[2018] UKFTT 633 (TC)

TC06784

Appeal number: 2014/01530
2013/08083

VALUE ADDED TAX – scrap metal transactions undertaken by appellant - denial of input tax – the appellant did not dispute that there was a tax loss, that the tax loss resulted from fraudulent evasion of VAT and that the transactions were connected with fraudulent evasion of VAT - did the appellant know or should it have known that the transactions were so connected – yes - appeal dismissed - decision by HMRC to deregister appellant for VAT - whether correct on basis that registration probably connected to fraud – yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MILLENNIUM ENERGY TRADING LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE THOMAS SCOTT
MRS SONIA GABLE

Sitting in public at Taylor House, Rosebery Avenue, London on 14 May 2018

The Appellant did not appear and was not represented

James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Millennium Energy Trading Limited ("MET") against:

> (1) HMRC's decision to cancel MET's registration for VAT, notified to MET on 23 July 2013 and made on the basis that MET had used or intended to use its registration for fraudulent and abusive ends.
>
> (2) HMRC's decision to deny MET VAT input tax credit on the purchase by it of metals in periods 02/13, 05/13 and 99/99 (being 1 June 2013 to 23 July 2013).
>
> (3) The consequential issue by HMRC of assessments to VAT for the periods in which input tax credit was denied, totalling £4,890,631.

The hearing

2. The sole director and shareholder of MET is Richard George. Neither Mr George nor anyone from MET attended the hearing, and MET was not represented at the hearing.

3. Mr Puzey on behalf of HMRC applied to proceed in MET's absence under Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules"). Rule 33 provides as follows:

> "**Hearings in a party's absence**
>
> **33.** If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal--
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

4. We were entirely satisfied that Mr George had been notified of the hearing. Mr George had applied to the Tribunal on previous occasions to postpone the scheduled hearing, and prior to the scheduling of this hearing his most recent application had been granted. On 12 April 2018 Mr George applied to postpone this hearing, on grounds of his ill-health and because it coincided with the anniversary of his wife's death. On 4 May 2018 Judge Mosedale refused that application, and issued the following Direction:

> "The application to postpone the hearing made on 12/4/18 by the appellant has been refused because a postponement is not justified because (a) while Mr George has a serious illness, by its nature it is likely not to be resolved in the short term so a short postponement would achieve nothing; (b) there is no medical evidence that the illness has seriously impacted on Mr George's ability to prepare for and attend the hearing; (c) further treatment is planned for later in the year so it is sensible for the hearing to take place in May before Mr George undergoes this further treatment; (d) the appeal relates to events many

> years ago so further delay risks the evidence becoming yet more stale, and (e) this hearing has already been postponed once before. It is also the case that a long postponement of several years is also not justified as (a) there is no certainty that Mr George will be any better able to prepare for and attend the hearing in a few years time and (b) excessive delay in resolving an appeal is inimical to justice.
>
> The hearing will therefore take place."

5. We were informed that HMRC had offered to Mr George the option of not sitting on the date of the anniversary of his wife's death, but that this had been declined. On 8 May 2018 Mr George replied to Judge Mosedale's Direction by email as follows:

> "I am in receipt of your email letter dated 4th May 2018, refusing my application to postpone the above appeal hearing due to start on Monday 14th May.
>
> In view of the refusal and the joint reasons for the request, in particular the first anniversary of my wife's passing, I will not attend the hearing.
>
> I reserve the right to appeal the decisions of the tribunal."

6. Having satisfied ourselves that Mr George had been notified of the hearing, we then considered whether it was in the interests of justice to proceed. We were guided by the overriding objective in Rule 2 of the FTT Rules, to deal with cases fairly and justly.

7. We considered that the reasons given by Judge Mosedale for refusing Mr George's application to postpone made it in principle appropriate and in the interests of justice for the hearing to proceed, but subject to the issues discussed below and to the safeguards set out at [10].

8. We gave detailed consideration to the need to ensure that if the hearing proceeded MET would not thereby be prevented from receiving a fair trial. We noted that MET's lack of representation did not of itself mean that a fair trial was not possible, taking into account that a taxpayer before the FTT may choose not to be represented, and that the FTT was a specialist tribunal which could adopt a more inquisitorial role: see *Aleena Electronics Ltd v Revenue & Customs* [2011] UKFTT 608(TC).

9. Mr George had reached the decision not to attend the hearing, and his reasons for doing so are set out at [5]. This was not a case where the appellant was determined to attend but it was physically impossible for him to do so, or where he contended that a hearing in his absence could not be fair.

10. We directed that the following procedures and guidelines would apply to the hearing:

> (1) HMRC would ensure that Mr George received a transcript of the hearing at the end of each day. This would be done as soon as the transcript was available, and at HMRC's cost. HMRC would ensure acknowledgement of receipt was received.
>
> (2) The witness statements of Mr George and his colleague Mr Jogi would be admitted as their evidence. The Tribunal would take into account that

neither witness could be cross-examined by HMRC or questioned by the Tribunal.

(3) HMRC and the Tribunal would attempt to present all the issues in as clear and straightforward a way as possible, with the aim that they should be intelligible to Mr George from the transcripts.

(4) Mr George would be given 21 days from the close of proceedings to send to the Tribunal any submissions or comments on the hearing, which the Tribunal would take into account in reaching its decision.

(5) In relation to the two witnesses for HMRC, Mr Puzey would, following examination-in-chief, represent the interests of MET in asking questions of the witnesses, including any relevant points raised by Mr George in his witness statement.

11. All of these points were agreed by Mr Puzey, for whose co-operation we express our gratitude.

12. We concluded for the reasons given above and with these important safeguards that it was in the interests of justice for the hearing to proceed.

Background

13. The following facts were not in dispute.

14. MET was incorporated on 18 October 1996 and changed its name to Millennium Office Supplies Ltd. It was registered for VAT on 6 April 1998, with its business activity declared as "security and support services/minor building maintenance". Mr George was appointed a director of MET on 13 October 2005. Mr George's two sons became secretary and director in 2005, and resigned on 1 November 2013. They took no active part in MET's business activities. Mr George was the sole shareholder of MET during the period relevant to this appeal.

15. Between October 2005 and early July 2013 MET notified its principal place of business to HMRC as Mr George's successive home addresses. On 4 July 2013 MET notified HMRC that its new address was a yard which Mr George said he had rented in order to receive consignments of scrap metal.

16. MET traded in various goods between 2007 and 2012, including razors, sunglasses and waste clearance skips.

17. The name of the company was changed to Millennium Energy Trading Ltd on 9 February 2010. The change of name was only notified by MET to HMRC on 7 December 2012. That notification prompted HMRC to visit MET on 24 January 2013. HMRC subsequently made a number of further enquiries into MET's business.

18. On 23 July 2013 HMRC wrote to MET notifying it of HMRC's decision to cancel MET's VAT registration on the grounds that MET had used or intended to use the registration for fraudulent and abusive ends ("the Deregistration Decision").

19. On 14 February 2014 HMRC wrote to MET denying its claims to input tax as follows ("the Input Tax Denial"):

(1) Period 02/13— £2,631,972

(2) Period 05/13—£1,859,581

(3) Period ending 24 July 2013—£399,078

20. HMRC assessed MET to VAT totalling £4,890,631 for the periods of the Input Tax Denial.

21. HMRC also issued penalties to both MET and Mr George, which have not been appealed.

22. MET's appeals against the Deregistration Decision and the Input Tax Denial were directed by the Tribunal to be heard together and are the subject of this appeal.

Summary of the transactions in the appeal

23. In period 02/13 MET reported 98 wholesale purchases of scrap metal. All purchases were made from UAA Holdings Ltd ("UAA").

24. In period 05/13 MET reported 53 such purchases from UAA and 12 such purchases from GPSE Ltd ("GPSE").

25. In the period ending 27 July 2013 (terminated early by virtue of the Deregistration Decision) MET reported 12 such purchases from GPSE and 13 such purchases from SWAT Tyres and Recycling Ltd ("Swat").

26. Where relevant further details of individual transactions are referred to below.

Evidence

27. We considered ten lever arch files of documents, including correspondence between the parties, reports compiled by HMRC officers, and records of interviews with UAA.

28. In relation to witness evidence, we received witness statements from Mr George and Mr Jogi for MET. For HMRC, we received witness statements from the following officers:

(1) Mary Kinman

(2) Colin Needs

(3) Clive Bright

(4) Marion Gibrill

(5) Keith Thompson

29. Officer Penry was the decision maker in relation to the Input Tax Denial, but following his retirement Officer Kinman became the decision maker in respect of both

that issue and the Deregistration Decision. Officer Needs was responsible within HMRC for UAA. Both Officer Kinman and Officer Needs were questioned by Mr Puzey, including pursuant to our direction at [10](5), and we also questioned them. We found them both to be credible and reliable witnesses.

30. Officers Bright, Gibrill and Thompson were responsible respectively for Swat, IBY Limited and GPSE. IBY was a defaulting trader for VAT purposes in relation to transactions with GPSE. Since MET accepted that both Swat and GPSE had been involved in VAT fraud in relation to the transactions in the appeal, it was not necessary for Officers Bright, Gibrill or Thompson to appear before the Tribunal.

31. Following the hearing, we received comments from Mr George, pursuant to our direction at [10](4). While these were submissions rather than admissible evidence, we considered them in reaching our findings and decision.

32. We comment below on the witness statements of Mr George and Mr Jogi in setting out our findings of fact.

Issues in the appeal

33. The issues which it was necessary for us to consider in the appeal required some consideration.

34. We discuss at [99] the nature of the Tribunal's jurisdiction in relation to the Deregistration Decision, and our reasons for concluding that it is appellate and not merely supervisory. The Deregistration Decision was explained in its decision letter by HMRC as resting on the assessment that MET's registration had been or was to be used for fraudulent and abusive purposes. The evidence necessary to support that conclusion would be substantially similar to that necessary to support the *Kittel* aspect of the Input Tax Denial. We therefore decided that it was most appropriate and efficient to consider first the Input Tax Denial.

35. In relation to the Input Tax Denial, HMRC's decision was issued on the basis of any or all of four alternatives, namely:

(1) Connection to fraud (the *Kittel* denial, being a reference to the joined decisions of the European Court of Justice ("ECJ") in *Axel Kittel v Belgium; Belgium v Recolta Recycling SPRL* (Case C-349/104 and C-440/04) [2009] STC 1537

(2) Insufficient evidence that taxable supplies to MET had taken place

(3) Insufficient evidence of payment by MET

(4) In relation to purchases from UAA in period 02/13, that the invoices were invalid and HMRC was justified in not accepting alternative evidence of the charge to VAT.

36. By the time of the hearing HMRC had withdrawn argument (2) regarding evidence of taxable supplies.

37. Case law makes it clear that in relation to a denial based on *Kittel*, four issues arise for the Tribunal, namely:

(1) Was there a tax loss?

(2) If so, did that loss result from fraudulent evasion?

(3) If so, were the transactions which are the subject of the appeal connected with that evasion?

(4) If so, did the appellant know, or should it have known, that the transactions were so connected?

38. The burden of proof in relation to *Kittel* rests with HMRC. The standard of proof is the ordinary civil standard, namely the balance of probabilities.

39. In determining which of the issues relevant to the *Kittel* denial were contested by MET, we had the benefit of "Fairford" directions, intended to clarify in good time the issues in dispute (so called following the Upper Tribunal decision in *HMRC v Fairford Group plc* [2015] STC 156). It was clear from those directions that MET *did* contest the existence of knowledge or means of knowledge. It was also clear that it *did not* contest the existence of a fraudulent tax loss or connection to such a loss in relation to MET's purchases from Swat and GPSE.

40. Approximately 80% of the transactions in the appeal were purchases from UAA. HMRC had prepared its Statement of Case on the basis that it was not entirely clear whether MET contested the fraudulent tax loss and connection issues in relation to those purchases. Our consideration of the correspondence between the parties in relation to their attempt to agree tribunal directions led us to conclude that in fact MET did not contest those issues in relation to its purchases from any of its suppliers, including UAA. In response to the question whether MET accepted without making any admission of knowledge or means of knowledge that MET's transactions in the appeal were part of an orchestrated fraud, the reply in that correspondence was "[Y]es, it is accepted after the submissions by HMRC provided in the files that were sent to the appellant". In response to the question whether in respect of chains of transactions alleged by HMRC to be directly connected to a defaulter MET accepted that there had been a fraudulent VAT default at the start of the chain, the response was "[Y]es, it is accepted after the submissions by HMRC provided in the files sent to the appellant (without making any admission of knowledge or means of knowledge)".

41. These replies from MET were given in February 2016, and therefore after Mr George's witness statement of 20 October 2015. We concluded, and Mr Puzey agreed, that in fact the only *Kittel* issue contested by MET was knowledge or means of knowledge.

42. We proceeded on this basis, but should record that in any event our consideration of the evidence would have led us to conclude that HMRC had discharged its burden of proof in relation to the *Kittel* issues other than knowledge or means of knowledge in relation to all of the purchases by MET in the appeal.

43. We now consider the four issues before the Tribunal in the appeal, namely:

(1) In relation to the *Kittel* denial, whether HMRC had proved knowledge or means of knowledge

(2) Whether there was insufficient evidence of payment by MET such as to justify the denial of input tax

(3) In relation to purchases from UAA by MET in period 02/13, were the VAT invoices invalid, and, if so, were HMRC justified in not accepting alternative evidence?

(4) Was the Deregistration Decision correct?

The *Kittel* denial: the law

44. Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 (the Principal VAT Directive or "PVD") set out a taxable person's right to recovery of input tax as follows:

> "167—A right of deduction shall arise at the time the deductible tax becomes charged.
>
> 168—In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person".

45. Domestic legislation provides for the right to recovery of input tax in sections 24 to 26 of the Value Added Tax Act 1995 ("VATA 1994"). In particular, so far as relevant the legislation states as follows:

> "25(2) Subject to the provisions of this section, [a taxable person] is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.
>
> 26(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below."

46. In *Kittel*, the ECJ determined that there is an exception to the right to deduct. In that case, the ECJ held that a taxable person who knew or should have known that, in purchasing goods, he was taking part in a transaction connected with the fraudulent evasion of VAT, loses the right to deduct input tax on those goods. At [51] of *Kittel*, the ECJ stated:

> "… 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 …"

47. At [56] – [59] of *Kittel*, the ECJ concluded as follows:

> "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.
>
> 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> 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'."

48. As explained by the Court of Appeal in *Mobilx Ltd (in administration) v Commissioners for HMRC* [2010] EWCA 517 (at [49]) there is no relevant distinction in this regard between domestic and Community law. The right to deduct must be refused:

> "… 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'." (*Kittel* at [59])."

49. In *Davis and Dann Ltd v Revenue & Customs Commissioners* [216] STC 126, the Court of Appeal approached the " should have known" test on the basis of Moses LJ's comment in *Mobilx* that it required that " the only reasonable explanation" for the transactions must have been connection to fraud. However, in *AC (Wholesale) Limited v The Commissioners for Revenue & Customs* [2017] UKUT 191 (TCC), the Upper Tribunal determined that the "only reasonable explanation" formulation was simply one way of showing that a person should have known that the transaction was connected to fraud: see paragraphs 19 and 27. It is important to take into account that the meaning of the *Kittel/Mobilx* formulation was not an issue in *Davis and Dann*; the critical issue before the Court of Appeal in that case was whether the Upper Tribunal had erred in failing properly to consider the *cumulative* effect of the circumstances known to the trader.

50. We would follow the analysis of the Upper Tribunal in *AC (Wholesale)* even if we were not bound by it, which we are, and in particular we endorse the following passage from the decision:

> "29. In our view, Mr Brown's submissions place a weight on the words used by Moses LJ in *Mobilx* that they cannot bear. Moses LJ was clear that the test in *Kittel* was a simple one that should not be over refined. It is, to us, inconceivable that Moses LJ's example of an application of part of that test, the 'no other reasonable explanation', would lead to the test becoming more complicated and more difficult to apply in practice. That, in our view, would be the consequence of applying the interpretation urged upon us by Mr Brown. In effect, HMRC would be required to devote time and resources to considering what possible reasonable explanations, other than a connection with fraud, might be put forward by an appellant and then adduce evidence and argument to counter them even where the appellant has not sought to rely on such explanations. That would be an unreasonable and unjustified evidential burden on HMRC. Accordingly, we do not consider that HMRC are required to eliminate all possible reasonable explanations other than fraud before the FTT is entitled to conclude that the appellant should have known that the transactions were connected to fraud.
>
> 30. Of course, we accept (as, we understand, does HMRC) that where the appellant asserts that there is an explanation (or several explanations) for the circumstances of a transaction other than a connection with fraud then it may be necessary for HMRC to show that the only reasonable explanation was fraud. As is clear from *Davis & Dann*, the FTT's task in such a case is to have regard to all the circumstances, both individually and cumulatively, and then decide whether HMRC have proved that the appellant should have known of the connection with fraud. In assessing the overall picture, the FTT may consider whether the only reasonable conclusion was that the purchases were connected with fraud. Whether the circumstances of the transactions can reasonably be regarded as having an explanation other than a connection with fraud or the existence of such a connection is the only reasonable explanation is a question of fact and evaluation that must be decided on the evidence in the particular case. It does not make the elimination of all possible explanations the test which remains, simply, did the person claiming the right to deduct input tax know that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT or should he have known of such a connection."

51. We have also found useful guidance in the following judicial pronouncements, which we have taken into account in reaching our decision in relation to the "should have known" issue:

(1) It is necessary to consider individual transactions in their context, including drawing inferences from a pattern of transactions, and to look at "the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them": *Red 12 Trading Ltd v Revenue & Customs* [2010] STC 589, at [109] to [111].

(2) In effect as a facet of the guidance given in *Red 12*, it is necessary to guard against over-compartmentalisation of relevant factors, and to stand back and consider the totality of the evidence: *Davis and Dann*, and *CCA Distribution Ltd v Revenue and Customs* [2017] EWCA Civ 1899.

(3) The Tribunal should take account of but not focus unduly on the question of whether the trader has acted with due diligence: Moses LJ in *Mobilx*, at [82].

(4) As stated by Briggs J in *Megtian Ltd v HMRC* [2010] EWHC 18(Ch), and approved by Lady Justice Arden in *Fonecomp Limited v HMRC* [2015] EWCA Civ 39:

> "37. In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place."

(5) In other words, the trader need not know the details of the fraud or of the connection between its transactions and the fraudulent evasion of VAT: *Fonecomp*.

(6) The Tribunal is entitled to rely on inferences drawn from the primary facts: *Mobile Export 365 v Revenue and Customs* [2007] EWHC 1737 Ch, at [20].

Kittel denial: discussion

52. As explained above, the issue in relation to the *Kittel* denial was actual or constructive knowledge.

HMRC arguments

53. In its letter of 14 February 2014 denying input tax credit on the basis of *Kittel* HMRC listed the following factors which it had taken into account in reaching that decision:

> (1) Every single transaction undertaken by MET had been traced to a fraudulent tax loss.
>
> (2) The transactions were contrived, with no evidence that MET performed any commercial purpose in the supply chain. The goods were delivered by the supplier direct to MET's customer. MET did not take physical possession of the goods.
>
> (3) MET did not have insurance in respect of any of the transactions.
>
> (4) MET did not inspect any of the goods bought, and it had no knowledge of the freight forwarder trusted with transporting the goods.

(5) There was no evidence of contractual negotiations in relation to the purchases.

(6) All parties to the transaction had used an " alternative banking platform" with the result that payment flows were unclear.

(7) All of the transactions were structured identically regardless of the seller to MET, and MET only dealt with one supplier at a time until that supplier was deregistered for VAT.

(8) There was an "incredible" increase in MET's turnover despite a lack of experience in that sector, no evidence of funding and minimal staff.

(9) MET had been given several warnings regarding Missing Trader Intra-Community or MTIC fraud by MTIC officers and was well aware of the risk of VAT fraud in its supply chains.

(10) The transactions were "back to back", and the supply chains pre-determined, so that MET never needed to hold on to goods or source them from different suppliers, as one would expect in a commercial trade. There was no financial risk to MET.

(11) MET failed to enter into any formal written contracts.

(12) MET carried out virtually no due diligence in respect of any of its suppliers.

(13) A number of documents in the supply chains were falsified.

(14) At the meeting with HMRC in January 2013 Mr George misled HMRC as to MET's metals trade at that time.

MET arguments

54. The grounds set out in the notices of appeal filed on behalf of MET against the Deregistration Decision and the Input Tax Denial contained a degree of overlap, so we set out extracts from both below in so far as they appear to relate to the *Kittel* denial:

> " The Appellant is not engaged in either a fraudulent scheme or an abusive scheme to defraud the VAT system…
>
> The Commissioners list, in their letter of 23 July 2013, 15 factors which they have "…taken into account…" in assessing the Appellant's VAT Registration. The Appellant contends that these factors do not substantiate the existence of a fraudulent or abusive scheme, nor do they substantiate an allegation of abuse. The majority of these factors are merely statements pertaining to the nature of back-to-back trade. The Appellant conducted this trade prior to its deregistration and it is both legal and commonplace…
>
> The Appellant was a taxable person and it made taxable supplies in the course and furtherance of its business; and
>
> The Appellant was charged VAT on the supplies it received and recovered this VAT on its returns; and there is no objective evidence for

> saying otherwise and denying the Appellant recovery of the VAT it was charged…"

55. Mr George also raised a number of other complaints in his witness statement and his submissions following the hearing. Some of those complaints related to HMRC behaviour or to perceived unfairness, including by comparison with other parties involved in the transactions. We have no jurisdiction in relation to those complaints in this appeal. Others asserted that MET had not itself acted fraudulently, and had not benefitted from any fraud. Those assertions, even if proven, would not operate to deprive a *Kittel* denial of its validity.

Transactions with UAA

56. Before we consider the factors relied on by HMRC as demonstrating knowledge or means of knowledge, it is necessary to deal with the sharp conflict of evidence regarding MET's purchases of metal from UAA. As stated at [40], these comprised approximately 80% of the transactions in this appeal, and UAA was the sole supplier to MET from 10 December 2012 until 1 May 2013.

57. UAA was incorporated on 23 November 2010. On 7 December 2012 its director, Mr Victor Adeyeri, applied for VAT registration, to be backdated to 1 December 2012. UAA's VAT application declared its main business activity as "purchase and sale of LED lighting, manufacture of frozen foods, and distribution of metals". It was registered for VAT in January 2013 with effect from 1 December 2012.

58. In January 2013 Mr Adeyeri told HMRC that at that time UAA had two main businesses, namely frozen foods and LED lighting. However, the invoices submitted to HMRC by MET by then indicated that MET had purchased approximately £3 million of metals from UAA. HMRC visited UAA, establishing that its principal place of business was a serviced office. At a meeting with HMRC on 1 May 2013, Mr Adeyeri made the following statements:

> (1) UAA's VAT registration had been "compromised".
>
> (2) He had been approached by Mr George to arrange imports of metal from Poland by UAA.
>
> (3) No money would change hands as payments would be via a banking platform.
>
> (4) A man who worked for Mr George, called Charles, would bring to UAA invoices for the supposed purchases by UAA from Poland, together with instructions for the invoices which UAA should prepare for supposed onward sales of the imported metal to MET. Mr Adeyeri provided HMRC with what he described as invoices from Poland.
>
> (5) As he was an accountant by profession, Mr Adeyeri intended to collect evidence of the wrongdoing for HMRC.

59. On 1 May 2013 HMRC compulsorily deregistered UAA for VAT. On 3 May 2013 Mr Adeyeri provided HMRC with further invoices showing metal purchases by UAA

from Poland, which he alleged had been given to him by Charles for MET. Mr Adeyeri told HMRC that the invoices from UAA to MET for sales of metal were "dummy" invoices. On 31 July 2013 Mr Adeyeri stated to Officer Needs that UAA had not purchased any metal from Poland and had not sold any metal to MET.

60. In due course, HMRC reached the conclusions that either there had been no supplies to or from UAA, or UAA was a defaulter, but that in either event it had colluded with MET to evade VAT.

61. The evidence of Mr George directly contradicted the statements made to HMRC by My Adeyeri. In his witness statement, which we admitted as his evidence, Mr George stated as follows. He had been introduced to Mr Adeyeri by an old schoolfriend in 2006. That friend then approached Mr George in September 2012, saying that Mr Adeyeri had asked him to look for scrap metal buyers. Following a meeting between Mr Jogi and Mr Adeyeri, MET began buying metal from UAA in December 2012. In relation to Mr Adeyeri's statements to HMRC summarised above, Mr George stated that "absolutely none of it makes any sense". Mr Adeyeri had proposed to MET that UAA would import metals, and that MET would then acquire them " as middle man" and sell them on to a pre-arranged buyer. All of the purchases from UAA reported by MET had taken place. Mr Adeyeri's version of events "painted a confusing and contradictory picture".

62. In his witness statement, Mr Jogi stated that he first met Mr Adeyeri in 2009. He said that "we got on well, often talking about our mutual African backgrounds whenever we met". He did not specifically refer to Mr Adeyeri's statements regarding falsified invoices.

63. Initially, one of HMRC's reasons for denying input tax recovery was that MET had not proved that its purchases had in fact taken place. Mr Puzey explained that HMRC no longer sought to argue that point in the appeal before us. In view of the sharply contradictory evidence, we have concluded that there is some doubt as to whether any or all of the purchases from UAA took place. However, none of Mr Adeyeri, Mr George or Mr Jogi appeared before us as a witness, which led us to conclude that we could not find as a fact (even on the basis of inferences drawn from the primary facts as referred to in *Mobile Export 365*) which version of events was to be preferred. In view of this, we proceeded on the basis that, notwithstanding the evidential uncertainty, we could not properly find that the purchases from UAA had not taken place.

The evidence

64. Where HMRC's evidence differs from that of Mr George or Mr Jogi in relation to factors relevant to knowledge or means or knowledge, we set out below our findings of fact. We also make two general observations, as follows, in relation to the evidence which was before us.

65. First, in his witness statement, Mr George challenged the accuracy of various HMRC notes of meetings with him. In particular, he alleged that HMRC's hand-written notes of meetings, including in particular the January 2013 meeting, had been

deliberately doctored " in vital respects" by HMRC in preparing the typed up notes of the meetings. Mr George also alleged that in certain respects even the hand-written notes were deliberately misleading.

66. Mr George submitted written comments to the Tribunal after the hearing, as we had permitted at [10](4). Although the comments were submitted later than the 21 days which we had allowed, we took account of them. The comments repeated this allegation, stating that:

> "Some records of conversations, ie in January 2013 with two officers of HMRC present, have been contrived and altered to strengthen HMRC's case when the original hand written record of the conversation is illegible. Similarly, a telephone conversation between Officer Everett of HMRC and myself has been totally misrepresented."

67. At the hearing, we conducted a detailed comparison of the hand-written notes and typed notes of various meetings at the points where Mr George alleged that the typed notes had been deliberately doctored in order to strengthen HMRC's case against him. We found the hand-written notes to be difficult but not impossible to decipher. We also questioned Officer Kinman on some of the differences of detail. We concluded that such detailed differences as there were not material, and we had no doubt that they did not represent an attempt by HMRC to mislead in the typed notes. There was no evidence whatsoever to suggest that the hand-written notes were inaccurate. We also noted that a number of the discrepancies highlighted by Mr George related not to factual matters but to observations or conclusions drawn by HMRC, of which we took no account in reaching our findings of fact. We concluded that Mr George's allegations as to the typed meeting notes were misconceived and did not affect the accuracy of those notes as to relevant factual matters.

68. Secondly, the witness statement from Mr Jogi did not, in our opinion, offer us any great assistance in the fact-finding exercise. It comprised a little over one page of text, and dealt briefly with MET's dealings with UAA and Mr Jogi's role in relation to MET's business.

Knowledge or means of knowledge

69. Each of the purchases by MET in this appeal was connected to a supply chain in which a fraudulent loss arose. Did MET know, or should it have known, that the purchases were so connected?

70. We considered this question by reference to the actual and constructive knowledge or Mr George and his associate Mr Jogi, who acted with MET's full authority. The burden of proof rests on HMRC, to the ordinary civil standard of the balance of probabilities. We took into account the observations and guidance set out at [46] to [51]. As directed by *Red 12 Trading*, we looked at "the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, together with the surrounding circumstances in respect of all of them". While we have considered individual factors, in our decision we guarded against over-

compartmentalisation of those factors, and stood back to consider the totality of the evidence.

71. On the basis of this approach, we have concluded that MET should have known that its transactions were connected to tax losses arising from evasion. While we have considered the totality of the evidence, we have placed particular weight on five factors in cumulation in reaching our conclusion.

72. First, Mr George received numerous warnings from HMRC regarding the risks of MTIC fraud, and in his own witness statement he accepted that he understood and was well aware of those risks.

73. On 12 March 2007, long before MET's metals trade began, HMRC wrote to MET alerting it to the risks of MTIC fraud in sectors in which it was then trading. That letter enclosed Notice 726 regarding joint and several liability for unpaid VAT. On 7 July 2010 HMRC visited MET, and were told by Mr George that the company intended to trade in carbon credits. MTIC fraud was discussed in detail at that meeting, with another copy of Notice 726 and other information on MTIC fraud being given to Mr George. On 24 January 2013 HMRC visited MET and specifically warned Mr George about the risks of MTIC fraud in the metals trade. He was also warned of the need for robust due diligence. On 25 January 2013 HMRC sent MET an " MTIC awareness letter" setting out indicators of VAT fraud and the need to verify trading partners in the sector. On 22 March 2013 HMRC wrote to MET advising that the company was being included in the " continuous monitoring" programme. On 3 July 2013 HMRC wrote to MET notifying it that tax losses of over £4.1 million had been identified in MET's supply chains.

74. Secondly, every one of the supplies to MET in this appeal traced to a fraudulent tax loss. MET dealt sequentially with three suppliers in fraudulent supply chains, turning to a new supplier when its current supplier was deregistered for VAT, and ceasing to trade only when MET itself was deregistered. It is inherently unlikely in these circumstances and given its level of awareness of the risks that MET would not have considered that the most likely explanation for its involvement in the transactions was a connection to fraudulent activity.

75. Thirdly, the circumstances of MET's trade viewed as a whole were in our judgment artificial and uncommercial. Mr George's explanation was that this was entirely explicable on the basis that MET bought and sold as a middle man on a back-to-back basis. For several reasons, we were not persuaded by that assertion. We agree with Mr Puzey that it is extremely difficult to see any valid commercial reason for MET to have been included at all in the supply chains. Mr George argued that MET's role was to keep the identities of the parties secret from each other. He also referred to MET sourcing buyers for the metals. However, there was no evidence to support or corroborate these assertions, and indeed considerable evidence which should reasonably have caused MET to question why it was involved in and being paid for these deals. MET had no written contracts with its customers, even though it sold metals cumulatively worth tens of millions of pounds. There was no evidence, contrary to Mr George's assertion, that there was any insurance covering the goods as they passed

through MET's ownership. There was no evidence that MET inspected the goods before it bought or sold them. Although Mr George asserted that MET found buyers, there was no evidence of this, or of any contractual negotiations by MET as one would have expected in a genuine commercial trade. Each of the sales in the appeal was structured identically, and the supply chain was pre-determined. Because a buyer was always arranged before any supply to MET, MET took no commercial risk. While we saw some limited evidence in the form of email correspondence to suggest that in relation to the final sales in the appeal MET had received some complaints from buyers, it was not possible to match these to specific transactions in the appeal. On every deal MET made a predictable profit, typically below 1% and in two thirds of the deals between 0.2% and 0.3%. MET had no premises on which to store the metals it bought, although shortly before it was deregistered for VAT there was evidence that it was in the process of renting a yard and acquiring scales.

76. Fourthly, MET's increase in turnover once it began its metals trade was, as HMRC termed it, "incredible". The company's turnover was between £1,000 and £2,000 per quarter in 05/12, 08/12 and 11/12. In 02/13 its turnover was over £13 million, and in the following quarter over £9 million. Mr George's evidence was that this was not unusual or suspicious, and he claimed that between 1975 and 2000 he had turned over approximately £50 million in various deals. We saw no evidence to support this. In any event, in this case MET achieved an exponential increase in turnover in circumstances where it had no prior track record in the metals business; no network of business contacts in the sector; no capital base with which to fund the trades, and no regular workforce. This was in our opinion a classic case of a trade being too good to be true.

77. Fifthly, notwithstanding Mr George's awareness of the risks of MTIC fraud, MET carried out no meaningful due diligence on its suppliers or customers. Mr Jogi's evidence was that he carried out no diligence on UAA because both he and Mr George knew Mr Adeyeri, and that he carried out checks on MET's other counterparties via the VIES system. We find as a fact from the documentary evidence that MET made no checks through HMRC's validation system on any of its 3 suppliers or 10 customers before July 2013. The only evidence we saw to support any checks by MET via VIES was a check on Swat on 3 July 2013. This was well after MET had begun trading with Swat, and even though the check showed that Swat's VAT number was not validated, MET continued to trade with it.

78. In light of the known risks, MET effectively turned a blind eye to the need for robust commercial due diligence.

79. One of the factors relied on by HMRC to indicate actual or constructive knowledge related to the method and evidence of payment by MET. MET's payments to its suppliers, and payments by several other parties in the supply chain, were made through an " alternative banking platform" called Currency Index. We find as facts that Currency Index was and is a business which purports to process payments more quickly than traditional banks, and which operates primarily on the basis of rapid and cost-effective conversions of non-sterling currencies. We observe that it was odd for MET to utilise the platform given that all of its payments were made in sterling. However, we had insufficient evidence before us to find, as HMRC submitted, that the platform

was being used in order to conceal or obfuscate payments. Nor did we have sufficient evidence to find as a fact that the payments made by MET to its suppliers were not in fact made. We therefore did not take this factor into account in reaching our decision regarding actual or constructive knowledge.

80. The Tribunal is entitled to take into account evidence of all the surrounding circumstances when considering a trader's state of knowledge. As stated by Christopher Clarke J in *Red 12 Trading*, at [109] of that judgment:

> "109. Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature, e.g that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
>
> 110. To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands."

81. Adopting this approach, we considered carefully whether HMRC had established on the balance of probabilities that MET had actual knowledge in this case. Some of the findings of fact set out above, such as tax losses in 100% of the supply chains, the statements made by Mr Adeyeri, and the apparently misleading information given by Mr George to HMRC in January 2013, would support such a finding. However, taking into account that no witnesses for MET appeared before us for cross-examination and for questioning by the Tribunal, and bearing in mind the comments of Henderson J in *Ingenious Games LLP v HMRC* [2015] STC 1659, at [15], as to the seriousness of such a finding, we find that actual knowledge was not established on the balance of probabilities.

82. However, standing back and looking at all the circumstances, we have concluded that MET clearly should have known of the connection to fraud. The appeal against input tax denial on the basis of *Kittel* is therefore dismissed.

Insufficient evidence of payment denial

83. Section 26A VATA 1994 has the effect that a taxable person ceases to be entitled to credit for input tax where " the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of 6 months following the relevant date". The " relevant date" for this purpose is the date of the supply or, if later, the date on which the consideration for the supply became payable.

84. The requirement to repay input tax in such circumstances, and the method for doing so, is set out in Regulations 172F to 172H of the VAT Regulations 1995 (SI 1995/2518).

85. HMRC denied MET input tax credit in respect of the purchases in this appeal on the alternative ground that MET had not produced sufficient evidence that it made payments to its suppliers for the purchases. Their case was based on the documentary and evidentiary issues relating to the payment mechanism, which, as explained at [79], was via Currency Index.

86. From our consideration of the relevant records produced by Currency Index, it did appear that there were some discrepancies between the payments which MET claimed to have made to UAA and those recorded as received by UAA. However, in considering the evidence as a whole and in questioning Officer Kinman we reached the conclusion that the evidence as to payment was somewhat confused and lacked clarity.

87. Mr Puzey, sensibly in our view, acknowledged as much, and invited us to consider the issue of evidence of payment primarily in relation to the actual or constructive knowledge relevant to the *Kittel* denial. We agree that this was a sensible approach, and we have set out our views on this area at [79]. In those circumstances, we see no useful purpose in determining whether a denial based on section 26A was justified, and we express no views on that question.

Invalid invoices denial

88. In relation only to purchases by MET from UAA in period 012/13, HMRC denied MET credit for input tax on the alternative basis that the invoices for those purchases were invalid.

89. HMRC's argument was based on the absence of VAT numbers in those invoices. A VAT identification number is a requirement for a valid VAT invoice under Article 226 of the PVD and under Regulation 14(1) of the VAT Regulations 1995.

90. Regulation 29(2) of the 1995 Regulations provides that at the time of claiming deduction of input tax in a VAT return a person shall, if the claim is in respect of a supply from another taxable person, hold a VAT invoice as required to be provided under Regulation 13. There is a proviso to Regulation 29(2) which allows the deduction

of input tax to be made without a valid VAT invoice "provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other…evidence of the charge to VAT as the Commissioners may direct".

91. In this case, HMRC declined to exercise the discretion conferred by Regulation 29(2), in view of their judgments as to the uncertainty surrounding to the supplies from UAA and, more generally, the risk of connection to fraud.

92. The Tribunal's jurisdiction in respect of HMRC's decision is supervisory in nature: see the helpful exposition by the Upper Tribunal in *Scandico v HMRC* [2017] UKUT 467(TCC).

93. There is much case law, at both a domestic and Community level, on the effect of invalidity as a result of a failure to satisfy a formal requirement. It is fair to say the issue is not straightforward. In view of our conclusion as to the *Kittel* denial, and noting that this line of argument relates to only one of the periods in the appeal, it is not necessary for us to consider and determine the issue in this appeal.

Deregistration decision

94. On 23 July 2013 HMRC wrote to MET informing it that its registration for VAT had been cancelled. The reason given for the decision was that HMRC had concluded that MET had used or intended to use its registration for fraudulent or abusive ends. MET appealed against that decision.

95. Paragraph 1(1) of Schedule 1 to VATA 1994 states as follows:

> "Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule—
>
> (a) at the end of any month, if… the value of his taxable supplies in the period of one year then ending has exceeded [the registration limit], or
>
> (b) at any time, if… there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed [the registration limit]".

96. Paragraph 13 of Schedule 1 deals with HMRC's right to deregister, and so far as relevant states as follows:

> "13(2) Subject to sub-paragraph (5) below, where the Commissioners are satisfied that a registered person has ceased to be registrable, they may cancel his registration from the day on which he so ceased or from such later day as may be agreed between them and him…
>
> (5) The Commissioners shall not under sub-paragraph (2) above cancel a person's registration with effect from any time unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, [under paragraph 9 of Schedule 1] to be registered under this Act".

97. HMRC submitted that although MET was *prima facie* required to be registered for VAT, because it had exceeded the turnover threshold, a right to registration did not exist, or persist, when the principal aim of the registration was to abuse the VAT system.

98. In our opinion, this proposition is clearly supported by the decision of the ECJ relating to the doctrine of abuse in *Halifax and others v Commissioners for Customs & Excise* Case C-255/02. The decision of the Court of Justice of the European Union ("CJEU") in *Ablessio SIA* Case C-527/11 makes it clear that where it is on objective grounds probable that a trader is involved in VAT fraud, that trader can be denied VAT registration.

99. We heard no submissions on the nature of the Tribunal's jurisdiction in considering the appeal against HMRC's decision to deregister. However, we have concluded that our jurisdiction in that respect is appellate rather than merely supervisory. We are indebted to Judge Mosedale for her analysis of this question in *Manhattan Systems Ltd v HMRC* [2017] UKFTT 862(TC). We agree with that analysis, which stated as follows:

> "*Is the deregistration jurisdiction supervisory or full appellate?*
>
> 36. So is the jurisdiction of the notional tribunal hearing the de-registration appeal full appellate or merely supervisory? The jurisdiction is contained in s 83(1)(a) Value Added Tax Act 1994 ('VATA') and it provides:
>
> **83 Appeals**
>
> Subject to sections 83G and 84 an appeal shall lie to the Tribunal with respect to any of the following matters –
>
> (a) the registration or cancellation of registration of any person under this Act;
>
> .....
>
> S 83G contains the time-limit provisions and is not relevant here. S 84 contains a number of provisions and in particular in relation to various sub-sections of s 83, but not (1)(a), provides that the Tribunal's jurisdiction is supervisory only.
>
> 37. The parties appear agreed, however, that the fact that s 84 does not expressly provide for supervisory jurisdiction does not necessarily mean the jurisdiction is full appellate; nor does a reference to HMRC's discretion in the decision making power necessarily mean the jurisdiction is merely supervisory. As was said in *Banbury Visionplus Ltd* [2006] EWHC 1024 (Ch) (Etherton J), relying on the Court of Appeal decision in *John Dee Ltd* (1995) STC 941, the Tribunal must consider the nature of the decision from which the appeal was brought and the legislative context in which that decision was made.
>
> 38. HMRC's registration and deregistration decision making powers are contained in Sch 1 of VATA. As the appellant points out, Sch 1 VATA appears to make certain deregistration decisions a discretionary matter for HMRC (my underlining):

3 A person who has become liable to be registered under this Schedule shall cease to be so liable at any time if the Commissioners are satisfied in relation to that time that he...

[(a)-(c) comprise 3 pre-conditions none of which are applicable here]

4(1) ...a person who has become liable to be registered under this Schedule shall cease to be so liable at any time after being registered if the Commissioners are satisfied that the value of his taxable supplies in the period of one year then beginning will not exceed [figure stated]....

13(1) ...where a registrable person satisfies the Commissioners that he is not liable to be registered under this Schedule, they shall, if he so requests, cancel his registration.....

(2)....where the Commissioners are satisfied that a registered person has ceased to be registrable, they may cancel his registration.....

39. A binding High Court decision in *Gray* [2000] STC 880 ruled that

"[19] ....A VAT tribunal, or this court itself, can only interfere with the decision of the Commissioners [under paragraph 1(3) of Sch 1 of VATA] if it is shown that the decision is one which no reasonable body of Commissioners could reach.

.....

[23] I conclude, therefore, that in cases of late registration as well as in a case where the trader notifies in due time, the Commissioners must give effect to paragraph 1(3) by considering the case as at the date from which registration would otherwise take effect and, by looking forward, asking themselves whether they are or are not satisfied that turnover will not exceed the threshold amount. Obviously they cannot do this otherwise than on the basis of what they consider to be likely. But if they reach a conclusion which would be open to a reasonable body of Commissioners considering the relevant evidence, an appellate tribunal cannot interfere with their decision. It is not enough that the appellate tribunal thinks that it would have reached a different conclusion on the same evidence."

40. This has been followed in *Vaughan* [2008] UKVAT V20547 and *Gayle (t/a Photogen Promo Music Adverts Ltd and Photogen PMA Ltd)* [2017] UKFTT 211 (TC). Both the appellant and respondents consider what was said to the contrary in *Gardner & Co* [2011] UKFTT 470 (TC) was without hearing argument, per incuriam, and wrong, and in the light of *Gray*, they must be right.

41. In conclusion, the Tribunal's jurisdiction is limited to being supervisory in at least certain deregistration appeals. Where the appellant and respondents diverge is in respect of the Tribunal's jurisdiction on hearing an appeal against a deregistration decision taken by HMRC on the back of *Ablessio SIA* C-527/11, as in this appeal. The appellant considers that all deregistration decisions are subject only to supervisory jurisdiction; HMRC does not consider that the *Gray* line of cases applies in situations where the deregistration was on the basis that HMRC considered it likely the VAT registration would be used for fraudulent purposes.

> 42. HMRC's point is that the right to deregister where it is thought likely that a VAT registration will be used fraudulently is a power read into the VAT Act, in the same way that the right to deny input tax on *Kittel* grounds was read into the legislation (see *Mobilx* [2010] EWCA Civ 517 §49). So the right to deregister is only implied into Sch1 of VATA without being expressly provided for, so it does not follow that it is a discretionary decision for HMRC in the same way as HMRC have a discretion when deregistering under §3 and §4(1) of Sch 1.
>
> 43. HMRC go on to say that *Ablessio* itself indicates that the Tribunal's jurisdiction must be full appellate because:
>
> (a) The CJEU indicated that the national courts should have unlimited jurisdiction to consider whether the decision to deregister was right (citing [38] of *Ablessio*);
>
> (b) The burden of proof must be on HMRC to establish that it is likely the appellant will use its VAT registration fraudulently and it is incompatible with supervisory jurisdiction for HMRC to have the burden of proof;
>
> (c) The right to be registered for VAT is fundamental to the PVD so natural justice requires full appellant jurisdiction to determine whether a taxpayer was right deprived of that right.
>
> 44. I find HMRC's case on this persuasive. It seems wrong to me to suggest that the Tribunal would be limited to deciding whether HMRC's decision to deregister the appellant, on the basis that it was using its VAT registration for fraudulent purposes, was reasonable on the facts as known to HMRC at the time: for justice to be done, the question must be whether that decision was right. The CJEU would expect no less.
>
> 45. In conclusion, I find that the Tribunal will have full appellate jurisdiction when deciding the appeal against the de-registration in this case; and the *Gray* line of cases does not apply to *Ablessio*-type deregistrations; the Tribunal will decide, not whether [the HMRC officer's] decision was reasonable in light of what was known to him at the time, but whether his decision was right in the light of the entire evidence before the Tribunal."

100. In this case, HMRC's reasons for deregistering MET were in all material respects identical to those for the *Kittel* denial. We have found that HMRC has comfortably discharged its burden of proof to the ordinary civil standard in establishing that MET ought to have known that its transactions were connected to fraudulent evasion. Our reasons are set out in full above , and no purpose is served in repeating them here. For those same reasons, we find that the deregistration decision taken on the basis of *Ablessio* was correct. The appeal against it is dismissed.

Disposition

101. The appeals against the denial of input tax and against the deregistration decision are dismissed.

102. This document contains full findings of fact and 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 Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. 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.

THOMAS SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2018