in relation to those appeals and therefore that, in accordance with Rules 8(3)(c) and 8(8) of the Tribunal Rules, I am empowered to bar the Respondents from taking further part in the proceedings in relation to the Invalid Invoice Claims and to determine the appeals in relation to those claims against the Respondents.

34. As for whether or not I should exercise that discretion, there are two final points which I need to address.

35. First, in its skeleton argument and at the hearing, the Respondents argued that the application by the Appellant to bar them from the proceedings and determine the appeals against them was an abuse of process by the Appellant because of the Appellant's repeated delays over the course of the appeals and, in particular, since the decision of the Court of Appeal in October 2016 in relation to the nature of certain of the evidence to be submitted in the proceedings. There is much to be said in favour of this submission. As the Respondents have pointed out, their statement of case was served in October 2010 and the Appellant could at any stage since then (or at least since the decisions of the ECJ in *Mahageben* and *Stroy Trans* were handed down) have made the application that is now being made. Instead, the Appellant chose to apply to strike out part of the evidence in May 2012 and this led to appeals on that subject to the Upper Tribunal and the Court of Appeal and was resolved only in October 2016. Even if one were to accept that the course of applying to bar the Respondents from the proceedings occurred to the Appellant only upon reading the Court of Appeal decision – which makes reference to the fact that the matter before the Court of Appeal was not such an application – it was still over a year after that decision before the Appellant made the present application. Moreover, over that time, the Appellant repeatedly failed to meet deadlines that were set for it to file its additional factual evidence. Filing deadlines of 23 November 2016, 23 January 2017, 27 February 2017, 24 October 2017 and 24 November 2017 were all set and then subsequently moved at the Appellant's request.

36. In response to this, the Appellant accepts that the delays since the Court of Appeal decision in October 2016 can fairly be laid at its door but points out that these appeals date from 2006 and that the delays in the initial years were largely attributable to the Respondents.

37. I am not particularly sympathetic to the Appellant's counter-argument. It seems to me that this application should have been made long before now and that the primary responsibility for that failure lies with the Appellant. However, I am mindful of the fact that the Appellant is in administration and that its costs are therefore a matter of great concern. Under Rule 2 of the Tribunal Rules, I am required to deal with these appeals in accordance with the overriding objective, which is to say fairly and justly, and this involves, inter alia, dealing with the appeals in ways which are proportionate to the resources of the parties and avoiding delay. In the course of hearing the application which is the subject of this decision, both parties have had an opportunity to make detailed and full submissions in relation to the legal point at issue. Now that I have reached the conclusion, following those submissions, that any further finding of facts would be irrelevant to the outcome of the appeals in relation to the Invalid Invoice Claims, it seems to me that it would not be consistent with the overriding objective to have a further hearing at which the same arguments would need to be rehearsed all over again and in preparation for which both parties would need to prepare evidence. So, notwithstanding the fact that I consider the delays which have occurred to date to be largely attributable to the failings of the Appellant, I think that failing to exercise my powers under Rule 8 of the Tribunal Rules after reaching the conclusion that I have would be inconsistent with the overriding objective of the Tribunal Rules.

38. Secondly, I am mindful of the fact that, in its decision of October 2016, the Court of Appeal clearly considered that it would be better for these appeals to be determined only after the relevant facts had been found and not by way of an application to bar the Respondents from participating in the proceedings. For example, in paragraph [1] of his decision, Briggs LJ noted that:

"No strike out application of that kind has been made in these proceedings and it is probable that the resolution of the underlying legal issues would be better achieved once the relevant facts have been found, rather than on the artificial and arid battleground constituted by assumptions that one side's or the other's pleaded case is true."

39. So it is quite clear that the Court of Appeal was seeking to discourage the Appellant from making the application that the Appellant has now made because it considered that it would be better for the legal point at issue to be addressed in the context of the facts as found by the First-tier Tribunal and not on the basis of hypothetical assumed facts.

40. The Appellant has chosen not to follow that advice. However, whilst that is regrettable, it seems to me that, for the same reasons as are set out in paragraph 37 above, that is not a reason why I should decline to exercise my powers under Rule 8 of the Tribunal Rules. Declining to do so would simply result in further delays in concluding these appeals and consequent additional expense for both parties.

41. For the above reasons, I have decided that, so far as concerns the appeals in relation to the Invalid Invoice Claims, the Respondents should be barred from taking further part in the proceedings and that the appeals should be summarily determined in favour of the Appellant.

The Export Claims

42. The Respondents have based the assessments to VAT and adjustments to VAT which have given rise to the Export Claims on the fact that the conditions set out in Section 30(8) of the Value Added Tax Act 1994 (the "VATA") were not met in relation to the supplies by the Appellant of the relevant goods and therefore those supplies did not qualify as zero-rated for VAT purposes.

43. Section 30(8) VATA stipulates that, in order for a supply to be zero-rated:

> (a) the Commissioners must be satisfied that the goods in question have been or are to be exported to a place outside the member States or that the supply in question involves both the removal of the goods from the UK and the acquisition of the goods in another member State by a person who is liable for VAT on acquisition in accordance with the laws of that member State corresponding to the provisions of Section 10 VATA; and
>
> (b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.

44. The conditions referred to above are set out in Regulation 134 of the Value Added Tax Regulations 1995 (1995/2518) and Public Notice 725, parts of which have the force of law.

45. Regulation 134 provides that, where the Commissioners are satisfied that (a) a supply of goods by a taxable person involves their removal from the UK, (b) the

supply is to a person taxable in another member State, (c) the goods have been removed to another member State, and (d) the goods are not goods in relation to whose supply the taxable person has opted for VAT to be charged by reference to the profit margin on the supply, then the supply shall, subject to such conditions as the Commissioners may impose, be zero-rated.

46. Section 4 of Public Notice 725 states the following, in a box that has the force of law:

"A supply from the UK to a customer in another EC Member State is liable to the zero rate where:

> (a) you obtain and show on your VAT sales invoice your customer's EC VAT registration number, including the 2-letter country prefix code, and
>
> (b) the goods are sent or transported out of the UK to a destination in another EC Member State, and
>
> (c) you obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4."

47. In the appeals which have given rise to the Export Claims, the Respondents allege that the goods in question were not removed from the UK. In paragraph 38 of their statement of case, they set out various facts on which they intend to rely in establishing that the goods in question did not leave the UK and that the conditions in section 4 of Public Notice 725 have not been met. These are as follows:

> (a) Magic Transport BV, the freight forwarder, has been shown by Dutch Fiscal authorities to have had residential, rather than business, premises, with no facilities for the receipt, examination or storage for the quantity of mobile phones shown on the Appellant's invoices;
>
> (b) The owner of Magic Transport BV was arrested and interviewed by the Dutch Fiscal authorities and admitted to fabricating evidence of the arrival of non-existent shipments of goods. He stated that Magic Transport BV falsified CMRs (a consignment note supplied under the Convention relative au Contrat de Transport International de Merchandises par Route – Convention on the Contract for the International Carriage of Goods by Road) in return for payment, and that all consignments for which he stamped CMR notes were part of a carousel fraud scheme to defraud the UK tax authorities.
>
> (c) The judgment dated 2 July 2008 of Groningen Court, Full Bench (Criminal Division), North Fraud Division, Amsterdam, the Netherlands, in the criminal case against the owner of Magic Transport BV, Harmen Klaas Van Den Bor, found Mr Van den Bor guilty of the following criminal offences:
>
> "*Participating in a criminal organisation whose purpose is to commit crimes."*
>
> *"Acting as a co-perpetrator in forgery, committed several times"*
>
> *"Money laundering, committed several times".*
>
> (d) Easy Trading Communications SL, a customer of the Appellant, was deregistered by the Spanish fiscal authorities with effect from 18 November 2005. It had been operating from a lawyers' bureau, which was incompatible with the operation of a wholesale business.
>
> (e) Scopex BV, a customer of the Appellant, was deregistered with effect from 1 December 2005 by the Dutch authorities. Its company address was a trust office appears to have been used as a mailbox only.

(f) A further customer of the Appellant is Universal Handels. Information received from the authorities in Austria states that the supplies invoiced to several European customers by the Austrian company did not take place. The goods were sent back to Great Britain directly.

(g) There are a number of discrepancies and inconsistencies regarding the dates of the pick up of goods, the journey times of the alleged freight haulage and the invoices and CMRs supplied which do not support the Appellant's claims that the relevant goods were in fact removed or exported from the UK.

(h) One example of this is that in relation to the Appellant's invoice 2175, the CMR is stamped and dated by Magic Transport BV in the Netherlands 3 days before the goods are transported from the UK.

48. The Respondents go on to say, in paragraph 39 of their statement of case:

"Accordingly, the Commissioners do not consider that the Appellants acted in good faith and/or that they took every reasonable measure to ensure that their supply did not lead to their participation in tax evasion, in accordance with the ECJ decision in *Teleos plc and Ors v The Commissioners of Customs and Excise C-409-04*".

49. The Appellant's application for the Respondents to be barred from taking further part in the proceedings and for the appeals in relation to the Export Claims to be summarily determined in favour of the Appellant is based on the following contentions:

(a) first, the Appellant relies on the decision of the ECJ in *R (Teleos plc and others) v Customs and Excise Commissioners* (Case C-409/04) [2008] QB 600 ("*Teleos*") which, it says, means that, in the absence of a finding that the Appellant had actual or constructive knowledge of the fraud, the Appellant is entitled to zero-rate the relevant supplies regardless of whether the goods actually left the UK and the relevant export documents were false. It follows, says the Appellant, that, unless it can be shown to the satisfaction of the Tribunal that the Appellant had actual or constructive knowledge of the fraud, there is no need for there to be any finding of fact on those matters;

(b) secondly, the Appellant points out that the Respondents have never alleged that the Appellant had actual or constructive knowledge of the fraud in question. It was not in the Respondents' statement of case and the Respondents have repeatedly asserted, both orally and in written submissions, that they are not alleging such actual or constructive knowledge;

(c) thirdly, the Appellant argues that the allegation made by the Respondents in paragraph 39 of their statement of case is unparticularised. The statement is therefore inadequate as a pleading (and it is now too late for the Respondents to apply to amend the statement); and

(d) finally, the Appellant points out that the allegation made by the Respondents in paragraph 39 of their statement of case purports to require the Appellant to establish that it acted in good faith and took every reasonable measure to ensure that the relevant supplies did not lead to the Appellant's participation in tax evasion. Relying on the conclusions reached by Peter Smith J in an earlier case management decision relating to the evidence in this case, which is described in more detail below, it

argues that this is an allegation of fraud, dishonesty and bad faith the onus of proving which falls on the Respondents. The statement therefore purports to place the burden in the wrong place by purporting to place the burden of establishing the Appellant's ignorance of the fraud on the Appellant.

50. It can be seen from both paragraph 39 of the Respondents' statement of case and the above description of the submissions made by the Appellant that both parties seek to rely on the decision of the ECJ in *Teleos* and therefore that that decision is of critical importance in reaching a conclusion on the present question.

51. In *Teleos*, the third question referred to the ECJ concerned the ability of a national tax authority to recover VAT from a supplier in respect of a supply in circumstances where the documentation purporting to show that the goods had been exported was subsequently found to be false. The ECJ answered that question as follows:

"**68** The reply to the third question referred must therefore be that the first subparagraph of Article 28c(A)(a) of the Sixth Directive is to be interpreted as precluding the competent authorities of the Member State of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for VAT on those goods where that evidence is found to be false, without, however, the suppliers involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion."

52. The Appellant argues that the answer set out above demonstrates that *Teleos* is simply an application of the principle set out in *Kittel* and that the case is therefore authority for the proposition that, in the absence of actual or constructive knowledge of the fraud, the Appellant cannot be required to account for VAT in respect of the relevant supplies regardless of whether or not the goods in question actually left the UK and the documentation suggesting that they did was false.

53. In contrast, the Respondents say that the answer set out above very clearly establishes a slightly different test from the one outlined in *Kittel*, a test with two limbs to it, as is made clear by the reference to good faith in the third line of the answer and then the existence of the proviso at the end of the answer. In other words, the Respondents contend that, before it is possible for the First-tier Tribunal to conclude that a supplier is not required to account for VAT in circumstances where the export has not occurred, it must be necessary for the First-tier Tribunal to conclude both that the supplier acted in good faith and that the supplier has taken every reasonable measure in its power to ensure that the supply it was effecting did not lead to its participation in the relevant fraud. The Respondents say that, whilst this double-limbed test may be analogous to the *Kittel* test, and may in many cases give rise to the same answer as the one to which the *Kittel* test would have given rise, the fact remains that, unless the Appellant can show that it took every reasonable measure in its power to ensure that it was not participating in tax evasion, it fails to satisfy the language in the proviso and therefore, if it cannot establish that the goods in question left the UK, it is not entitled to succeed in zero-rating the relevant supplies.

54. Before setting out my conclusions in relation to the parties' respective submissions, I think it would be helpful to describe at this juncture some points arising out of the earlier case management decisions in this matter by Peter Smith J in the Upper Tribunal and by the Court of Appeal and the impact on these proceedings of the decision by Arnold J in *N2J Limited v Commissioners for HM Revenue and Customs* [2009] STC 2193 ("*N2J*").

55. Peter Smith J treated the Invalid Invoice Claims and the Export Claims as raising the same issue – namely, whether or not the Appellant was guilty of fraud. Citing the decision of the Court of Appeal in *Medforth v Blake* [1999] 3 WLR 922, he noted that the allegation of bad faith in paragraph 39 of the Respondents' statement of case was tantamount to accusing the Appellant of fraud because bad faith requires an element of dishonesty or an improper motive. He went on to set out various conclusions, the gist of which was that, if the Respondents wish to challenge the prima facie evidence provided by a taxpayer on the grounds that the taxpayer either participated in the fraud or failed to take reasonable care to avoid being involved in the fraud, then the burden is on the Respondents to establish that.

56. In the Court of Appeal, Briggs LJ, with whom the other two Lord Justices agreed, declined to express any view either way on the conclusions reached by Peter Smith J. In the view of Briggs LJ, it was not appropriate at the stage of considering what evidence to admit in the proceedings for the parties to engage in battle on whether or not the conclusions were correct – see paragraph [15] of his decision. However, he did note that "if a positive case of fraud, dishonesty or bad faith is to be advanced in civil litigation (whether in a court or a tribunal) it must be distinctly advanced and set out with the requisite degree of particularity. If (as here) no such positive case is advanced, then evidence purporting to substantiate such misconduct is inherently objectionable, unless it is shown to serve some other legitimate purpose" (see paragraph [16] of his decision).

57. Briggs LJ went on as follows in relation to the evidence relating to Magic Transport BV:

"24. Mr Benson QC had little difficulty in persuading me that the Magic Transport evidence is relevant for the purposes of enabling HMRC to challenge the weight and reliability of the CMRs proffered by Infinity as the basis for its zero rating claims, and now its appeals. Evidence that a person is in the habit of fabricating a particular type of document, and evidence that a purported freight forwarding agent has no business premises, or facilities for the storage or handling of goods, is plainly relevant to the weight which can be placed upon a CMR issued by such a person as evidence of export of goods. Furthermore, the facts about Magic Transport are pleaded with reasonable particularity at paragraph 38 of HMRC's Statement of Case.

25. Mr Davis-White QC for Infinity did not seek to challenge that at all. Rather, he submitted (as Peter Smith J had held) that wherever the challenge to the reliability or authenticity of an apparently valid document proffered as evidence of export is based upon fraud of any kind, then HMRC must show, not merely that there was such a fraud, but that the trader seeking zero rating was implicated, knew about it, acted in bad faith or failed to take reasonable steps. Since HMRC put forward no positive case of that kind against Infinity, they had no legitimate basis for challenging the evidence of export.

26. This submission would, if correct, be a complete answer to HMRC's case on the Zero Rated Appeals which, incidentally, constitute by far the largest part of the proceedings in terms of financial consequences. It would not merely justify refusing to permit HMRC from

adducing the Magic Transport evidence, but from adducing any evidence, or indeed opposing the Zero Rated Appeals at all. It would, as Mr Davis-White QC was constrained to accept, be a strike out point. Yet no strike out application has been made in this respect, so that HMRC's case on the Zero Rated Appeals is one which appears to be proceeding to a full hearing on the facts and the law, at which the FtT would in the ordinary course have to deal with the point of principle upon which Mr Davis-White QC relies. Furthermore, the Magic Transport evidence does not, separately from the other objectionable fraud-related evidence in the Holden statement, expressly or by any necessary implication contain any allegation of participation in or knowledge of fraud, bad faith or failure to take reasonable steps by Infinity. So it does not fall foul of the criticism that HMRC is at one and the same time abjuring and seeking to prove by evidence a case of misconduct of any kind against Infinity.

27. Looking at the matter as it must have appeared to the FtT, at a stage when the sophisticated arguments of principle about the necessary elements of HMRC's case in a zero rated appeal had yet to be deployed, it would in my view have been wrong for the tribunal judge to have refused to admit evidence relevant to a case which a party wished to put forward as its positive case at trial, in circumstances where the party seeking to exclude it was not submitting that the case was itself liable to be struck out in its entirety. Nor is that the basis upon which Judge Porter struck out the Magic Transport evidence. He did so (at paragraphs 11 and 12 of his written reasons) because he regarded the Magic Transport evidence as being deployed not for the purpose of challenging the reliability of the CMRs, but for the purpose of proving a positive case that Infinity had not acted in good faith, which HMRC had declined positively to plead.

28. In my judgment it cannot be an objection to the deployment of evidence in support of a positive case that does not allege fraud or misconduct against a party to proceedings, that the same evidence is supportive of such a case, merely because that additional case is not being pursued. It not infrequently happens in civil litigation that the same evidence may serve more than one purpose. In the present context, the Magic Transport evidence is plainly supportive of a positive case that no real reliance can be placed on the CMRs as evidence of export. The fact that it might also constitute the first plank in a positive case of misconduct against Infinity which has not been pleaded is neither here nor there.

29. It follows that the only basis upon which Judge Porter's decision to exclude the Magic Transport evidence could be justified is that HMRC has no case at all on the Zero Rated Appeals fit for trial, as is indeed implicit in Peter Smith J's analysis. It is not in my view good or appropriate case management to decide an objection to the admissibility of part of the evidence in support of a pleaded case in that way. For as long as a party has a positive pleaded case to which evidence upon which it wishes to rely is relevant, then it seems to me that it ought to be admitted unless and until that case is itself struck out or abandoned. Where the question whether the pleaded case is fundamentally objectionable (or, as it used to be said, demurrable) depends, as here, upon a difficult question of legal analysis calling for sophisticated argument and mature reflection, then to argue it for the first time on an appeal against that case management decision (as happened here) seems to me to put the cart before the horse, and to involve a disproportionate and potentially unsatisfactory diversion from the management and preparation of the case for final hearing. As Arden LJ suggested during the course of argument, for as long as a party has a pleaded case which has not been struck out, then case management for the final hearing should not generally exclude evidence supportive of it.

30. For those reasons I would allow the appeal in relation to the Magic Transport evidence, and leave the question whether HMRC is entitled to resist a claim for zero rating in a case of this kind without alleging relevant fraud or misconduct by the appellant trader to be determined at the final hearing, when all the relevant evidence has been deployed and the relevant facts found."

58. In *N2J*, the question before the First-tier Tribunal had been whether the appellant was entitled to zero-rate its supplies of mobile phones. The First-tier Tribunal decided that, although the appellant had evidence in the form of CMRs which at first sight established its right to zero-rate the relevant supplies and had acted in good faith, it was not entitled to zero-rate the relevant supplies because it could not show that it had taken "every reasonable measure in [its] power" (as laid down in *Teleos*) to ensure that the transactions were not connected with fraud.

59. The appellant appealed to the High Court on four grounds, three of which are highly relevant to the question before me.

60. Its first ground was that the First-tier Tribunal had erred in law by losing sight of the fact that there was no evidence of fraud and asked itself the wrong question. In rejecting that argument, Arnold J noted that:

"It is quite correct that the commissioners had not made any allegation of fraud against N2J. That is immaterial, however. The question before the tribunal was whether N2J had satisfied it that the goods in question had been removed from the United Kingdom. If N2J failed to demonstrate that the goods had been removed from the United Kingdom, the only conceivable explanation for the non-removal of the goods from the United Kingdom was that there had been fraud on the part of someone. That someone might well have been the purchaser. It might also have been one of the other parties involved in the series of transactions. The tribunal did not make any finding that N2J had committed or participated in any such fraud. Accordingly, it did not address its mind to the wrong question" (see paragraph [14] of the decision).

61. The third and fourth grounds of appeal both related to the question of whether a supplier should be entitled to rely on a CMR as conclusive evidence of export – either initially or to defend itself against a subsequent challenge by the Respondents - unless there was something on the face of the CMR which obviously was illegitimate or necessitated further enquiry. Arnold J held that this contention was inconsistent with the decision in *Teleos* and, in particular, paragraphs [66] and [68] of *Teleos*. He held that the proviso in paragraph [68] of *Teleos* – to the effect that, before zero-rating could apply, the supplier must have taken every reasonable measure in its power to ensure that the supply it was effecting did not lead to its participation in tax evasion – would be redundant if the supplier could rely on an apparently-valid CMR without further ado.

62. Taking all of the above into account, I have concluded that the Appellant should not succeed in its application to bar the Respondents from taking further part in the proceedings in relation to the Export Claims. This is for the following reasons:

> (a) first, contrary to the submissions made on behalf of the Appellant, I consider that the ECJ in *Teleos* was not simply applying the test laid down in *Kittel* in reaching its decision but was instead setting out a different, albeit analogous, test. Whereas the test laid down in *Kittel* is asking whether the taxpayer knew or should have known of the fraud at the time of the relevant supply, the test set out in *Teleos* is asking whether the taxpayer acted in good faith and, if so, whether the taxpayer took every reasonable measure to ensure that it was not involved in tax evasion;

(b) Mr Bridge sought to persuade me that the language used in paragraph [51] of *Kittel* shows that there is no difference between the two tests because that paragraph provides as follows:

"In the light of the foregoing, it is apparent that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT (see, to that effect, Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-4191, paragraph 33)";

(c) I agree that the language set out above does suggest that there is no difference between, on the one hand, actual or constructive knowledge of the fraud and, on the other hand, whether the taxpayer has acted in good faith and taken every reasonable measure to ensure that it is not involved in tax evasion. However, it is possible to point to language in the ECJ case law that points in the opposite direction. For example, in paragraph [54] of the decision in *Mecsek-Gabona Kft v Nemzeti Ado-es Vamhivatal Del-dunantuli Regionalis Ado Foigazgatosaga* (Case C-273/11) [2013 STC 171, the ECJ noted as follows:

"If the referring court were to reach the conclusion that the taxable person concerned knew or should have known that the transaction which it had carried out was part of a tax fraud committed by the purchaser and that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed, there would be no entitlement to exemption from VAT."

It can be seen that, in that extract, the ECJ is clearly distinguishing between, on the one hand, actual or constructive knowledge of a fraud and, on the other hand, the taking of reasonable measures to avoid participation in tax evasion;

(d) I have concluded that, whilst the two tests are clearly analogous and that, in many cases, there will be little or no difference between information which the taxpayer should have known (ie constructive knowledge, as per *Kittel*) and information which the taxpayer would have known if it had been acting in good faith and taken every reasonable measure to ensure that it was not participating in tax evasion (as per *Teleos*), I am not entirely convinced that the two tests are identical. I think that it may be possible to conceive of circumstances in which a taxpayer might pass one test but not the other. For example, although it is the other way around, I would have thought that it might be possible for a taxpayer to have acted in good faith and taken every reasonable measure to avoid participating in fraud and yet still to be in a position where it can be said that the taxpayer ought to have known that it was participating in fraud;

(e) even if I am not correct in concluding that there is a difference between the two tests, and the two tests are identical, I consider the question to be moot because the fact is that, in providing its formal responses to the questions raised in *Kittel*, the ECJ did not refer to taking every reasonable measure to avoid participating in tax evasion and instead used the terms "did not and could not know" and "knew or should have

known" (see paragraphs [60] and [61] of the decision), whereas, in providing its formal response to the relevant question in *Teleos*, the ECJ used the terms "acted in good faith" and "took every reasonable measure in his power". Since *Teleos* is the case which governs this particular circumstance – ie the zero-rating of exports – and *Kittel* related to the quite different question of input tax deduction, I am bound in this instance to apply the test as it was expressed in *Teleos*;

(f) the distinction between the case law relating to input tax deductions and the case law relating to exports was highlighted by Arnold J at paragraph [15] of his decision in *N2J* and it is quite clear from the manner in which he dealt with the three grounds of appeal mentioned in paragraphs 59 to 61 above that Arnold J was applying the "every reasonable measure" test set out in the proviso in *Teleos*. Unless it can be said that the decision of Arnold J in *N2J* is inconsistent with ECJ case law, I am bound by that decision. And, for the reason set out at paragraph 62(e) above, I do not think that that decision is inconsistent with the ECJ case law. So, I am bound to conclude that, unless the Appellant is able to show that it took every reasonable measure to ensure that the supplies it was effecting did not lead to its participation in tax evasion, it will be unable to disregard the fact, if proved, that the CMRs which establish export in this case are defective – see the answers given by Arnold J to the third and fourth grounds of appeal in *N2J;*

(g) I do not agree with Mr Bridge that the decision of Arnold J in *N2J* is inapplicable in the present case because the facts in that case are distinguishable from those in the present case. It is true that, in *N2J*, the First-tier Tribunal had found that the appellant in that case had not taken every reasonable measure to satisfy itself that it was not participating in tax evasion – see paragraphs [10] and [20] of the First-tier Tribunal's decision in that case – and such a finding has not been made in relation to the Appellant in this case. However, similarly, there has, as yet, also been no finding that the Appellant in this case has taken every reasonable measure to satisfy itself that it was not participating in tax evasion. That question is something which needs to be answered in due course in the light of the applicable evidence. Therefore, whether or not the facts of this case are distinguishable from the facts in *N2J* is something that can be determined only in due course after the evidence has been heard. But, regardless of whether or not the facts in this case are ultimately determined to be distinguishable from the facts in N2J, the key point arising out of the decision by Arnold J in *N2J* – and the point which is binding on me - is that, as a matter of law, the appropriate test to apply to the facts in each case is whether or not the "every reasonable measure" test has been satisfied and it is only once that test is determined to have been satisfied that the relevant taxpayer can rely on the decision in *Teleos* to say that any invalidity in the CMRs which evidence export and whether or not the export occurred are irrelevant; and

(h) as regards the question of whether the Appellant took every reasonable measure to ensure that the supplies it was effecting did not lead to its participation in tax evasion, it is clear that the Respondents have pleaded – in paragraph 39 of their statement of case – that the Appellant did not do that. Moreover, this pleading was preceded in paragraph 38 of

the Respondents' statement of case by an explanation of the reasons why the pleading was made – note the use of the word "Accordingly" at the start of paragraph 39. So it is quite clear that the Respondents are seeking to rely on the matters described in paragraph 38 as evidence that, inter alia, the Appellant failed to take every reasonable measure that the relevant supplies did not lead to its participation in tax evasion;

(i) when one examines the items outlined in paragraph 38 of the Respondents' statement of case, it is apparent that, whilst they certainly go to the question of what weight should be attached to the evidence of export provided by the Appellant (and, hence, the question of whether the goods in question did actually leave the UK), which is the factual question to be determined only if the Appellant is found not to have acted in good faith and taken every reasonable measure to ensure that the supplies it was effecting did not lead to its participation in tax evasion, they are also highly relevant to the determination of the "every reasonable measure" test because they raise the question of whether the Appellant should have done more than it did to satisfy itself that the CMRs were correct and that it was not participating in tax evasion. By way of example, the last two limbs of the list in paragraph 38 clearly raise the question of whether the Appellant could have done more to satisfy itself that it was not participating in tax evasion and therefore those limbs link naturally with the use of the word "Accordingly" at the start of the paragraph which follows; and

(j) I believe that the above is sufficient to mean that the question of whether the Appellant took every reasonable measure to ensure that the supplies it was effecting did not lead to its participation in tax evasion is something that needs to be determined at a full hearing. That is a key part of the test set out in *Teleos* and paragraphs 38 and 39 of the Respondents' case clearly say that the Respondents consider that the Appellant has not surmounted this hurdle and explain the reasons why the Respondents have reached that conclusion. This means that it is only if the Appellant can establish that, notwithstanding the allegations set out in paragraphs 38 and 39 of the Respondents' statement of case, it did take every reasonable measure to ensure that the supplies it was effecting did not lead to its participation in tax evasion that the question of whether or not the goods in question left the UK would be irrelevant to the outcome of the appeals in question.

63. Whilst that is sufficient to reach a conclusion on the question that has been raised of me by the Appellant's application, I should, for completeness and because it was raised at the hearing, comment on the fact that, in paragraph 39 of their statement of case, the Respondents have alleged both that the Appellant did not take every reasonable measure to ensure that the supplies it was effecting did not lead to its participation in tax evasion and that the Appellant did not act in good faith. I think that there is a difference between those two allegations in that, whereas the allegation of bad faith is clearly one which equates to an allegation of fraud or dishonesty, the onus of proving which properly falls on the Respondents, as noted by both Peter Smith J and Briggs LJ in the earlier case management decisions – see paragraphs 55 and 56 above - the allegation that the Appellant has failed to take every reasonable measure to ensure that the supplies it was effecting did not lead to its participation in tax evasion is not.

64. There is no necessary implication of fraud, dishonesty or bad faith in the way that that test is expressed and therefore I consider that the Respondents are correct in saying that the onus of establishing that fact should fall on the Appellant, in accordance with the terms of the test as it was set out in *Teleos*. In other words, I consider that the Respondents are perfectly entitled to point to the proviso at the end of paragraph [68] in the *Teleos* decision and require the Appellant to prove that it is entitled to rely on that proviso. However, this is a question which can be considered by the First-tier Tribunal at the full hearing and is not relevant to my decision.

65. For the above reasons, I consider that the appeals in relation to the Export Claims cannot be determined until a full hearing has been held at which the evidence in relation to whether or not the Appellant took every reasonable step to ensure that its supplies did not lead to participation in tax evasion and whether or not the goods were exported can be presented.

66. This document contains full reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 1 MAY 2018