[2020] UKUT 0320 (TCC)

Appeal number: UT/2019/0154 (V)

VAT – FTT concluding that taxpayer "should have known" that transactions were connected to fraud – whether decision adequately reasoned – whether FTT's conclusion was reached following application of correct test

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

REVIVE CORPORATION LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE JONATHAN RICHARDS**
JUDGE GUY BRANNAN

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Strand, London on 4 November 2020

Tim Brown instructed by UHY Hacker Young for the Appellant

Joanna Vicary, instructed by the General Counsel and Solicitor for Her Majesty's Revenue & Customs, for the Respondents

DECISION

Introduction

1. In a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) released on 7 August 2019, the FTT dismissed appeals that the appellant company (the "Company") made against HMRC's decisions refusing it credit for input tax totalling £1,012,500.90 in respect of 20 purchases of goods made in the period March 2015 to January 2016. The Company's appeals involved the application of the familiar test that the CJEU set out in *Kittel v Belgium* [2008] STC 1537 of whether the Company knew, or should have known, that those transactions were connected with fraudulent evasion of VAT. Applying that approach, the FTT concluded, in dismissing the appeal, that the Company did not have actual knowledge, but that it "should have known" of the connection to fraud.

2. With the permission of the Upper Tribunal, the Company appeals against the FTT's conclusion that it should have known that its purchases were connected with fraudulent evasion of VAT. HMRC have served no Respondents' notice seeking to challenge the FTT's conclusion that the Company had no actual knowledge of connection to fraud. The hearing before us took the form of a fully remote video hearing and neither party suggested that the hearing should take a different form.

The Decision

3. There were more issues before the FTT than we need to consider for the purposes of this appeal and so we can deal with the Decision relatively briefly. References in the remainder of our decision to numbers in square brackets are to paragraphs of the Decision unless we specify otherwise.

4. The FTT referred to the 20 transactions on which HMRC had denied the Company's claim for input tax as the "Challenged Deals" and we will do the same. All of the Challenged Deals involved the Company purchasing computer hardware and software from Product Placement Sales and Marketing Consultants Limited ("PPSM"). The Company accepted before the FTT that some of the Challenged Deals could be traced back to fraudulent evasion of VAT, though it required HMRC to prove their assertion that deals 9-13 were connected with fraudulent evasion of VAT by Shark Partners Ltd. In those circumstances, the parties agree that the FTT recorded the issues that it needed to resolve correctly at [9]:

> … the matters for determination by the Tribunal are:
>
> (1) Whether the VAT loss resulting from deals 9-13 resulted from fraudulent evasion, and whether those deals were connected with that evasion.

(2) For all the Challenged Deals, whether the Company knew or should have known that the deals were connected to fraud.

5. Before the FTT, the following witnesses appeared for the Company: (i) Mr Inglis and Mr Munro, two of its directors and shareholders, (ii) Mr Pappalardo, the Company's sales manager and (iii) Mrs Brown, an employee of the Company who performed various "back office" and book-keeping tasks.

6. HMRC's witnesses before the FTT were (i) Mr Stock (the HMRC officer who had since 2015 been responsible for the VAT affairs of the Company), (ii) Ms Hirons, the HMRC officer responsible for the affairs of PPSM and (iii) Mr Guest who, as officer responsible for Shark Partners Ltd, gave evidence in support of HMRC's case that that company (to whom deals 9 to 13) had been traced, was a fraudulent VAT defaulter.

7. Of the matters that the FTT determined, only its conclusion that the Company should have known that the deals were connected to fraud is under appeal. An aspect of the Company's case on that issue was that there was a reasonable explanation of the Challenged Deals that did not involve those deals having any connection to VAT fraud. Very broadly, the Company said that it entered into the Challenged Deals following an approach by Mr Wildman of PPSM. Mr Inglis knew Mr Wildman from a time when they had worked together and considered that he had a reputation as a highly respected and well-connected businessman. Mr Inglis said in evidence that Mr Wildman had told him that PPSM had contacts with a large distributor ("GECX[1]") who wished to purchase a large quantity of items from PPSM. However, in order to fulfil GECX's order, PPSM would need to purchase stock from UK-based suppliers and thus would suffer VAT on its purchases which it could not pass on to GECX (as, since GECX was based outside the UK, the supply to GECX would be zero-rated). In that case, PPSM would be entitled to a repayment of VAT but, on Mr Inglis's account, could not afford the cashflow cost. Therefore, said Mr Inglis, Mr Wildman proposed that the Company would effectively step into the transaction by purchasing goods from PPSM, selling them to GECX and funding the VAT cost until HMRC repaid VAT to the Company ([18(7)] and [18(8)]).

8. Insofar as relevant for the purposes of this appeal, the FTT structured the Decision as follows:

(1) In paragraphs [3] to [4], it directed itself as to the law. Neither party suggests that the FTT misdirected itself.

(2) In a section headed "Evidence" and extending for some 23 pages ([11] to [21]), the FTT summarised aspects of the evidence that it had received from each of the witnesses who appeared before it. Each summary of a witness's evidence included paragraphs summarising answers given in cross-examination.

[1] In fact, there were two companies, both called "GECX", one incorporated in Greece and one incorporated in the Czech Republic. We will use the expression "GECX" to refer to both companies.

(3) From pages 25 to 33 ([22] to [69]), the FTT summarised the competing contentions of the Company and HMRC in sections headed "Respondents' case" and "Appellant's case".

(4) From pages 33 to 38 ([70] to [93]), in a section headed "Consideration and Conclusions", the FTT set out its conclusions on the issues before it.

The FTT's reasons for concluding that the Company "should have known" of the connection to fraud were set out on pages 35 to 37 ([79] to [87]).

9. It is convenient at this point to refer to what we see as a difficulty arising from the FTT's decision to include lengthy summaries of the parties' evidence and cases followed by a short "Consideration and Conclusions" section. The FTT's summaries of evidence dealt both with matters that did not appear to be disputed alongside matters that could be expected to be more contentious. It was not, however, straightforward in all cases to tell precisely which evidence was contentious and which was not. The fact that the FTT's summary of cross-examination might not refer to any questions challenging a particular piece of evidence offered a degree of reassurance that such evidence was accepted. However, the FTT's summary did not purport to capture all questions asked in cross-examination. Therefore, even where the FTT summarised (apparently) uncontentious evidence and did not record any questions being raised on that evidence in cross-examination, there was still room for doubt as to the extent to which the evidence was accepted.

10. There was a greater difficulty in relation to potentially controversial evidence. To give an example, at [18(8)], the FTT summarised Mr Inglis's evidence as to the explanation that Mr Wildman gave for inviting the Company to participate in the Challenged Deals. That Mr Wildman gave this explanation did not appear to be contentious as it was set out in email he sent Mr Inglis on 16 March 2015. However, it was clear from [47(2)] that HMRC's case was that Mr Wildman's explanation was implausible and should not have been believed because it involved the proposition that Mr Wildman, an apparently successful and experienced businessman, suffered from a "fundamental business shortcoming" of being unable to fund the VAT cashflow cost that would naturally arise in his chosen business area. Mr Inglis was evidently asked some questions in cross-examination that went to the plausibility of Mr Wildman's explanation and there are suggestions, at [18(30)(g)] and [18(30)(h)], that Mr Inglis answered that he regarded Mr Wildman's explanation as plausible, and that he genuinely believed it. However, the FTT made no express primary finding as to whether Mr Inglis genuinely believed that explanation to be true. Nor did it make any express secondary finding as to (i) whether Mr Wildman's explanation was objectively reasonable or (ii) the extent to which other facts were inconsistent with Mr Wildman's explanation.

11. It follows that the FTT's findings of fact on contentious issues can only be reliably drawn from the section of the Decision headed "Consideration and conclusions". We highlight the following findings of fact made in [82]:

(1) Mr Inglis, Mr Munro and Mr Pappalardo had decades of experience in the computer games industry ([82(1)]).

(2) HMRC had made several visits to the Company prior to the Challenged Deals during which they had explained to the Company that there was a risk of MTIC fraud in its chosen business of dealing in electronic goods [(82(2)].

(3) HMRC had, on several occasions prior to the Challenged Deals, given the Company a copy of Notice 726 which explained the risks of MTIC fraud and steps that traders could take to avoid being caught up in it ([82(2)]). (Mr Inglis had, in his evidence, denied himself being aware of Notice 726 until August 2015, by which time some of the Challenged Deals had been effected (see [18(30)(a)]), but the FTT's finding at [82(2)] was that the Company at least was aware of Notice 726 from September 2012 at the latest.)

(4) In 2010 or 2011, and so before the Company entered into the Challenged Deals, the Company had nearly had to cease trading, and had to make several staff redundant, because HMRC delayed making a VAT repayment to the Company because they suspected that the relevant transactions to which the Company was party at the time were connected with a fraudulent evasion of VAT ([82(3)]).

(5) During most of 2012, and from September 2015 (which was before the Company entered into deals 14-20), the Company had been involved in a "continuous monitoring project" which required them to provide continuous information on transactions to HMRC ([82(4)]).

(6) The Company's VAT returns had been subject to extended verification on 15 occasions ([82(5)]).

12. When setting out its reasons for concluding that the Company "should have known" that the Challenged Deals were connected to fraudulent evasion of VAT, the FTT drew on its findings as to the Company's prior awareness of MTIC fraud and its experience of having VAT repayments denied or made subject to extended verification. It said, at [82]:

> We do not accept the statements of the Company's witnesses that they were naive or unaware of the risks of MTIC fraud in their industry.

It commented, at [82(3)]:

> Directors and senior staff who have come close to losing their jobs and capital because of involvement in an MTIC fraud would have their eyes wide open to any future risk of a repeat of such a disaster.

It said, of the Company's involvement in the "continuous monitoring project":

> Mrs Brown explained that she had joked to Mr Inglis and Mr Munro that there were so many information demands that she almost felt she was working for HMRC rather than the Company. The effort being expended

> by HMRC and required from (and delivered by) the Company must have highlighted that the Company was in a business with high risk of involvement in transactions connected with VAT fraud.

13. Having concluded that, prior to entering into the Challenged Deals, the Company should have been on notice of the risks of getting caught up in MTIC fraud in its chosen line of business, the FTT found, at [84], that the Company did not appreciate the difference between "normal commercial due diligence" and the kind of "MTIC red flag due diligence" that HMRC recommended in their published VAT Notice 726 to guard against becoming caught up in MTIC fraud. Notice 726 does not itself refer to "red flag due diligence". However, it does contain a section headed "What checks can I undertake to help ensure the integrity of my supply chain" in which HMRC set out examples of possible indicators of a risk that VAT due in the chain could go unpaid. It was common ground that these indicators were the "red flags" to which the FTT was referring.

14. At [85], the FTT concluded that a reasonable person of business reading Mr Wildman's email of 16 March 2015 would have concluded that the following red flags mentioned in Notice 726 were present:

> (1) PPSM, the Company's supplier in the Challenged Deals, referred the Company to GECX, the Company's purchaser in those deals, with GECX being prepared to buy goods of the same quantity and specification as PPSM was offering.
>
> (2) PPSM was offering deals that carried no commercial risk since GECX would pay in advance for stock and all transportation costs would be covered.
>
> (3) The Challenged Deals involved the Company obtaining consistent and predetermined margins, irrespective of the goods traded, or the date of transaction.

15. At [86] and [87], the FTT set out its conclusion on whether the Company "should have known" of connection to fraud in the following terms:

> 86. We conclude that it was not merely more likely than not that the PPSM transactions were connected with fraud; rather, the only reasonable explanation for the Challenged Deals was that they were connected with fraud.
>
> 87. Taking together all the above and applying the stated legal tests, we find that the Company should have known that the Challenged Deals were connected with VAT fraud.

16. As we have noted, the FTT's conclusion that the Company did not have actual knowledge that its transactions were connected with VAT fraud is not under appeal. However, some of its findings on this issue cast some light on its conclusion on the question of whether the Company "should have known". At [92], the FTT said:

> 92. We have commented above on the clear applicability of the MTIC red flags to Mr Wildman's March 2015 email setting out the basis of the

> proposed transactions. However, we do not conclude that Mr Inglis ignored those red flags because he was complicit in VAT frauds. Rather, he seems to have been beguiled by a combination of what he perceived to be Mr Wildman's good standing in the industry, and the opportunity to earn a relatively easy profit by acting as commission broker on "no risk" deals arranged by Mr Wildman. That also, we consider, explains Mr Inglis's ready acceptance of Mr Wildman's assurances that PPSM's supplier chain was secure and of no concern to HMRC, and Mr Inglis's pestering of Mr Stock to be allowed to recommence trading with PPSM. The same explanation accounts for why the Company undertook deals with PPSM for goods that were not its usual line of business, and trusted Mr Wildman was looking after the merchantability of the stock.

The Company's grounds of appeal against the Decision

17. The Company applied for permission to appeal on the following basis:

> The Applicant had given evidence as to why it did not consider its transactions were connected with fraud: it trusted Mr Wildman (who it considered to have a good standing in the industry) and it believed Mr Wildman's explanation of the rationale for the transactions (namely that Mr Wildman could not himself afford to fund the VAT cost that would arise if he purchased from a UK-based supplier, incurring VAT, but sold goods VAT-free to a customer outside the UK). The FTT based its conclusions on "means of knowledge" on inferences that it concluded a reasonable businessman would have drawn as to the risk that transactions were connected with VAT fraud. However, it did not explain why a reasonable businessman would have concluded from the presence of those risks that the transactions were actually connected with VAT fraud in the light of the reassurance that was available from Mr Wildman's standing and his explanation of the rationale for the transactions. Its conclusion on "means of knowledge" was, therefore, vitiated by either or both:
>
> (a) a failure to give sufficiently full reasons; or
>
> (b) a failure to apply the law on "means of knowledge" to the facts that it had found.

18. The Upper Tribunal granted permission to appeal on the basis that this ground of appeal disclosed an arguable error of law in the Decision.

19. Following an oral hearing on 26 February 2020, the Upper Tribunal confirmed that, as part of its arguments on the above grounds of appeal, the Company was entitled to submit that:

(1) the FTT was mistaken in concluding, at [82(1)] of the Decision, that the Company's witnesses or any of them claimed to be naïve or unaware of the risks of MTIC fraud in their industry and/or;

(2) the FTT's application of the test of means of knowledge was flawed insofar as it was based on the FTT's perception that the Company's witnesses were making such a claim.

The Grounds of Appeal considered

Ground 1 – Whether the Decision was adequately reasoned

20. The parties were agreed that the FTT was obliged to give reasons for its decision and we were referred to the decisions of the Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 and *Weymont v Place* [2015] EWCA Civ 289.

21. We did not understand the parties to disagree with the proposition that the FTT's reasons needed to be sufficient to make it apparent why one had won and the other had lost. That is important for at least two reasons. First, justice must be seen to be done.

Second, this Tribunal, hearing an appeal against the Decision, must be able to understand why the FTT reached its decision so that, if it contains an error of law, that error can be corrected.

22. Those statements of principle are easy to articulate. However, it is not possible to give a formula that determines the extent of reasons that are to be given in any particular case. In *English v Emery*, the Court of Appeal stressed that the extent to which reasons must be given would depend on the nature of the case but subject to that Lord Phillips MR gave this guidance at [19] of his judgment:

> It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.

23. It is appropriate to commence the analysis of the adequacy of the FTT's reasons with two principles of law on which the parties were agreed:

> (1) The "should have known" condition is not satisfied if there is a reasonable explanation for the transactions other than those transactions being connected with fraudulent evasion of VAT.
>
> (2) A finding that the Company should have known that there was a risk that its transactions were connected with the fraudulent evasion of VAT, or even that it was "more likely than not" that those transactions were so connected, is not sufficient to invoke the principle in *Kittel*. Rather, it has to be shown that the Company should have known that its transactions were connected with fraudulent evasion of VAT.

24. The Company had given the FTT an account that sought to explain the Challenged Deals on a basis that they were not connected with fraudulent evasion of VAT. Given the principle of law set out at [23(1)], before concluding that the Company "should have known" of connection to fraud, the FTT had to conclude that this alternative explanation was not reasonable, not by looking at it in isolation, but by considering it against the background of the totality of the evidence: see *HMRC v Davis & Dann Ltd and Anor* [2016] EWCA Civ 142 at [56]-[65]. Moreover, since the alternative explanation was at the heart of the Company's case, the FTT's duty to give reasons meant that it had to explain why it was rejecting it as being unreasonable.

25. As we have already noted, the FTT gave no express reasons as to why it was dismissing the Company's alternative explanation as unreasonable. HMRC nevertheless argue that the FTT's reasoning was perfectly clear. They point out that the FTT realised that HMRC were arguing that the Company's alternative explanation made no sense, and HMRC had put that case to the Company's witnesses in crossexamination ([47(2)]). Against that background, HMRC argue that the FTT's reasons were perfectly adequate: it was concluding that the Company should have been on notice of the risk of MTIC fraud in its chosen business line, it should have read Notice 726 and had it done so, the presence of the red flags highlighted at [85] of the Decision would have caused a reasonable business person to conclude that despite Mr Wildman's assurances, the only reasonable explanation was that the transactions were connected with fraud. HMRC sought to characterise the Company's criticisms of the reasoning in the Decision as relating simply to the Decision's format which involved the FTT reciting largely uncontroversial factual evidence under thematic headings before expressing a reasoned conclusion on that evidence.

26. We quite accept HMRC's general point that there is no single correct way to structure a decision. But we do not accept that the Company's criticisms of the FTT's reasoning simply relate to format. Whatever format or structure the FTT adopted, the FTT needed to explain why it had concluded that the Company's alternative, and innocent, explanation was unreasonable. The FTT gave no such express explanation.

27. Nor do we accept HMRC's argument that, read as a whole, the FTT's conclusions at [85] on the presence of red flags involved a rejection of the Company's alternative explanation. The FTT clearly regarded the presence of the red flags as being important. However, the Company's alternative account of the Challenged Deals sought to explain those red flags. The Company did not deny that the first red flag was at least apparently present, as PPSM had indeed put it in contact with GECX. However, its case was that there was an innocent explanation for the presence of that red flag namely that PPSM could not fund the VAT cashflow cost and so needed the Company to interpose itself in the transaction so that the Company, and not PPSM, would suffer that cashflow cost. In a similar vein, the Company was advancing an innocent explanation of the presence of the other two red flags namely that, because the Company was simply being interposed in a transaction that PPSM had put together, it should be remunerated by reference to a flat percentage of the transactions' value and should not be required to take commercial risk. Therefore, we do not accept HMRC's argument that the FTT

adequately explained why the presence of the red flags effectively trumped the Company's alternative explanation. On the contrary, the FTT could only properly conclude that the red flags were of such significance by explaining why it was rejecting as unreasonable the Company's innocent explanation for the presence of those red flags.

28. HMRC go on to argue that, even if there was a technical failure to give reasons, this Tribunal should not interfere with the Decision because that technical failure cannot have affected the result since the only possible conclusion was that the Company's alternative explanation was unreasonable.

29. We consider that we should be slow to describe any failure to give reasons as purely "technical". As we have explained, the requirement to give reasons is important since it enables the parties to understand why they have won, or lost, and enables an appeal court or tribunal to see clearly whether the correct legal approach has been followed.

30. In any event, we do not consider that the Decision contains sufficient factual findings for us to determine whether or not the Company's alternative explanation for the transactions was unreasonable. Of course, it is clear that HMRC submitted that the explanation was unreasonable since it was said to be contradictory: if Mr Wildman was as reputable and established an industry player as the Company claimed, it made no sense that he could not fund the VAT cost, but the Company could. However, that was simply HMRC's assertion and there are suggestions in the Decision that the Company sought to give an answer to it. For example, at [18(30(g)], the FTT records Mr Inglis saying that Mr Wildman's shortage of cash-flow was temporary only (as he wanted to "take back the deals" when cashflow permitted). In the same paragraph, Mr Inglis observed that PPSM's poor credit rating was consistent with Mr Wildman's explanation. In a similar vein, at [18(30)(h)], Mr Inglis had said that it was "completely feasible" that, because of Mr Wildman's reputation and experience in the industry, he had a number of good contacts that enabled him to put deals together without necessarily having the financial wherewithal to fund the VAT cost that would arise from completing those deals. Assessing the reasonableness or otherwise of the Company's alternative explanation would involve a multi-factorial assessment of, among others, circumstances surrounding the Challenged Deals and what a reasonable person would have thought of Mr Wildman and the explanation of the deals. Given the relative lack of factual findings on these and other issues in the Decision to which we have referred, we do not consider we are equipped, at this remove from the evidence, to perform that assessment. A similar point can be made of submissions that Ms Vicary made orally to the effect that, if Mr Wildman needed funding to cover cash-flow problems, a reasonable person would have expected him to seek bank finance rather than give the Company a percentage of his equity in the transactions he had negotiated.

31. There is a further reason why we do not consider that the FTT's findings as to the presence of red flags satisfactorily dealt with the Company's alternative explanation for the transactions. The red flags to which the FTT referred came from a section of VAT Notice 726 that read, as far as material:

6.1 What checks can I undertake to help ensure the integrity of my supply chain?

The following are examples of indicators that **could** alert you to the **risk** that VAT would go unpaid:

…

- has your supplier referred you to a customer who is willing to buy goods of the same quantity and specifications being offered by the supplier?
- does your supplier offer deals that carry no commercial risk for you – eg, no requirement to pay for goods until payment received from customer?
- do deals with your customer/supplier involve consistent or predetermined profit margins, irrespective of the date, quantities or specifications of the specified goods traded? [our emphasis]

32. Therefore, on its face, VAT Notice 726 was simply stating that the existence of particular hallmarks, or red flags, could alert a taxpayer to a risk of fraud. However, as we have observed at [23(2)], the fact that a taxpayer should have appreciated a risk is not of itself sufficient to support a conclusion that the taxpayer "should have known" that a transaction was connected with fraud. HMRC invite us to conclude that the FTT was reasoning that the presence of the red flags rendered express consideration of the Company's alternative explanation unnecessary. However, we see some risk of that approach applying the wrong legal standard since it seems to result in a conclusion that because the Company should have appreciated that its transactions had hallmarks that indicated a possible risk of fraud, it "should have known" that its transactions were connected with fraud.

33. Finally, HMRC submitted that the findings at [82] were so "damning" as to render any express consideration of the Company's alternative explanation unnecessary. We reject that submission. At [82], the FTT was making findings as to the extent of the Company's awareness, and that of its directors and employees, as to MTIC fraud generally. None of those findings whether alone, or together, supports a conclusion that the Company should have known that the Challenged Deals specifically were connected with the fraudulent evasion of VAT. At most those findings suggest that the Company should have been put on notice that there was a risk that the Challenged Deals were connected with such a fraud. In saying this we are not, of course, saying that the findings at [82] are irrelevant: the Company's awareness of the extent of MTIC fraud in its chosen business area might well be relevant to an assessment of whether it should have known that actual transactions were connected to fraud. However, HMRC put matters too high in submitting that the findings at [82] were "damning".

34. In her oral submissions, Ms Vicary referred us to the FTT's findings at [84] as to the inadequacy of the Company's due diligence processes. We agree that, in this paragraph, the FTT is critical of those processes. However, as we think Ms Vicary ultimately accepted, those criticisms do not seek to address the Company's alternative

explanation of the Challenged Deals. Therefore, while we quite accept that paragraph [84] contained an analysis of material that was relevant to the question of whether the Company "should have known" its transactions were connected to fraud, it does not render unnecessary an analysis of the alternative explanation the Company was advancing.

35. Our conclusion, therefore, is that Ground 1 is made out since the FTT did not give sufficient reasons for rejecting the Company's alternative explanation of the Challenged Deals.

Ground 2 – Whether the FTT applied the correct approach to the facts that it had found

36. Given our conclusion on Ground 1, we do not propose to address Ground 2. First, it is not necessary to do so since, as we discuss in the next section, the effect of the Company's success on Ground 1 is that the appeal will need to be remitted back to the FTT. Second, in any event, since we have concluded that the FTT gave insufficient reasons for its decision, it is correspondingly difficult to determine whether the FTT's conclusion involved an application of the correct test.

Disposition

37. We have concluded that the Decision contains an error of law consisting of a failure to give sufficient reasons. In those circumstances, s12 of the Tribunals, Courts and Enforcement Act 2007 provides that:

(1) We may, but need not, set aside the decision of the FTT; and

(2) If we do set aside the decision, we must either:

(a) remit the case to the FTT with directions for its reconsideration; or

(b) re-make the decision.

38. We have already explained why do not consider that the insufficiency of reasons can be considered immaterial. Accordingly, we are in no doubt that the Decision must be set aside.

39. We have also explained the difficulties that we would have, at this remove from the evidence, in deciding whether the Company had put forward a reasonable alternative explanation of the Challenged Deals other than those transactions being connected with the fraudulent evasion of VAT. Those difficulties mean that we will not exercise our power to remake the Decision.

40. It follows, therefore, that the matter must be remitted back to the FTT and the sole outstanding question is what directions we should make for its reconsideration. HMRC argue that the matter should be remitted to the same FTT with a direction that it consider whether there was a reasonable explanation for the Challenged Deals other than those

transactions being connected with fraudulent evasion of VAT and give reasons for that view.

41. The Company agrees that it would be appropriate for the FTT to focus, when the appeal is remitted, on the limited issue HMRC identify. However, they argue, referring to the decision of the Upper Tribunal in *HMRC v Beigebell Limited* [2020] UKUT 176 (TCC), which itself referred to guidance from the Court of Appeal in *HCA International Limited v Competition and Markets Authority* [2015] EWCA Civ 492, that the matter should be remitted to a differently constituted FTT.

42. We will apply the guidance given by the Court of Appeal in *HCA International Limited*. We stress, that, as was the case in *Beigebell*, there is no suggestion that the FTT was biased, or gave an appearance of bias. However, the FTT reached a decision that was unfavourable to the Company without giving adequate reasons why it rejected as unreasonable the alternative explanation of the Challenged Deals as being unconnected with VAT fraud that the Company was advancing. In those circumstances, if we remitted the matter back to the same FTT, we would see some risk in public confidence in the decision-making process being damaged. By parity of reasoning with *Beigebell*, if HMRC succeeded at a renewed hearing, a dispassionate observer might be concerned that the FTT was subconsciously affected by its earlier insufficiently reasoned decision whereas, if the Company succeeded, a dispassionate observer might be concerned that the FTT had over-compensated.

43. We will therefore remit the matter back to the FTT with the following directions for determination:

(1) The remitted appeal must be heard by a differently constituted Tribunal.

(2) Unless both parties agree otherwise, the remitted appeal should be limited to a determination of whether the Company "should have known" that the Challenged Deals were connected with the fraudulent evasion of VAT. As part of its determination of that issue, the FTT must consider whether there was a reasonable explanation for the Challenged Deals other than those transactions being connected with fraudulent evasion of VAT, consisting of that summarised at [18(7)] and [18(8)] of the Decision, when viewed against the background of the totality of the evidence.

44. Both parties have liberty to apply, within 21 days of release of this decision, for any variation to the precise drafting of the direction outlined at [43(2)]. Before making any application to the Upper Tribunal for variation of that direction, they should first seek to agree the terms of any revision between themselves.

Signed on Original

JUDGE JONATHAN RICHARDS
JUDGE GUY BRANNAN

RELEASE DATE: 16 November 2020