[2014] UKUT 0028 (TCC)

Appeal number FTC/53/2012

Value Added Tax – input tax – disallowance of input tax – MTIC fraud – whether Appellant should have known that its purchase was connected with fraud

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

[2014] UKUT 0028 (TCC)

ANNOVA LIMITED **Appellant**

- and –

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

Tribunal: The Hon Mr Justice Arnold

Sitting in public in London on 13-14 January 2014

Craig Ferguson and Vivienne Tanchel, instructed by Aegis Tax, for the Appellant

Christopher Kerr and James Onalaja, instructed by the General Counsel and Solicitor to HMRC, for the Respondents

MR JUSTICE ARNOLD:

Introduction

1. This is an appeal from a decision of the First-Tier Tribunal (Tax) (Tribunal Judge Charles Hellier and Ms Sheila Wong Chong FRICS) dated 15 November 2011 [2011] FTT 742 (TC). By its decision the First-Tier Tribunal, which hereinafter I will refer to for brevity simply as "the Tribunal", dismissed an appeal by Annova Ltd against a decision of the Commissioners foe Her Majesty's Revenue and Customs ("HMRC") to deny Annova entitlement to the right to deduct input tax in the total sum of £2,069,843 in respect of four purchases of mobile telephones referred to as "Deals 1-4" in the periods 04/06, 05/06 and 06/06. The ground for that decision was that the input tax incurred by Annova arose from transactions connected with the fraudulent evasion of VAT (i.e. so-called Missing Trader Intra-Community or MTIC fraud) and that Annova knew or should have known of that fact.

2. The Tribunal's decision was given after a ten day hearing at which a number of witnesses gave evidence, including Shandip Popat, Annova's sole director at the relevant time. It was common ground before the Tribunal that each of the transactions was in fact connected with the fraudulent evasion of VAT. In relation to Deals 3 and 4, the Tribunal concluded that Annova knew this. In relation to Deals 1 and 2, the Tribunal concluded that Annova did not know this, but should have known it. This appeal is solely concerned with Deal 1.

Background

3. Annova was established by Mr Popat in 1999 to trade in consumer electronics. From 1999 to the end of 2005 Annova had a disparate business in that field. Its turnover prior to 2005 was around £1 million, but this fell to less than £500,000 in 2005. The business was not particularly successful, generating small profits despite the payment of modest salaries. By July 2003 Mr Popat was aware that MTIC fraud was a serious concern and that it was being perpetrated on a very large scale.

4. In 2005 Annova suffered what the Tribunal described at [25] as a "catastrophe". Annova purchased some computers from Dell for the sum of £144,000 which Annova borrowed from other traders (since Dell would not give it credit). Annova exported the computers to Nigeria, but the buyer defaulted and Annova had to sell them off at prices which were not profitable. As a result, at the end of 2005, Annova had no substantial assets and substantial debts. It was, as Mr Popat put it, "going down". Accordingly, Mr Popat let it be known to his contacts that he was looking for an outside investor.

5. In January 2006 Mr Popat sold 90% of his shares in Annova to Ribariton, a BVI company owned or controlled by one Avram Ttroshvilla, a Georgian who lived in Israel, and his son Simon. It was term of the agreement that Mr Popat would continue to work for Annova for three years. After this, the strategic direction of Annova was shared between Mr Popat and the Ttroshvillas. In

February and March 2006 Annova was lent £224,176.78 by a Hong Kong company called Hornington which had some relationship with Ribariton.

6. Also in February and March 2006, Annova engaged in three large transactions in which Annova purchased mobile phones from a UK supplier called XChange and sold them to one of two European purchasers called Tagleemer and Nova. As the Tribunal commented at [30], it is noteworthy that Annova's involvement in large back-to-back mobile phone deals started at about the time it was acquired by the Ttroshvillas. It is also noteworthy that, as the Tribunal found at [14], Mr Popat was not initially frank in his evidence about these deals, first trying to avoid discussing them and then trying to suggest that they had been done before the takeover of Annova. Finally, it should be noted that at [188] the Tribunal accepted evidence from Mr Popat to the effect that Mr Popat had been assured by XChange that XChange would not supply him with tainted phones.

7. The four deals in issue took place between 11 April 2006 and 30 June 2006. Again, Annova purchased large quantities of mobile phones from XChange (or in one case another UK supplier called Morganrise) and sold them to Tagleemer or Nova.

8. Deal 1 involved the purchase by Annova of 6000 Nokia N8800 phones and 1000 Sony Ericsson W900i phones from XChange on 11 April 2006 for the sum of £2,999,775 and the sale by Annova of those phones to Tagleemer on 14 April 2006. XChange purchased the phones from an importer which defaulted on the VAT payable. The Tribunal found at [65] that Annova's profit on the deal was between £15 and £25 per phone, while XChange's profit was between 25p and £2 per phone.

The Tribunal's decision

9. The Tribunal's decision is a careful and detailed one running to 206 numbered paragraphs. Since there is no challenge to the Tribunal's conclusions in relation to Deals 2, 3 and 4, and since there is only a limited challenge to the Tribunal's findings in relation to Deal 1, some of the decision is not relevant for the purposes of this appeal. In particular, as is common ground, it is necessary to put on one side facts which the Tribunal found that Annova knew or should have known at later dates than 11 April 2006. In addition to the matters I have set out in the background section above, the key aspects of the decision for present purposes are as follows.

10. First, the Tribunal received expert evidence regarding the grey market in mobile phones in 2006 from John Fletcher of KPMG on behalf of HMRC and Nigel Attenborough of NERA Economic Consulting on behalf of Annova. As the Tribunal explained at [46], it found much of this evidence of little relevance because the evidence was based on an objective and informed analysis of the market, whereas the Tribunal was concerned with what Annova knew or had the means to discover. The Tribunal nevertheless considered Mr Fletcher's analysis of data which had been commercially published by GfK for the monthly sales of the relevant models of mobile phones in 22 European countries and Mr Attenborough's comments on that data. The Tribunal

concluded at [57] that this evidence showed that the numbers of mobile phones traded by Annova in the deals in issue represented surprisingly high percentages of overall European, and worldwide, sales of those phones. The Tribunal also concluded at [58] that, due to the complexity of the issues, analysing the data and reaching conclusions "would be the work of many weeks for a small operation. The most that could reasonably be expected would be a broad brush feeling for whether or not the percentages were so large as to be suspicious". The Tribunal went on at [59] to find that Annova did not know the proportions which its sales of particular phones represented of worldwide or European sales.

11. Secondly, the Tribunal accepted Mr Popat's evidence that Annova had purchased the mobile phones on credit. As the Tribunal explained at [98], however, the Tribunal considered that it was surprising that XChange and Morganrise had extended Annova as much credit as they had for as long as they had. Concentrating on Deal 1, the Tribunal found at [85]-[87] and [100] that XChange allowed Annova to purchase all of the phones on interest-free credit. Furthermore, XChange sold the phones on terms which did not include a retention of title clause and released the phones before payment. Annova made payments to XChange on 18 April, 26 April, 4 May and 10 May 2006. Thus the credit was extended for between 7 and 30 days. As the Tribunal noted at [101], the credit was given on an unsecured basis to a company which, as Mr Popat accepted, did not have a good credit standing. Furthermore, in February or March 2006 Mr Popat had obtained XChange's annual return and accounts for the year ended 31 March 2004, which indicated that the company was dormant. He also obtained an Equifax report dated 22 February 2006 which stated that XChange had received a striking-off notice and that officers of the company had been involved in other companies which had been struck off. The Tribunal concluded at [114] that XChange's ability and willingness to extend credit to Annova called for an explanation.

12. Thirdly, at [181]-[185] the Tribunal concluded that Annova had been acquired as a vehicle to participate in a fraudulent VAT evasion scheme. In reaching this conclusion, the Tribunal held at [182] that the following features of the transactions stood out:

> "(1) the finance which became available to Annova after it was acquired by the Ttroshvillas: by way of direct loans, unpaid debts and credit from suppliers; (2) the fact that so many of the Appellant's counterparties were recently formed companies which were able to offer and obtain large amounts of credit; (3) the lack of concern that the deal documentation fully specified the phones being traded; and (4) knowledge that in each deal (not just one) the phones were imported into the UK although they were not fit or intended for the UK market."

13. Fourthly, in view of the arguments on the appeal and in fairness to the Tribunal, it is necessary to quote the Tribunal's reasons for concluding that Annova should have known that the Deals were connected with the fraudulent evasion of VAT in full:

"Deals 2, 3 and 4

194. It seems to us that at and after 26 April 2006 (the time of Deal 2) the Appellant should have known that Deals 2, 3 and 4 were connected to VAT fraud. That is because that was the only reasonable explanation of the following features:

(1) the credit previously given by Xchange, and the credit Morganrise had agreed to give in relation to Deal 2. Why would someone give unsecured interest free credit for a seemingly indeterminate period to an uncreditworthy party? They might do so if they were stupid, but there was nothing to indicate that these parties were stupid; they might do it so to a family member or an old friend, but Mr. Popat was neither of these. The only reason they might do so would be if some collateral advantage would accrue to them from the transaction.

(2) the coincidence of these transactions and Ribaraton takeover of the Appellant. The only reasonable explanation is that there was some connection between the events.

(3) the facts, known to Annova by 22 March that Xchange was a recently formed company, and by 26 April that Morganrise had filed no accounts (and therefore was recently formed), and yet that both were able to provide millions of pounds of credit. The only reasonable explanation of this was that someone was providing credit so that they could do these deals;

(4) the lack of concern of the Appellant's customers over the precise nature of the phones traded. One explanation is carelessness, another is that all they wanted was goods to buy and sell but they did not mind what the goods were. The first explanation in a deal of this size is unreasonable;

(5) the fact, known to the Appellant, that these were phones which had been imported into the UK and which were not for the UK market and were being exported. For one transaction a previous accidental import might be a reasonable explanation for finding such phones in the UK, but for Deals 2, 3, and 4 the number of and the number of different sorts of phones which were involved, the only answer is that these phones were being imported *in order to be exported;*

195. From (4) and (5) the only explanation is that there was a scheme for the import of something and its export. From that and (3) the only explanation is that the credit was provided for that scheme to take place. From that and (1) and (2) the only reasonable explanation is a collateral advantage would derive from a scheme for the import and export of the phones. What collateral advantage could so accrue? The only one was VAT

fraud: something which the Appellant knew was a real concern.

Deal 1

196. But we feel less secure in a conclusion that the only reasonable explanation of the circumstances at 12 April, the time of Deal 1, was that this was part of the VAT fraud. That is because the evidence of the credit given at this stage is weaker. At that stage: (i) the Appellant knew only of the credit given by Xchange in the previous three deals in February and March 2006, (ii) the Appellant knew that Xchange was a new company but did not have the same surprisingly similar evidence about Morganrise; and (iii) it had not received the benefit of the odd supply of credit from Euro Counsel.

197. On the other hand: (i) Annova knew that it was dealing in 2 pin phones when it made little sense for such phones to be in the UK; although this could have been the first deal in such phones (since we were not told what type of phones were dealt in the February and March Deals) and a plausible explanation might be that this particular consignment of phones had been imported into the UK accidentally or for some special reason, or had been brought here with the failed intention of converting them into 3 pin phones for sale in the UK (an explanation which becomes implausible when repeated); (ii) Annova knew that Xchange had imported them, and was getting credit from its supplier: that made the possible explanations for their presence in the UK less likely; and (iii) it knew that its customer on this occasion was not concerned to be specific in its documentation of a high value sale (we also believe that it is likely that it knew that its customer in the previous deals was similarly unconcerned, given Mr Popat's description of them as being in similar circumstances).

198. We asked ourselves whether at the time of Deal 1 these features should have caused Annova to make further enquiries, and whether if it had pursued those enquiries, and any enquiries which reasonably led from them, it would have discovered facts which would have led it ineluctably to the conclusion that there was a connection to fraud.

199. In Deal 1 Annova dealt in 6000 Nokia 8800's and 1000 Sony Ericsson W900i's. Mr Fletcher's table shows that the Appellant's sale of 7000 N8800s (bring 6000 from Deal 1 and 1000 from Deal 2) represented 4% or 5% of global retail sales of such phones for that month and its sale of the W900i's represented 1% of such global sales. Only in the latter case did Mr Attenborough suggest that the market might be inflated by dumping. Had Annova known this it would have indicated that

it was very unlikely that the N8800 phones were in the UK by accident or for the purpose of being converted into 3 pin phones. If it knew that, the only reasonable conclusion, particularly when taken 5 with the lack of specification, would have been that the phones were in the UK in order that they could be exported; ie as part of a scheme. Taken with the granting of credit and Ribariton's takeover of Annova and the only reasonable explanation of that would have been that the phones were being traded as part of a VAT fraud.

200. Mr Popat told us that the three previous transactions with Xchange had been for amounts which totalled over £2m. That suggested that a large volume of phones was being traded. On balance it seemed to us that the volumes traded and the suspicious facts that the phones in this deal were 2 pin phones and that substantial credit was being extended by Xchange would have caused a reasonable businessman to attempt some investigation of global sales volumes. We do not believe that the kind of investigation undertaken by Mr Fletcher would reasonably have been warranted, but we think that it is likely that a modest and reasonable investigation of manufacturers' accounts and trade magazines together with internet searches would have revealed that this deal represented a surprising percentage of the market. That would have pointed to the conclusion in the preceding paragraph: it would have given rise to reasonable suspicion, and that would have warranted further enquiry

201. Some further investigation of Xchange's willingness to grant credit would also have been a reasonable response. Mr Popat had been told that Xchange was given credit by its supplier. It would have been reasonable to have pressed for an answer to the question why its supplier was willing to do so.

202. It is clear to us, because this deal was part of a fraudulent scheme, and because of the small margin which Xchange made for taking such a large credit risk, that if the question had been pressed Mr Popat either would not have received a believable commercial answer or would have been given an answer which showed his involvement in a scheme for importing and exporting phones whose only explanation could have been a VAT fraud. The lack of a believable commercial answer in the context of a market in which VAT fraud was a serious concern, we believe could in the circumstances outlined in the preceding paragraphs only be explained by a connection to such fraud.

203. Overall we conclude, albeit with some hesitation, that at the time of Deal 1 Annova was in a position where it should have concluded that the only reasonable explanation of its circumstances and the deal was a connection to VAT fraud."

The law

14. In Joined Cases C439/04 and C440/04 *Kittel v Etat Belge* [2006] ECR I-616 the Court of Justice of the European Communities (Third Chamber) held as follows:

> "54. As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76). Community Law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32).
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> 55. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, inter alia, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 24; Case C-110/94 *INZO* [1996] ECR I-857, paragraph 24; and *Gabalfrisa*, paragraph 46). It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends (see *Fini H*, paragraph 34).
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> 56. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
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> 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
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> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions is apt to prevent them.
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> 59. Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.
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> 60. It follows from the foregoing that the answer to the questions must be that where a recipient of a supply of goods is a taxable

person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void – by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller – causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.

61. By contrast, where 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, it is for the national court to refuse that taxable person entitlement to the right to deduct."

15. In *Mobilx Ltd v Commissioners for Her Majesty's Revenue and Customs* [2010] EWCA Civ 517, [2010] STC 1436 the Court of Appeal had to consider the proper interpretation and application of the ECJ's decision in *Kittel.* Moses LJ, with whom Carnwath LJ (as he then was) and Sir John Chadwick agreed, considered the meaning of the words "should have known" and held as follows:

"51. Once it is appreciated how closely *Kittel* follows the approach the court had taken six months before in *Optigen*, it is not difficult to understand what is meant when it is said that a taxable person 'knew or should have known' that by his purchase he was participating in a transaction connected with fraudulent evasion of VAT. In *Optigen* the Court ruled that despite the fact that another prior or subsequent transaction was vitiated by VAT fraud in the chain of supply, of which the impugned transaction formed part, the objective criteria, which determined the scope of VAT and of the right to deduct, were met. But they limited that principle to circumstances where the taxable person had 'no knowledge and no means of knowledge' (§ 55). The Court must have intended *Kittel* to be a development of the principle in *Optigen. Kittel* is the obverse of *Optigen.* The Court must have intended the phrase 'knew or should have known' which it employs in §§59 and 61 in *Kittel* to have the same meaning as the phrase 'knowing or having any means of knowing' which it used in *Optigen* (§55).

52. If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more

> culpable state of mind than carelessness, in the light of the principle in *Kittel*. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises."

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

> "59. The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who 'should have known'. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel.*
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> 60. The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

17. Moses LJ held at [61]-[62] that this approach did not infringe the principle of legal certainty. As he said in [61]:

> "…It is difficult to see how an argument to the contrary can be mounted in the light of the decision of the court in *Kittel*. The route it adopted was designed to avoid any such infringement. A trader who decides to participate in a transaction connected to fraudulent evasion, despite knowledge of that connection, is making an informed choice; he knows where he stands and knows before he enters into that transaction that if found out, he will not be entitled to deduct input tax. The extension of that principle to a taxable person who has the means of knowledge but chooses not to deploy it, similarly, does not infringe that principle. If he has the means of knowledge available and chooses not to deploy it he knows that, if found out, he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct."

18. Moses LJ considered the facts of the appeals before the Court of Appeal at [67]-[80]. In relation to the appeal by Blue Sphere Global Ltd he held 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 fraudulent evasion of VAT."

19. Moses LJ considered questions of proof at [80]-[85]. He held at [81] that the burden lay upon HMRC to prove the trader's state of knowledge. He went on at [82]:

> "But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG appeal, 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 a 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."

20. At paragraph [84] he said:

> "Such circumstantial evidence … will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reach a large and predictable reward over a short space of time."

The nature of an appeal from the First-Tier Tribunal to this Tribunal

21. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the first tier tribunal other than an excluded decision". It is common ground that the principles established under section 11(1) of the Tribunals and Inquiries Act 1992 and its predecessors were equally applicable under section 11(1) of the 2007 Act.

22. In *Edwards v Bairstow* [1956] AC 14 Viscount Simonds said at 29:

> "… though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted

> without any evidence or upon a view of the facts which could not reasonably be entertained."

Lord Radcliffe said at 36:

> "If the case contains anything ex facie which is bad law and which bears upon the determination, it is obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene."

23. In *Georgiou v Customs and Excise Commissioners* [1996] STC 463 Evans LJ, with whom Saville and Morritt LJJ (as they then were) agreed, said at 476:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. … 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. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of the evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

24. In *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990 Jacob LJ, with whom Mummery LJ and Toulson LJ (as he then was) agreed, said at [11]:

> "It is also important to bear in mind that this case is concerned with an appeal from a specialist Tribunal. Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker, see per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [30] …."

25. What Baroness Hale said in *AH (Sudan)*, which has since been approved by Sir John Dyson SCJ giving the judgment of the Supreme Court in *MA (Somalia) v Secretary of State for the Home Department* [2007] UKSC 49, [2011] 2 All ER 65 at [43], was this:

> " … This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. … "

The appeal

26. Annova challenges the Tribunal's conclusion in relation to Deal 1 on the grounds that the Tribunal's findings at [200] (concerning sales volumes) and [202] (concerning credit) were not open to the Tribunal on the evidence before it. Annova contends that, absent those two findings, the Tribunal would not have concluded, or at any rate it would not have been open to the Tribunal to conclude, that Annova should have known that Deal 1 was connected with the fraudulent evasion of VAT.

Sales volumes

27. As counsel for Annova pointed out, the Tribunal did not consider that an investigation of the kind undertaken by Mr Fletcher (i.e. using the GfK data) would have been warranted. Rather, it concluded at [200] that "it is likely that a modest and reasonable investigation of manufacturers' accounts and trade magazines together with internet searches would have revealed that this deal represented a surprising percentage of the market". Counsel for Annova submitted that this finding was not one which the Tribunal was entitled to make, because there was no evidence before the Tribunal that investigation of

(a) manufacturers' accounts, (b) trade magazines and (c) websites available as at 11 April 2006 would have yielded information as to the volumes of N8800 and W900i being traded at that time. Indeed, there was no evidence as to what information would have been yielded by such an investigation at all, and so it was pure speculation as to whether or not it would have included sales volumes of the relevant models.

28. Counsel for HMRC took me to the evidence which was before the Tribunal regarding the sources of information available to Annova in April 2006. In particular, he pointed out that there was evidence regarding a number of websites which Annova had actually used in connection with its mobile phone trading, including two called GSM Exchange and IPT. He showed me some print outs from the former website that were before the Tribunal, which appeared to show that it was possible to view statistics as to the supply and demand of particular phone models on the website. As he accepted, however, there was no evidence before the Tribunal as to what information could have been obtained by that means as at 11 April 2006. More generally, he was unable to point to any evidence that investigation of (a) manufacturers' accounts, (b) trade magazines and (c) websites available as at 11 April 2006 would have yielded information as to the volumes of N8800 and W900i phones being traded at that time.

29. In these circumstances I consider that Annova's first complaint is well-founded. In the absence of evidence that an investigation of manufacturers' accounts, trade magazines and websites available as at 11 April 2006 would in fact have revealed sales volumes of the relevant phone models, it was not open to the Tribunal to make the finding that it did.

Credit

30. As is common ground, Mr Popat gave evidence that he had asked XChange why it was able and willing to offer Annova credit. As the Tribunal recorded at [201], the answer he said he was given was that XChange received credit from its supplier. As counsel for HMRC pointed out, this answer simply invites the same question once removed: why was XChange's supplier able and willing to offer XChange so much credit? But there is no evidence that Mr Popat asked XChange that question.

31. The Tribunal concluded at [201]-[202] that it would have been reasonable for Mr Popat to have pressed for an answer to that question, and that, if he had done so, he would not have received a believable commercial answer. Counsel for Annova submitted that this conclusion was not open to the Tribunal. In the first place, he pointed out that there was no evidence that Annova had known of the small margin being made by XChange. I accept that point, but it does not detract from the Tribunal's reasoning in [202]. Secondly, he pointed out that there was evidence before the Tribunal that the names of suppliers were regarded as confidential information and not divulged to traders further down the chain. Again I accept that point, but again it does not detract from the Tribunal's reasoning. More fundamentally, he submitted that the Tribunal was again indulging in unjustifiable speculation: it was equally likely that

XChange would simply have said that its arrangements with its supplier were commercially sensitive and declined to discuss the matter.

32. I do not accept this submission. The question which the Tribunal was asking itself was what possible explanation there was for Annova being offered so much interest-free and unsecured credit by XChange when, as Mr Popat was well aware, Annova was not a good credit risk. On his own evidence, Mr Popat asked XChange this question, but received an answer which simply moved the question one stage up the chain. I consider that the Tribunal was entitled to conclude that Mr Popat should not have accepted that answer, but should have pressed further. After all, from the information available to him, he should have appreciated that XChange was not a good credit risk either. Furthermore, he should have appreciated that XChange would have been unable honestly to tell its supplier "we [XChange] have a customer [Annova] which is a good credit risk". If one supposes that, upon being pressed by Mr Popat as to why its supplier was prepared to offer credit, XChange had said "that's confidential", that would have left the question without a satisfactory answer. Thus in my judgment the Tribunal was entitled to conclude that Mr Popat would not have received a commercially believable explanation.

Would the Tribunal have been entitled to conclude that Annova should have known that Deal 1 was connected with fraud?

33. For the reasons given above, I have concluded that Annova's first complaint is well-founded, but not its second. It follows that I must consider whether the Tribunal would have been entitled to conclude that Annova should have known that Deal 1 was connected with fraudulent evasion of VAT absent the impugned finding with regard to knowledge of sales volumes.

34. In my judgment the answer to this question is that the Tribunal would have been entitled to reach the same conclusion as it did. If one considers the Tribunal's reasoning in relation to Deals 2, 3 and 4 at [194]-[195], it seems to me that it justifies the same conclusion in relation to Deal 1. It is true that, as the Tribunal recognised at [196], the evidence relating to credit was weaker at the time of Deal 1. As the Tribunal held at [197], however, there were three other factors which pointed in the direction of a conclusion that Deal 1 was connected with fraudulent evasion of VAT. Furthermore, I consider that the Tribunal's reasoning at [201]-[202] holds good even disregarding its finding at [200]. Even without knowledge of sales volumes, the Tribunal was entitled for the reasons given above to conclude that Mr Popat should have pressed for answer to the question about credit, but would not have received a commercially credible response if he had. Thus, although the evidence relating to credit was weaker at the time of Deal 1 than at the time of Deals 2, 3 and 4, it was strong enough to entitle the Tribunal, in combination with the other factors on which the Tribunal relied, to reach the conclusion that it did. I would add that a further factor on which the Tribunal would have been entitled to rely, in combination with the other factors, as supporting that conclusion was the extraordinary profitability of the deal for a company in Annova's position.

Conclusion

35. The appeal is dismissed.

MR JUSTICE ARNOLD

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